

# IF HE MAKES YOU QUIT, WE'RE NOT LIABLE: HOW *PENNSYLVANIA STATE POLICE V. SUDERS* UNNECESSARILY COMPLICATES TITLE VII LAWSUITS

## I. INTRODUCTION

Rosemary Martin was a model employee, receiving two “Employee-of-the-Month” awards during her tenure as Director of Payroll and Personnel at the Cavalier Hotel in Virginia Beach, Virginia.<sup>1</sup> Unfortunately, her employment at the Hotel was not model at all because her supervisor, Dan Batchelor, spent the greater part of four years making her working life miserable.<sup>2</sup> What began as verbal abuse escalated to much more serious activity when, on at least three occasions, Batchelor sexually assaulted Martin.<sup>3</sup> Martin resigned shortly thereafter and filed a lawsuit alleging sexual harassment against Batchelor and the Cavalier Hotel.<sup>4</sup>

Fortunately for Martin, she filed her lawsuit in 1993,<sup>5</sup> and the Fourth Circuit upheld the jury verdict she won against Batchelor and the Hotel in 1995.<sup>6</sup> The result of Martin’s suit would have been different had it been filed today, after the Supreme Court’s decision in *Pennsylvania State Police v. Suders*.<sup>7</sup> *Suders* is a direct outgrowth of two cases the Supreme Court decided in 1998.<sup>8</sup> In those two cases, *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, the Supreme Court set out an affirmative defense for employers that can be used only when there is no “tangible employment action” at issue in the litigation.<sup>9</sup> If there is a

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1. *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1348 (4th Cir. 1995).

2. *Id.* at 1349. In 1988, Batchelor “attempted to kiss Martin and on another [occasion] he nudged her and told her he wanted to take her to a hotel and ‘stick something between her legs.’” *Id.*

3. *Id.* “In February of [1992], Batchelor called Martin into his office, placed a ‘Meeting in Progress’ sign on his office door, locked it, put his hand over her mouth to prevent her from screaming, and committed oral and anal sodomy on her.” *Id.* “At the beginning of March, Batchelor asked Martin to remain after a regularly scheduled senior staff meeting in one of the hotel conference rooms, locked the door, and forced her to engage in oral sex.” *Id.* “At the end of March, Batchelor raped Martin.” *Id.*

4. *Id.* at 1348.

5. *Id.*

6. *Id.* at 1360.

7. 124 S. Ct. 2342 (2004).

8. *See Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

9. *Faragher*, 524 U.S. at 808 (“[n]o affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment”).

tangible employment action at issue, the employer can be held strictly liable for the actions of its supervisors.<sup>10</sup> Between 1998 and 2004, the U.S. Courts of Appeals struggled to accurately interpret the phrase “tangible employment action” and to determine whether a constructive discharge<sup>11</sup>—where an employee such as Martin quits because the abuse at work has rendered her atmosphere intolerable—fits within that rubric.<sup>12</sup>

Unfortunately, *Suders*, decided in 2004, did not lessen the burden on trial and appellate courts in answering these questions. In fact, the question presented to the Supreme Court required a simple yes or no answer: “When a hostile work environment created by a supervisor culminates in a constructive discharge, may the employer assert the affirmative defense recognized in” *Ellerth* and *Faragher*?<sup>13</sup> Instead of answering yes or no, however, the Court created an additional layer of analysis for federal courts to undertake in order to reach the issue of whether this affirmative defense may be asserted.<sup>14</sup>

The doctrine of constructive discharge was developed by the National Labor Relations Board (“NLRB”) in the 1930s “to address situations where employers coerced employees into resigning because the employees had engaged in statutorily-protected collective bargaining activities.”<sup>15</sup> Early cases at the appellate level met with little success<sup>16</sup> until 1953, when

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10. *Ellerth*, 524 U.S. at 765 (“[a]n 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”).

11. *Suders*, 124 S. Ct. at 2345 (explaining constructive discharge as asking the question: “Did working conditions become so intolerable that a reasonable person in the employee’s position would have felt compelled to resign?”).

12. See, e.g., *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003); *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27 (1st Cir. 2003); *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003); *Jaros v. LodgeNet Entm’t Corp.*, 294 F.3d 960 (8th Cir. 2002); *Kohler v. Inter-Tel Tech.*, 244 F.3d 1167 (9th Cir. 2001); *Turner v. Dowbrands*, No. 99-3984, 2000 WL 924599 (6th Cir. June 26, 2000); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999).

13. *Pa. State Police v. Suders*, No. 03-95 (Docket) (U.S. July 17, 2003), available at <http://www.supremecourtus.gov/qp/03-00095qp.pdf> (last visited Sept. 19, 2004).

14. See *Suders*, 124 S. Ct. at 2355–56; see also *infra* Part II.E.

15. Cathy Shuck, Comment, *That’s It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKELEY J. EMP. & LAB. L. 401, 406 (2002) (“[t]he NLRB appears to have first used the term ‘constructive discharge’ in 1938”); see also *In the Matter of Sterling Corset Co.*, 9 N.L.R.B. 858, 865 (1938) (“[T]he respondents’ efforts to destroy the Union culminated in Davis’ speech to the employees on April 20, and the *constructive discharges* which followed”) (emphasis added).

16. *NLRB v. Waples-Platter Co.*, 140 F.2d 228 (5th Cir. 1944). The officers of Waples-Platter Company had been intimidating employees because the officers did not want the employees to join a union. *Id.* at 228–29. This decision may have been influenced by its time in history; the activities giving rise to the lawsuit took place in 1942, during the early years of World War II. The Fifth Circuit alluded to this when it held that the complaining employees “were not constructively discharged. They elected to quit the service of the Corporation . . . at a time when vacancies were occurring and when

the First Circuit upheld an NLRB decision on behalf of an employee who was constructively discharged.<sup>17</sup> After the passage of the Civil Rights Act of 1964<sup>18</sup> and the Age Discrimination in Employment Act of 1967<sup>19</sup> (“ADEA”), the constructive discharge doctrine<sup>20</sup> firmly entered employment law jurisprudence.<sup>21</sup>

Unlike the long and distinguished history of constructive discharge, the phrase “tangible employment action” appears to have entered employment discrimination law in 1998 with the *Ellerth*<sup>22</sup> and *Faragher* decisions.<sup>23</sup> While courts had used similar phrases to describe an action taken by an employer that adversely affects an employee’s economic livelihood, these decisions marked the first appearance of this specific phrase in employment discrimination law.<sup>24</sup>

This Note examines both the struggle that circuit courts have faced since 1998 in determining whether a constructive discharge is a tangible employment action and the subsequent struggle courts are likely to face

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labor was sorely needed. A vacancy occurred at the garage for the reason a worker there had been inducted into the armed forces.” *Id.* at 230.

17. *NLRB v. Saxe-Glassman Shoe Corp.*, 201 F.2d 238 (1st Cir. 1953). The facts of *Saxe-Glassman* supported “ample justification for the conclusion that [an employee] was forced to quit in the face of discriminatory treatment calculated to make her job unbearable.” *Id.* at 243.

18. 42 U.S.C. § 2000e et seq. (2000).

19. 29 U.S.C. § 621 et seq. (2000).

20. Constructive discharge has often been defined as occurring when “an employer renders the employee’s working conditions so intolerable that the employee is forced to quit.” *Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 935 (8th Cir. 2002). In the wake of *Suders*, lower courts will likely adopt the definition of the doctrine adopted by the Supreme Court instead of its Circuit. *See McPherson v. City of Waukegan*, 379 F.3d 430, 440 (7th Cir. 2004) (citing *Suders*, holding that to show constructive discharge in the Title VII context, an employee must prove “that the abusive working environment was so intolerable that her resignation was an appropriate response”); *see supra* note 11.

21. *See generally Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

22. 524 U.S. 742 (1998).

23. 524 U.S. 775 (1998). The Supreme Court claimed that “[t]he concept of a tangible employment action appears in numerous cases in the Courts of Appeals discussing claims involving race, age, and national origin discrimination, as well as sex discrimination.” *Ellerth*, 524 U.S. at 761. In reality, the cases it cited use different phrases, but the meaning is the same. *See supra* note 21.

24. *See Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 886 (6th Cir. 1996) (“[w]e conclude that Kocsis has not suffered a materially adverse employment action.”); *Harlston v. McDonnell-Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (“[c]hanges in duties or working conditions that cause no materially significant disadvantage, such as Harlston’s reassignment, are insufficient to establish the adverse conduct required to make a prima facie case.”); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456 (7th Cir. 1994) (“[t]he district court subsequently granted GRI’s motion for summary judgment on the ADEA claims, finding that Flaherty had not suffered an adverse employment action under that statute”).

following *Suders*.<sup>25</sup> Part II examines the short history of the impasse from the Supreme Court's instructions in *Ellerth* and *Faragher* to cases decided only months before *Suders*, and concludes with a brief description of Justice Ginsburg's rationale in *Suders*. Part III analyzes these decisions, demonstrating that constructive discharge ought to qualify as a tangible employment action and render the *Ellerth* defense inapplicable. Finally, Part IV argues that Congress is best situated to resolve this issue, and suggests the appropriate focus in doing so.

## II. HISTORY

### A. *The Supreme Court in 1998*

#### 1. *Faragher v. City of Boca Raton*<sup>26</sup>

The saga begins with Beth Ann Faragher, who worked as a part-time lifeguard in Boca Raton, Florida, from 1985 to 1990.<sup>27</sup> During this period, her male supervisors, Bill Terry and David Silverman, repeatedly harassed her and other female lifeguards.<sup>28</sup> Faragher resigned in June 1990.<sup>29</sup> Faragher and a fellow lifeguard, Nancy Ewanchew, brought a sexual harassment lawsuit against the City, Terry, and Silverman in 1992.<sup>30</sup> The district court ruled in favor of Faragher on the Title VII claim, but awarded her only one dollar in nominal damages.<sup>31</sup> Initially, an Eleventh Circuit panel reversed the judgment against the City.<sup>32</sup> The following year, the

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25. *See supra* note 12.

26. 542 U.S. 775 (1998).

27. *Id.* at 780.

28. *Id.* at 780–82. “During that 5-year period, Terry repeatedly touched the bodies of female employees without invitation, [and] would put his arms around Faragher, with his hand on her buttocks.” *Id.* at 782 (internal citations omitted). “[Silverman] once tackled Faragher and remarked that, but for a physical characteristic he found unattractive, he would readily have had sexual relations with her. Another time he pantomimed an act of oral sex.” *Id.* (internal citations omitted).

29. *Id.* at 780.

30. *Faragher v. City of Boca Raton*, 864 F. Supp. 1552, 1555 (S.D. Fla. 1994).

31. *Id.* at 1564. This ruling was conditioned in part on general agency principles. Because “the two harassers in this action, Terry and Silverman, were acting as agents of the City, the City is directly liable.” *Id.*

32. *Faragher*, 524 U.S. at 784–85; *Faragher v. City of Boca Raton*, 76 F.3d 1155 (11th Cir. 1996). The Eleventh Circuit panel held that because there was not sufficient evidence to demonstrate that Terry and Silverman were “acting within the scope of their employment in subjecting Faragher to offensive language, gestures, and touching . . . the district court erred in holding the City directly liable for that conduct.” *Id.* at 1166.

Eleventh Circuit heard the case en banc and affirmed the panel in a 7-to-5 decision.<sup>33</sup>

The Supreme Court's decision in *Faragher*, as well as its decision to grant certiorari, rested in part on the fact that "Courts of Appeals have struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees."<sup>34</sup> The Supreme Court examined the types of scenarios in which an employer should be held responsible for harassment perpetrated by its supervisors upon subordinates:<sup>35</sup> (1) cases where the employer had actual knowledge of the harassment;<sup>36</sup> (2) cases where the "individual charged with creating the abusive atmosphere . . . was indisputably within that class of an employer organization's officials who may be treated as the organization's proxy;"<sup>37</sup> and (3) cases where the employer took "discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment."<sup>38</sup>

The Court examined the history of each of these justifications for employer vicarious liability in combination with Title VII's preventive policy<sup>39</sup> and developed a framework to clarify this area of the law.<sup>40</sup> By

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33. *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (en banc).

34. *Faragher*, 524 U.S. at 785. It is important to note that the struggle only arises under allegations of hostile work environment, not in *quid pro quo* lawsuits. *See, e.g.*, *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) ("[w]hen a supervisor requires sexual favors as *quid pro quo* for job benefits, the supervisor, by definition, acts as the company").

35. *Faragher*, 524 U.S. at 789–91.

36. There are "myriad cases [where] District Courts and Courts of Appeals have held employers liable on account of actual knowledge by the employer . . . of sufficiently harassing action." *Id.* at 789 (citing *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989); *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983)).

37. *Id.*; *see also* *Torres v. Pisano*, 116 F.3d 625, 634 n.11 (2d Cir. 1997) (finding abusive supervisor held a sufficiently high position in the company's hierarchy); *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 564 (8th Cir. 1992) (finding harasser was owner of company, so was company for all intents and purposes); *Katz*, 709 F.2d at 255 (holding by implication that when a "proprietor, partner or corporate officer participates personally in the harassing behavior," the employer company will be found liable).

38. *Faragher*, 524 U.S. at 790. The Supreme Court approvingly reiterated its holding in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), that agency principles for imputing liability to the employer is appropriate in some cases. *Id.*; *see Meritor*, 477 U.S. at 70–72. In addition to common law agency principles, Congress deliberately included any agent of an employer within the scope of Title VII, and this "surely evinces an intent to place some limits on the acts of employees for which employers are to be held responsible under Title VII." *Id.* at 72.

39. *Faragher*, 524 U.S. at 793–807. Title VII's primary objective, according to the Court, "like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." *Id.* at 806 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

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

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may

creating an affirmative defense for employers who had reasonable preventive procedures in place, the Court attempted to influence employers' behavior to stop harassment before it escalates rather than to simply provide remedies to aggrieved employees.<sup>41</sup> This defense would not be available "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."<sup>42</sup> In these situations, strict liability would still govern Title VII claims.<sup>43</sup> The Court failed to further define "tangible employment action" in *Faragher*, but *Ellerth*, decided the same day, helped to explain this phrase.<sup>44</sup>

## 2. Burlington Industries v. Ellerth<sup>45</sup>

Kimberly Ellerth was employed as a salesperson at Burlington Industries in Chicago, Illinois.<sup>46</sup> During the fourteen month period that she worked there, Ted Slowik, a midlevel manager at Burlington, verbally harassed her repeatedly.<sup>47</sup> Ellerth requested and received a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC")<sup>48</sup>

raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

*Id.*

41. *Id.* at 805–06. The Court added the defense in order to provide employers with an incentive to create appropriate policies to prevent harassment. *Id.* at 806. The new requirement that employees bear some duty of care comports well with the doctrine of mitigation. The Court points out that under "the general theory of damages, . . . a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute." *Id.* (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982)).

42. *Id.* at 808. This is the language that has played a central role in judicial interpretation of the affirmative defense. See, e.g., *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27 (1st Cir. 2003).

43. See *supra* note 8.

44. See generally *Ellerth*, 524 U.S. 742.

45. 524 U.S. 742 (1998).

46. *Id.* at 747.

47. *Id.* at 747–48. "When Ellerth was being considered for a promotion, Slowik expressed reservations during the promotion interview because [Ellerth] was not 'loose enough.' [This] comment was followed by his reaching over and rubbing her knee." *Id.* at 748. The month Ellerth quit, she called Slowik to ask "permission to insert a customer's logo into a fabric sample. Slowik responded, 'I don't have time for you right now, Kim . . . unless you want to tell me what you're wearing.'" *Id.* Several days later, Slowik again harassed Ellerth, this time asking her, "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." *Id.*

48. Before filing Title VII lawsuits, claimants must have "filed a timely complaint with the EEOC and obtained a right-to-sue letter." *Shah v. New York State Dept. of Civil Serv.*, 168 F.3d 610, 613 (2d Cir. 1999). Title VII mandates this. 42 U.S.C. § 2000e-5(e), (f) (2000).

and filed suit in October 1994 “alleging Burlington engaged in sexual harassment and forced her constructive discharge, in violation of Title VII.”<sup>49</sup> The district court granted summary judgment in favor of Burlington.<sup>50</sup> The Seventh Circuit, sitting en banc, “reversed in a decision which produced eight separate opinions and no consensus for a controlling rationale.”<sup>51</sup> Just as with *Faragher*, the Supreme Court granted certiorari “to assist in defining the relevant standards of employer liability [in Title VII lawsuits].”<sup>52</sup>

Beginning with general agency principles, the Court looked to see whether liability could be imputed to the employer.<sup>53</sup> Ruling out liability premised on scope of employment, or apparent authority, the Court examined whether an “aided-in-agency” relation standard was appropriate.<sup>54</sup> This standard would apply, the Court reasoned, when something more than the existence of the agency relationship abetted the harassment, namely when a supervisor, vested with authority by the

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49. *Ellerth*, 524 U.S. at 749.

50. *Id.* “The court found Slowik’s behavior, as described by Ellerth, severe and pervasive enough to create a hostile work environment, but found Burlington neither knew nor should have known about the conduct.” *Id.*; see *Ellerth v. Burlington Indus., Inc.*, 912 F. Supp. 1101 (N.D. Ill. 1996).

51. *Ellerth*, 524 U.S. at 749; see *Jansen v. Packaging Corp.*, 123 F.3d 490 (7th Cir. 1997) (en banc). The opinion consolidated two cases, *Jensen v. Packing Corp.* and *Ellerth*, because the “similarity of the issues ha[d] persuaded [the judges] to treat the cases together.” *Id.* at 492. Justice Kennedy observed the inability of the Seventh Circuit to find a single deciding rationale and commented that “Congress has left it to the courts to determine controlling agency law principles in a new and difficult area of federal law.” *Ellerth*, 524 U.S. at 751. This Note proposes that Congress regain control in this area of federal law originally created by statute. See *infra* Part IV.

52. *Ellerth*, 524 U.S. at 751.

53. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) states: “A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.” *Id.* However, “[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.” *Ellerth*, 524 U.S. at 757. The Court also referenced § 219(2) of the Restatement as the basis of its opinion:

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958). The Court decided that subsection (b) was inappropriate because the issue was whether strict liability is the appropriate standard. *Ellerth*, 524 U.S. at 758–59. The first clause of subsection (d) was also found inappropriate because the harassing employee is typically not exercising apparent authority; supervisors have actual power to affect the employment terms of their subordinates. *Id.* at 759.

54. See RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). The Court recognized that “most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation.” *Ellerth*, 524 U.S. at 760. This, the Court opined, would provide too broad a scope of employer liability, as any harassment on the job, whether perpetrated by co-workers or supervisors, would cognize liability, a result no court or the EEOC has ever endorsed. *Id.*

employer, “takes a tangible employment action against the subordinate.”<sup>55</sup> Justice Kennedy briefly defined tangible employment action as an action that would cause “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>56</sup> It is important to note that although *Ellerth* pled that she had been constructively discharged, this allegation was not before the Supreme Court, so Justice Kennedy’s failure to include this in his definition is not dispositive.<sup>57</sup>

The Court balanced its holding that strict vicarious liability would be appropriate when a tangible employment action had occurred by developing an affirmative defense for employers when no tangible employment action had occurred.<sup>58</sup> This defense incorporates the agency principles described above<sup>59</sup> and furthers Title VII’s purpose by encouraging employers to develop policies to prevent workplace harassment and encouraging employees to utilize the procedures provided by these policies when subjected to workplace harassment.<sup>60</sup>

In light of the confusion that followed *Ellerth* and *Faragher*, Justice Thomas proved prescient with his prediction that the Court had confused the issue more than it answered the questions it granted certiorari to

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55. *Id.*; see *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 70–71 (1986) (“courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, or should have known, or approved of the supervisor actions.”). This result is logical because supervisors are necessarily vested with some additional authority before they can discharge workers, or more broadly, before they can economically affect the terms of their subordinate’s employment. This is precisely why an “aided-in-agency” relationship is the appropriate one to use.

56. *Ellerth*, 524 U.S. at 761. Justice Kennedy’s use of the phrase “such as” denotes the list may not be exclusive. Arguments have been made that this list was merely suggestive of situations that would meet the standard of tangible employment action. See, e.g., *Suders v. Easton*, 325 F.3d 432, 456 (3d Cir. 2003) (“[t]he Supreme Court made it clear that it intended to provide a non-exclusive list of clear cases of tangible employment actions, on the one hand, and broader categories on the other”); *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 93 (2d Cir. 2002) (“the definition given [of tangible employment action] by the Supreme Court [in *Ellerth*] is non-exclusive”); *Vasquez v. Atrium Door and Window Co.*, 218 F. Supp. 2d 1139, 1142 (D. Ariz. 2002) (“the Supreme Court’s list of tangible employment actions in *Ellerth* was likely not intended to be either exhaustive or exclusive of constructive discharge”); *Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160, 1175 (N.D. Iowa 2000) (finding that the “Supreme Court simply provided a non-exhaustive list of incidents that would constitute a ‘tangible employment action’”).

57. See *infra* note 100 and accompanying text.

58. *Ellerth*, 524 U.S. at 765; see *supra* notes 40–42.

59. See *supra* notes 53–55 and accompanying text.

60. *Ellerth*, 524 U.S. at 764; see also *Faragher*, 524 U.S. at 807 (using nearly identical language in the rationale for supporting this affirmative defense); see *supra* note 36. Title VII was originally passed primarily to influence employers not to discriminate, rather than to provide compensation for employees who had been discriminated against. *Ellerth*, 524 U.S. at 764; see also *supra* note 38.



resolve.<sup>61</sup> At least with regard to constructive discharge, the Court failed to “derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees.”<sup>62</sup>

*B. Constructive Discharge was not Considered a Tangible Employment Action in the Second or Sixth Circuits*

One of the first federal appellate courts to squarely address the issue of whether constructive discharge fell into the tangible employment action framework was the Second Circuit in *Caridad v. Metro-North Commuter R.R.*<sup>63</sup> *Caridad* combined two Title VII claims: one of racial discrimination and one of sexual harassment.<sup>64</sup> The plaintiff, Veronica Caridad, was the only female electrician working on a shift with twelve men.<sup>65</sup> She alleged that her male supervisor repeatedly harassed her, and that other male employees treated her with hostility.<sup>66</sup> Eventually, Caridad resigned after an admittedly half-hearted attempt to pursue assistance through the proper channels at Metro-North.<sup>67</sup>

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61. *Ellerth*, 524 U.S. at 774 (Thomas, J., dissenting) (“[a]ll in all, today’s decision is an ironic result for a case that generated eight different opinions in the Court of Appeals on a fundamental question, and in which we granted certiorari ‘to assist in defining the relevant standards of employer liability’”).

62. *Faragher*, 524 U.S. at 785. The best attempt to more clearly define the scope of tangible employment action came a year later when the EEOC published guidelines as to what it believed *Ellerth* and *Faragher* meant:

Any employment action qualifies as “tangible” if it results in a significant change in employment status. For example, significantly changing an individual’s duties in his or her existing job constitutes a tangible employment action regardless of whether the individual retains the same salary and benefits. Similarly, altering an individual’s duties in a way that blocks his or her opportunity for promotion or salary increases also constitutes a tangible employment action.

THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, (Notice 915.002 June 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html> (last visited Jan. 29, 2005).

63. 191 F.3d 283 (2d Cir. 1999).

64. The racial discrimination claim was brought as a class action, and much of the opinion dealt with whether or not the class should be certified pursuant to Federal Rule of Civil Procedure 23(a). *Id.* at 286. The sexual harassment claim brought by Veronica Caridad addressed the constructive discharge/tangible employment action issue. *Id.*

65. *Id.* at 290.

66. *Id.* This harassment included unwanted sexual touchings by her supervisor, and Caridad later testified that “she found it difficult to do her job because she ‘didn’t know when [her supervisor] was going to do this,’ and ‘every day [she felt she] could be subject’ to another attack.” *Id.*

67. *Id.* Caridad had made complaints to the Director of Affirmative Action at Metro-North, but refused to supply specifics about her harassment, fearing investigation and possible further reprisal. *Id.* Additionally, Caridad testified, “she did not trust Metro-North or its equal employment office.” *Id.*

The Second Circuit relied heavily on language in *Ellerth* and *Faragher* in holding that constructive discharge did not constitute a tangible employment action.<sup>68</sup> This decision was partially based on the fact that co-workers, in addition to supervisors, can be responsible for a constructive discharge, which the court thought made it inappropriate to impose liability on the employer without the intervening authority of a supervisor.<sup>69</sup> The court also noted that a constructive discharge is not ratified by the employer in the manner that other tangible employment actions are.<sup>70</sup> The final premise for the court's conclusion was that the plaintiff in *Ellerth* had pled constructive discharge, and thus constructive discharge is not a tangible employment action.<sup>71</sup>

Following *Caridad*, after several district courts adopted its holding,<sup>72</sup> the Sixth Circuit tackled the issue in *Turner v. Dowbrands Inc.*<sup>73</sup> Renea

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68. *Id.* at 294 (“constructive discharge does not constitute a ‘tangible employment action’ as that term is used in *Ellerth* and *Faragher*”).

69. *Caridad*, 191 F.3d at 294. The court explained:

When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation . . . . As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury. A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. But one co-worker . . . cannot dock another's pay, nor can one co-worker demote another . . . . The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.

*Id.* This conclusion misstates the issue by omitting critical language from *Ellerth*. See *infra* note 104.

70. *Caridad*, 191 F.3d at 294 (“unlike demotion, discharge, or similar economic sanctions, an employee's constructive discharge is not ratified or approved by the employer”). No further detail was given to support this proposition, so it is unclear why an employer's filing of termination papers differs from an employer's filing of resignation papers when the cause of the discharge is a supervisor aided by his agency relationship in either firing or constructively discharging a subordinate.

71. *Id.* At the appellate level, the plaintiff in *Ellerth* attempted to fit her situation within the *quid pro quo* doctrine. *Jansen v. Packaging Corp.*, 123 F.3d 490, 494 (7th Cir. 1997). In *Jansen*, with eight separate opinions:

All the judges except Judges Easterbrook, Rovner, and Wood believe that the hostile-environment claim was expressly waived by *Ellerth* in her briefs to the panel and that the dismissal of this claim should therefore be affirmed. All the judges except Chief Judge Posner and Judges Coffey and Manion believe that *Ellerth*'s evidence of *quid pro quo* harassment was sufficient to create a genuine issue of material fact, thus precluding summary judgment, although the routes to this conclusion are different.

*Id.* This conclusion is also faulty, as the Supreme Court left the door open as to whether *Ellerth* might amend her complaint on remand to the district court. *Ellerth*, 524 U.S. at 766; see also *infra* note 105 and accompanying text.

72. See *Scott v. Ameritex Yarn*, 72 F. Supp. 2d 587, 594 (D.S.C. 1999) (“constructive discharge is not a ‘tangible employment action,’ as that term is used in *Ellerth* and *Faragher*, because it is not an action made with the authority or approval of the employer); *Alberter v. McDonald's Corp.*, 70 F. Supp. 2d 1138, 1147 (D. Nev. 1999) (“[c]onstructive discharge is not an official act of the enterprise”); *Desmarteau v. City of Wichita*, 64 F. Supp. 2d 1067, 1079 (D. Kan. 1999) (noting that even though the *Ellerth* plaintiff had pled constructive discharge, the Supreme Court failed to include constructive

Turner's action under Title VII alleged that her supervisor, Thomas Morrissey, "subjected her to sexually explicit gestures, remarks, innuendos and comments."<sup>74</sup> The Sixth Circuit panel affirmed the district court's grant of summary judgment to Dowbrands, and relying blindly on *Caridad*, disregarded Turner's claim that constructive discharge was a tangible employment action.<sup>75</sup>

*C. Constructive Discharge Might Have Been a Tangible Employment Action in the First, Seventh, and Ninth Circuits*

In *Reed v. MBNA Marketing Systems, Inc.*,<sup>76</sup> the First Circuit declined to follow the approach laid out by the Second and Sixth Circuits. The plaintiff, Bobbi-Lyn Reed, worked as a telemarketer for MBNA under the supervision of William Appel during two separate periods of employment.<sup>77</sup> Reed's complaint alleged that Appel seriously abused and harassed her<sup>78</sup> during both periods of employment, and alleged her first resignation was a constructive discharge.<sup>79</sup> The district court granted MBNA's motion for summary judgment under the *Faragher/Ellerth* affirmative defense.<sup>80</sup>

The First Circuit reversed, concluding that the decisions in *Caridad* and *Turner* ignored the real issue.<sup>81</sup> While leaning toward the holdings of

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discharge in its definition of tangible employment action); *Powell v. Morris*, 37 F. Supp. 2d 1011, 1019 (S.D. Ohio 1999) ("[t]he *Faragher* court does not mention constructive discharge as a tangible employment action. If it had desired, the Supreme Court could have easily listed 'constructive discharge' along with the other incidents as constituting a tangible employment action").

73. No. 99-3984, 2000 WL 924599 (6th Cir. June 26, 2000).

74. *Id.* at \*1.

75. *Id.* at \*2. "Turner's claim of constructive discharge is not a tangible employment action for purposes of *Faragher* and [*Ellerth*]. See *Caridad v. Metro-North Commuter R.R.*" *Id.*

76. 333 F.3d 27 (1st Cir. 2003).

77. *Id.* at 30. Reed worked from June 1999, until the fall of 1999 when she quit because of Appel's harassment, but returned in May 2000 because she needed the higher wages available at MBNA. *Id.* at 30-31. Her second tenure lasted for just over a year; Reed quit a second time in June 2001. *Id.* at 31.

78. *Id.* at 30-31. "Appel frequently dropped green M&M's on Reed's desk claiming that they would 'make [her] horny.'" *Id.* at 30. After an evening where Reed was babysitting Appel's two-year-old son, before Reed could leave Appel's house, he "put his arm around her neck and dragged her into the living room where he pressed her to perform oral sex on him." *Id.* Reed quit in light of these events, scared to tell anyone in light of Appel's warnings that his family had influence with the company and that they would both be fired if she told anyone what happened. *Id.* at 31.

79. *Id.* at 33. Fortunately, Reed was able to convince MBNA to initiate an investigation into Appel's behavior that resulted in his swift resignation before MBNA had completed the paperwork to fire him. *Id.* at 31.

80. *Reed v. MBNA Mktg. Sys., Inc.*, 231 F. Supp. 2d 363, 376 (D. Me. 2002).

81. *Reed*, 333 F.3d at 33. "Because the conduct differs from case to case, we see no reason to adopt a blanket rule one way or the other." *Id.* The court decided that rather than weighing in on this

the Second and Sixth Circuits, *Reed* left the door open to the possibility that constructive discharge, under an appropriate set of facts, might qualify as a tangible employment action.<sup>82</sup> However, the court in *Reed* decided that because Appel's actions were increasingly unofficial, this was the type of case for which the *Ellerth/Faragher* defense was intended.<sup>83</sup>

The Seventh Circuit also followed the course set down in *Reed*, though it ruled in *Robinson v. Sappington*<sup>84</sup> that the constructive discharge in that case was a tangible employment action.<sup>85</sup> In *Robinson*, the plaintiff was a judicial secretary and clerk for a state judge in Macon County, Illinois and her harasser was the judge.<sup>86</sup> Robinson did not allege that Judge Sappington directly propositioned her but rather that he repeatedly harassed her about her looks, her dating habits, and on two occasions, threatened her life.<sup>87</sup> The district court granted summary judgment in favor of the defendants on all counts.<sup>88</sup>

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issue, the real question to be decided was whether a supervisor should be treated as acting for the employer. *Id.* The court concluded that this should be the case when there is an official action taken against the employee. *Id.* In one sense, this returns this area of the law to pre-*Ellerth* notions of agency and scope of employment. Of course, Appel's actions were outside the scope of his employment; almost all harassment is outside the scope of employment. *See id.* The court concluded that because Appel's behavior was outside the scope of employment, "[it was] exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed." *Id.*

The court's comment that "Appel's supervisory status may have facilitated his harassment, but that is a reason for vicarious liability, not for bypassing the affirmative defense" misses the purpose for which the Supreme Court applied the "aided-in-agency" doctrine in *Ellerth*. *Id.*

82. *Id.* "Nothing is gained by arguing in the abstract about whether constructive discharge is or is not a discharge; for some purposes or rubrics, it might be so treated." *Id.* Again, this ignores the fact that doctrines in various federal employment discrimination statutes are treated similarly for a reason, to help the courts make consistent judgments and to apply the laws in a uniform manner.

On the other hand, perhaps this result is not so odd considering that a district court in Pennsylvania concluded that the question whether constructive discharge was a tangible employment action was best left to juries. *See Hawk v. Americold Logistics, LLC*, No. 02-3528, 2003 WL 929221, at \*8 (E.D. Pa. Mar. 6, 2003) ("the existence or nonexistence of a tangible employment action is an issue of fact for the jury").

83. *Reed*, 333 F.3d at 33; *see also* Recent Cases, *Employment Law—Vicarious Liability—First Circuit Holds That Classification of Constructive Discharge as a Tangible Employment Action Should be Left to Case-by-Case Determination—Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27 (1st Cir. 2003), 117 HARV. L. REV. 1004, 1007 (2004) (recognizing that although the First Circuit leaves the door open to the possibility that constructive discharge claims might be tangible employment actions, in reality, its result is a tacit endorsement of those courts that have held it is not). Because *Reed* stated that "possibly, on rare facts" a claim of constructive discharge might negate the affirmative defense, the leaning of the opinion is apparent. *See Reed*, 333 F.3d at 33.

84. 351 F.3d 317 (7th Cir. 2003).

85. *Id.* at 336. "[W]e believe a constructive discharge may be considered a tangible employment action." *Id.* The court did not explicitly resolve the issue, as the Second Circuit did in *Caridad*, but yet relied heavily on the rationale in *Caridad* to support its conclusion. *Id.* at 334–36.

86. *Id.* at 320.

87. *Id.* at 320–24. At one point, in Judge Sappington's chambers,

Robinson testified that "[Judge Sappington] brought my face up so that I made eye contact,

On the narrow question of whether Robinson's constructive discharge satisfied *Ellerth/Faragher* in order to qualify as a tangible employment action, the Seventh Circuit approved of both the First Circuit's decision in *Reed*<sup>89</sup> and the Second Circuit's decision in *Caridad*.<sup>90</sup> Ultimately, the court held that "in circumstances where 'official actions by the supervisor . . . make employment intolerable,' we believe a constructive discharge may be considered a tangible employment action."<sup>91</sup>

Although the issue has come tangentially before the Ninth Circuit, it specifically declined to decide whether constructive discharge is a tangible employment action.<sup>92</sup>

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and he told me that he wanted me to look into his eyes so that I fully understood what he was saying . . . . He told me if he ever found out I was shacking up with anybody, he would kill me."

*Id.* at 321. On another occasion, Robinson's testimony related:

Judge Sappington summoned Ms. Robinson and an assistant state's attorney to his courtroom. Judge Sappington asked the state's attorney to recount the facts of a grisly murder in which a woman was shot, dismembered and decapitated. After the state's attorney left the room, Ms. Robinson, who was "very tearful," asked Judge Sappington "why he did that to me because there was absolutely no purpose in [the attorney] coming over there. It wasn't as though he was signing a warrant or anything like that and needed any information." Judge Sappington responded that Ms. Robinson was "beautiful and naive, and . . . would face a fate like [the victim] faced."

*Id.* at 322 (internal citations omitted).

88. *Id.* at 328.

89. *See supra* note 76.

90. *See supra* note 63.

91. *Robinson*, 351 F.3d at 336 (citing *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 33 (1st Cir. 2003)). While this sounds like a middle of the road solution, the rationale it is based on is as biased as that in *Reed*. *See supra* note 83 and accompanying text.

The Seventh Circuit noted several extraneous circumstances unique to the case that pushed the constructive discharge over the line into a tangible employment action. *Id.* at 337. Robinson's resignation, in part, was effected by a suggestion from the presiding judge of the jurisdiction. *Id.* This suggestion came after a transfer of Robinson to a different judge, and these actions were only possible because the presiding judge "ha[d] been empowered by the [employer] . . . to make economic decisions affecting other employees under his or her control." *Id.* at 335 (citing *Caridad*, 191 F.3d at 294). The court held that these actions by the presiding judge could lead a jury to determine that the resignation resulted in part from these actions in addition to the harassment by Judge Sappington. *Id.* at 331.

92. *See Kohler v. Inter-Tel Tech.*, 244 F.3d 1167, 1179 n.8 (9th Cir. 2001) ("[w]e have not yet determined whether a constructive discharge is a tangible employment action . . . [and we] do not reach [the] issue in this case because Kohler has waived her constructive discharge claim"); *Montero v. Agco Corp.*, 192 F.3d 856, 861 (9th Cir. 1999) ("we need not decide whether a constructive discharge can be a 'tangible employment action' for the purpose of a *Faragher* analysis, because [the] Plaintiff was not constructively discharged").

*D. Constructive Discharge Was a Tangible Employment Action in the Third and Eighth Circuits*

The Eighth Circuit was the first Court of Appeals to consider constructive discharge a tangible employment action when it decided *Philips v. Taco Bell, Inc.*<sup>93</sup> The *Philips* plaintiff, however, was not constructively discharged, so resolution of the tangible employment action question was not necessary to the holding.<sup>94</sup> That dictum was affirmed by the Eighth Circuit three years later in *Jackson v. Arkansas Dep't of Vocational and Technical Educ. Div.*<sup>95</sup> The *Jackson* opinion, however, had no independent rationale supporting the proposition that a constructive discharge was a tangible employment action.<sup>96</sup> The Eighth Circuit affirmed this ruling two years later, again without providing an independent rationale.<sup>97</sup>

While the Eighth Circuit did not provide any meaningful rationale to support its conclusions in these three cases, a district court within the Eighth Circuit did publish an opinion substantially discussing the issue in June 2000.<sup>98</sup> *Cherry v. Menard, Inc.*<sup>99</sup> involved a claim by an African-American woman that her employer violated Title VII by both racially and sexually discriminating against her.<sup>100</sup> This discrimination ultimately

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93. 156 F.3d 884 (8th Cir. 1998).

94. *Id.* at 889 n.6. "As we explain . . . Philips was not constructively discharged, nor did she suffer *any other* tangible detrimental employment action." *Id.* (emphasis added). This language strongly suggests that the Eighth Circuit implicitly recognized, even at this early date, that constructive discharge is a tangible employment action by its mere inclusion in a sentence noting that Philips did not suffer a tangible employment action.

95. 272 F.3d 1020 (8th Cir. 2001).

96. *Id.* at 1026. The court cited language from *Ellerth* recognizing that a tangible employment action includes such actions as "discharge, demotion, or undesirable reassignment." *Id.* (quoting *Ellerth*, 524 U.S. at 765). This holding is not central to the decision in the case, however, because the court found that Jackson was not constructively discharged, and allowed the employer to assert the affirmative defense. *Jackson*, 272 F.3d at 1027.

97. See *Jaros v. LodgeNet Entm't Corp.*, 294 F.3d 960, 966 (8th Cir. 2003) ("constructive discharge constitutes a tangible employment action which prevents an employer from utilizing the [*Ellerth/Faragher*] affirmative defense").

98. *Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160 (N.D. Iowa 2000). This case was decided after *Phillips* but before *Jackson* and *Jaros*, perhaps explaining, in part, why the Eighth Circuit did not recover this ground, thinking the matter had been conclusively settled, though of course *Cherry* is not binding on the other courts in the Eighth Circuit.

99. *Id.*

100. *Id.* at 1164. The abuse that *Cherry* alleged she suffered was severe, ranging from remarks by her supervisor that "he had [sex with] black women before, and further explaining what he did with these [sic] women sexually." *Id.* at 1165. The racial abuse was just as severe, as *Cherry* endured "several months of constant degrading comments about minorities." *Id.* The final straw that led to *Cherry's* resignation was when she overheard an assistant manager deny a discount to an Asian customer because the manager said, "I hate those gooks." *Id.* at 1166.

resulted in Cherry's resignation, which she claimed was a constructive discharge.<sup>101</sup>

The district court dissected the *Caridad* opinion to support its conclusion that constructive discharge is a tangible employment action and that Menard could not utilize the *Ellerth/Faragher* affirmative defense.<sup>102</sup> The district court first concluded that an issue of tangible employment action would not arise unless the harassing party is a supervisor, finding irrelevant that co-workers can cause a constructive discharge.<sup>103</sup> This led to the court's disagreement with *Caridad's* reasoning, because of its focus on the distinction between co-workers and supervisors.<sup>104</sup> The court also dispensed with *Caridad's* claim that because the employer does not ratify constructive discharges, they cannot qualify as tangible employment actions by noting that all discharges are ratified in some sense.<sup>105</sup> Finally,

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101. *Id.*

102. *Id.* at 1171–77. This was probably because Menard relied strongly on *Caridad* in its brief, and *Caridad* was, at the time, the only Court of Appeals case with any supporting rationale on the issue. *See id.* at 1171.

103. *Id.* The court draws this inference directly from *Ellerth*, because the entire aided-in-agency relation discussion in *Ellerth* is premised on the notion that a supervisor is the harassing party. *Id.*; *see also Ellerth*, 542 U.S. at 759. Moreover, as Justice Souter recognized in *Faragher*, “supervisors have special authority enhancing their capacity to harass, and that the employer can guard against their misbehavior more easily because their numbers are by definition fewer than the numbers of regular employees.” *Faragher*, 524 U.S. at 800–01.

104. *Cherry*, 101 F. Supp. 2d at 1172–73. *Ellerth* instructs that tangible employment actions constitute “significant change[s] in employment status” coupled with inflictions of “direct economic harm.” *Id.* at 1172 (citing *Ellerth*, 542 U.S. at 761–62). By looking at the pertinent text from *Ellerth*, the *Cherry* court points out where *Caridad* went wrong. The *Caridad* opinion omitted particular phrases and words when it cited *Ellerth*:

When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. *A tangible employment action in most cases inflicts direct economic harm.* As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury. A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct . . . . But one co-worker (*absent some elaborate scheme*) cannot dock another's pay, nor can one co-worker demote another. *Tangible employment actions fall within the special province of the supervisor.* The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control. [*Ellerth*, 524 U.S. at 761–62, 118 S. Ct. 2257 (emphasis indicating portions deleted from the quotation of this paragraph in *Caridad*, 191 F.3d at 294).].

*Cherry*, 101 F. Supp. 2d at 1172. The point, then, is that while *Caridad* reasons that a tangible employment action must be an action that only supervisors can inflict, the question that remains is whether or not the proper standard of harm has been inflicted. *Id.* at 1172–73. This question argues against the Supreme Court's new standards. *See infra* Part III.A.

105. *Id.* at 1173–74. To rebut this argument, the *Cherry* court looked at prior case law interpreting constructive discharge to see whether or not ratification by the employer was present. *Id.* at 1174. This search concluded that “a constructive discharge resulting from a supervisor's conduct is, legally, the employer's own ‘deliberate act.’” *Id.*; *see also Spears v. Mo. Dept. of Corr.*, 210 F.3d 850, 854 (8th

the court disagreed with *Caridad's* claim that this issue was decided in *Ellerth*, because constructive discharge was not directly before the Supreme Court in *Ellerth*.<sup>106</sup> For these reasons, the district court held that Cherry's claim of constructive discharge could go forward and that Menard could not raise the *Ellerth/Faragher* defense.<sup>107</sup>

The first thorough analysis at the circuit court level resulting in a holding that constructive discharge was a tangible employment action occurred in the Third Circuit in 2003.<sup>108</sup> Nancy Drew Suders, the plaintiff in this case, was a Pennsylvania State Police ("PSP") officer who began work in March 1998.<sup>109</sup> From the beginning of her employment, Suders alleged she suffered severe harassment, and she eventually resigned in August 1998.<sup>110</sup> The final straw was an apparent set-up where the officers framed Suders for "stealing" her own computer skills test results, handcuffed her, and treated her as a suspect until she finally convinced the officers she really intended to resign.<sup>111</sup> Suders filed suit in the Middle

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Cir. 2000); *Philips v. Taco Bell*, 156 F.3d 884, 890 (8th Cir. 1998); *Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851, 858 (8th Cir. 1998); *Knowles v. Citicorp Mortgage*, 142 F.3d 1082, 1086 (8th Cir. 1998). Judge Posner addressed the same issue in the Seventh Circuit's opinion below *Ellerth*. *Jansen v. Packaging Corp.*, 123 F.3d 490, 515 (7th Cir. 1997) (Posner, J., concurring and dissenting). Judge Posner concluded "[constructive] termination will look to the supervisor's superiors like a voluntary quit. But since there is always some paperwork involved in an employee's quitting, the higher-ups in the company will have some ability to monitor constructive discharges, and I would therefore impose strict liability in such cases." *Id.*

106. *Cherry*, 101 F. Supp. 2d at 1174. The issue of whether or not the *Ellerth* plaintiff had suffered a constructive discharge was pled, but not considered by the Supreme Court in that case. *Id.* Furthermore, the Supreme Court specifically noted in *Ellerth* that "[i]n the context of *this* case, a tangible employment action would have taken the form of a denial of a raise or a promotion." *Ellerth*, 542 U.S. at 761 (emphasis added).

107. *Cherry*, 101 F. Supp. 2d at 1175 ("this court concludes that, contrary to the conclusion in *Caridad*, a constructive discharge resulting from sexually harassing conduct of a supervisor *does* constitute a 'tangible employment action' within the meaning of the *Ellerth/Faragher* standard, and therefore would deprive an employer of the *Ellerth/Faragher* affirmative defense to vicarious liability").

108. *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003).

109. *Id.* at 436. Suders had previously worked for ten years in law enforcement in Fulton County, Pennsylvania, when she was urged to apply for a position with the State police force. *Id.* at 435-36. Her application was accepted, and she began her employment with the State police as a "police communications operator." *Id.* at 436.

110. *Id.* The perpetrators of this harassment were three officers in the barracks where she worked, including Station Commander Sergeant Eric Easton, Patrol Corporal William Baker, and Corporal Eric Prendergast. *Id.* The harassment varied in degree, but Suders alleged, *inter alia*, that "every time she would go into Easton's office, 'he would bring up [the subject of] people having sex with animals. . . . [T]hat's all the man wanted to talk about.'" *Id.* Suders' main complaint against Baker was that as many as ten times a night, he would "cross his hands, grab hold of his private parts and yell, suck it. The man did this, and he would beat on [his crotch] . . . . All he wanted to do was play with his crotch." *Id.* at 437.

111. *Id.* at 439. She had been carrying a written resignation with her, and even after tendering it, she was not permitted to leave because she was a 'suspect' in the alleged 'theft.' *Id.* These final events



District of Pennsylvania, where the PSP's motion for summary judgment was granted in full.<sup>112</sup> She appealed to the Third Circuit.<sup>113</sup>

The Third Circuit reversed the district court and held that constructive discharge was a tangible employment action.<sup>114</sup> In contrast to the Eighth Circuit's cursory dispositions of this issue,<sup>115</sup> Judge Fuentes undertook a searching review of the case law and principles reviewed in *Ellerth* and *Faragher* and the intervening five-year period.<sup>116</sup> The discussion began by affirming the principle that only when a supervisor is responsible for the harassment is the "aided-in-agency" standard appropriate to impute liability to the employer.<sup>117</sup> The key principle from *Ellerth* and *Faragher* is that tangible employment actions "implicate, in some meaningful way, the authority of the employer itself."<sup>118</sup> While the behavior of Suders' fellow officers, Easton, Baker, and Prendergrast, was certainly not endorsed by the PSP and these individuals had no authority to demote or fire Suders, the court refused "to rein in the scope of a supervisor within the meaning of *Ellerth* and *Faragher*"<sup>119</sup> because they were all superiors to Suders.<sup>120</sup>

After discussing the position of various courts on the issue, the Third Circuit firmly sided with the Eighth Circuit in holding that constructive

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may have qualified as an official act under the new *Suders* framework. *Suders*, 124 S. Ct. 2342, 2357 n.11 (2004); see *infra* Part II.E.

112. *Id.* at 439–40. The district court agreed that Suders had raised a viable hostile work environment claim, but concluded that the *Ellerth/Faragher* affirmative defense applied, and foreclosed her claim when they found the defense was asserted successfully. *Id.* at 440. This was in spite of the fact that Suders had sought the assistance in June of Virginia Smith-Elliott, who was an Equal Employment Opportunity Officer for the State Police. *Id.* at 438. In August, Suders went back to Smith-Elliott for help, but alleged Smith-Elliott was insensitive and unhelpful. *Id.*

113. *Id.* at 440.

114. *Id.* at 461–62.

115. See, e.g., *supra* notes 93–97.

116. *Suders*, 325 F.3d at 447–62. Judge Fuentes noted particularly that the district court had allowed the defendants to assert the affirmative defense without analysis, and that "the District Court [seemed to have] bypassed the critical issue in this case." *Id.* at 447.

117. *Id.* at 450. The distinction between co-workers and supervisors is critical, because only supervisors are imbued with authority vested in them by the employer. See *supra* note 42.

118. *Suders*, 325 F.3d at 451. The court recognized some limitation on this, and was careful to use words such as 'often' and 'in most cases' to describe the amount of involvement of the enterprise necessary to find vicarious liability. See *id.*

119. *Id.* at 450 n.11.

120. *Id.* The court approvingly cited Susan Estrich, who claimed that while "the supervisor may have been specifically delegated the power to hire and fire, . . . he is also delegated the power to define the acceptable working conditions of the workplace." Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 855 (1991); see also *infra* note 155.

The record noted that "Easton was responsible for the day-to-day supervision of the McCConnellsburg barracks; and . . . both Baker and Prendergast had supervisory duties with respect to 'running their shifts.'" *Suders*, 325 F.3d at 450 n.11.

discharge is a tangible employment action.<sup>121</sup> Judge Fuentes considered the holding in *Cherry v. Menard, Inc.*<sup>122</sup> and noted that it “presented a compelling counterpoint to the Second Circuit’s decision in *Caridad*.”<sup>123</sup> Also cited approvingly was an Arizona District Court case which followed the Eighth Circuit,<sup>124</sup> as well as two unpublished district court opinions, one from Oregon, and one from Texas, which arrived at the same result.<sup>125</sup>

Also providing support to the Third Circuit’s ruling were two previous cases it decided that shed light on the definition of tangible employment action.<sup>126</sup> In *Cardenas v. Massey*,<sup>127</sup> the Third Circuit ducked the issue of whether a constructive discharge was a tangible employment action, leaving this decision to the District Court, though “[f]or the purposes of

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121. *Id.* at 454. This holding was based on three observations:

(1) although we have not definitively ruled on the issue, our recent decisions have suggested that a constructive discharge constitutes a tangible employment action; (2) none of the grounds advanced by the *Caridad* line of cases persuades us that a constructive discharge should not be held to constitute a tangible employment action; and (3) holding an employer strictly liable for a constructive discharge resulting from the actionable harassment of its supervisors more faithfully adheres to the policy objectives set forth in *Ellerth* and *Faragher* and to our own Title VII jurisprudence.

*Id.*

122. 101 F. Supp. 2d 1160 (N.D. Iowa 2000).

123. *Suders*, 325 F.3d at 454. The *Cherry* court noted that of the reasons cited in *Caridad* supporting the contention that constructive discharge is not a tangible employment action, “none . . . stands up to a probing scrutiny.” *Cherry*, 101 F. Supp. 2d at 1171. *See supra* notes 98–103 and accompanying text.

124. *Suders*, 325 F.3d at 454. *See Vasquez v. Atrium Door & Window Co.*, 218 F. Supp. 2d 1139, 1142 (D. Ariz. 2002). The *Vasquez* court listed three factors in support of the Eighth Circuit’s conclusion that constructive discharge was a tangible employment action:

(1) the Ellerth/Faragher list of tangible employment actions was not intended to be exhaustive; (2) the majority’s view that a constructive discharge is a tangible employment action is more consistent with the remedial purposes of Title VII; and (3) the economic damage to the employee is the same regardless of whether he or she is unlawfully fired or constructively discharged.

*Id.* In *Vasquez*, the court did not note any difference in constructive discharges brought as claims under separate provisions of federal law. *Id.* *See EEOC v. Univ. of Chi. Hosp.*, 276 F.3d 326, 331 (7th Cir. 2002) (holding constructive discharge is an adverse employment action in the context of religious discrimination); *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 554 (11th Cir. 1997) (pre-dating *Ellerth* and holding constructive discharge is an adverse employment action under an ADEA claim); *see also infra* note 144 (analogizing Title VII and the ADEA).

125. *See Haworth v. Romania Imported Motors, Inc.*, No. CV 00-1721-HA, 2001 WL 34041893, at \*8 (D. Or. Dec. 27, 2001) (including dicta that “if there were a factual determination that plaintiff was constructively discharged, defendant would be precluded from asserting the *Ellerth/Faragher* affirmative defense”); *Taylor v. United Reg’l Health Care Sys., Inc.*, No. CIV. A. 700CV145-R, 2001 WL 1012803, at \*6 (N.D. Tex. Aug. 14, 2001) (including dicta that constructive discharge would be a tangible employment action, but that the plaintiff had not presented sufficient evidence that he was constructively discharged).

126. *Suders*, 325 F.3d at 455–56. *See Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139 (3d Cir. 1999).

127. 269 F.3d 251 (3d Cir. 2001).

[that] discussion, [it] assume[d] [that] a constructive discharge [was] a tangible employment action.”<sup>128</sup> *Durham Life Ins. Co. v. Evans*<sup>129</sup> was clear in its agreement that constructive discharge was a tangible employment action, but resolution of that issue was unnecessary to the outcome of the case because the plaintiff had alleged other tangible employment actions.<sup>130</sup>

The Third Circuit continued by systematically attacking the reasoning of cases holding to the contrary, mainly by rebutting claims made in *Caridad*.<sup>131</sup> Judge Fuentes first agreed with the *Cherry* court that the list of tangible employment actions in *Ellerth* was not intended to be exclusive.<sup>132</sup> Next, the court dispensed with the claim that *Ellerth* itself settled the issue, noting that a constructive discharge claim was not before the court in that case.<sup>133</sup> Finally, the court noted that the claim that the employer does not ratify constructive discharges misses the point that employers are officially notified of employees who quit just as they are of employees who are terminated.<sup>134</sup>

#### *E. Constructive Discharge Might be a Tangible Employment Action: The Supreme Court Weighs In*

The PSP appealed the Third Circuit’s decision, and the Supreme Court granted certiorari.<sup>135</sup> The Court’s intention to avoid answering the question presented<sup>136</sup> with a yes or no was clearly evident at oral argument.<sup>137</sup> The

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128. *Id.* at 267 n.10.

129. 166 F.3d 139 (3d Cir. 1999).

130. *Id.* at 150 n.5 (“[i]n a case such as this one, where . . . Evans was constructively discharged by her supervisors’ action after their own actionable behavior, the holdings and instruction of *Ellerth* and *Faragher* are clear: the employer, Durham Life Insurance Company, is automatically liable and no affirmative defense is available”).

131. *Suders*, 325 F.3d at 456–61.

132. *Id.* at 456. The court noted that the list employed a structural technique beginning with specifics and ending with generalities that supported this proposition. *See id.* Also, the court looked back to its own decision in *Durham Life* where it found three disparate examples of activity that qualified as a tangible employment action, namely, “where a supervisor (1) dismissed an employee’s secretary, (2) removed her essential work files, and (3) allocated to her a disproportionate share of less lucrative assignments.” *Durham Life*, 166 F.3d at 153–54.

133. *Suders*, 325 F.3d at 456–57. *See supra* note 102.

134. *Suders*, 325 F.3d at 458–60. *See supra* note 101.

135. 540 U.S. 1046 (2003).

136. *See supra* note 13.

137. *See* United States Supreme Court Official Transcript, Pa. State Police v. Suders, 124 S. Ct. 2342 (2004) (No. 03-95 Mar. 31, 2004), available at 2004 WL 772081 [hereinafter *Suders* Oral Argument]. Justice O’Connor asked the first question to the Pennsylvania State Police’s counsel, and suggested that “I don’t know that viewing it through the lens of a constructive discharge is helpful.” *Id.* at \*4. Justice Scalia agreed. *See id.* at \*5.

final opinion makes it clear that although the Court believed it was helping to inform Title VII jurisprudence by clarifying the questions which cases like *Suders*' present, it had no interest in drawing a bright-line rule with respect to constructive discharges.<sup>138</sup>

Instead, the bright-line rule it purported to draw causes even more confusion. In introducing its analysis, the Court stated: "an employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment."<sup>139</sup> Justice Ginsburg began by recognizing that, as presented, the question was which of two categories a constructive discharge falls into.<sup>140</sup> The Court's exploration then proceeded to examine *Ellerth* and *Faragher*'s rationales.<sup>141</sup> The Court then viewed the intersection of *Suders*' original sexual harassment claim with her claim of constructive discharge.<sup>142</sup>

The recognition that constructive discharge is, in one sense, simply a more severe hostile work environment claim allowed the Court to examine what sources could potentially be responsible for a constructive discharge.<sup>143</sup> These sources are: "co-worker conduct, unofficial

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The overall tenor of the argument made it clear that the Court did not intend to simply answer the question presented with a simple yes or no. I was present in the courtroom for the argument in this case on March 31, 2004 and could tell immediately that the Justices were not satisfied with a straight yes or no answer, although exactly how they would resolve the case was unclear. Comparing the decision to the tone and questions of the individual justices at oral argument, it is my personal conclusion that a compromise was reached between Justices who were concerned with holding an employer liable for something that its higher-ups were unaware of and Justices who might have been willing to endorse the approach I lay out in Part IV, *infra*. The fact that eight of the nine Justices signed Justice Ginsburg's opinion is also somewhat telling.

138. *See Suders*, 124 S. Ct. at 2355–56 (noting that this is exactly what the Third Circuit had done and attacking this as misplaced).

139. *See id.* at 2351. This begs the question. As Part III demonstrates, the use of the phrase "official act" leaves district courts fumbling for guidance. *See infra* Part III.

140. *See Suders*, 124 S. Ct. at 2352 (asking "[i]nto which *Ellerth/Faragher* category do hostile-environment constructive discharge claims fall.>").

141. *See id.* at 2352–54. Of note in this discussion is the Court's tacit acknowledgement that the creation of this affirmative defense was an attempt to "advance Congress' purpose 'to promote conciliation rather than litigation' of Title VII controversies." *Id.* at 2353 (citing *Ellerth*, 524 U.S. at 764). As explained in Part IV, *infra*, Congress is the body best situated to determine what procedures promote conciliation rather than litigation. *See infra* Part IV.

142. *See Suders*, 124 S. Ct. at 2354. The logic here is that a run-of-the-mill Title VII hostile work environment claim is the same type of complaint as a constructive discharge, only that the constructive discharge claim requires "something more." *Id.*

143. Of course this analysis transforms constructive discharge from an analysis about the holistic intolerability of working conditions into one that may be more focused on individual events and attempting to classify them within a rigid framework which may have large gaps between its categories.

supervisory conduct, or official company acts.”<sup>144</sup> The first category is explicitly excluded from consideration by the Court.<sup>145</sup> The final holding in *Suders* applies the *Ellerth* framework to the final two categories: harassment that qualifies as “unofficial supervisory conduct” allows an employer to use the affirmative defense; harassment that is somehow an “official company act” negates the affirmative defense’s availability.<sup>146</sup> The analysis leaves open the potential question of whether the harassment itself must be an official act, or whether liability could potentially be imputed to the employer after an official act which was the “last straw” that precipitated the employee’s resignation.<sup>147</sup>

The Court remanded the case because genuine issues of material fact remained whether what *Suders* alleged constituted an official act of the PSP.<sup>148</sup> As of mid-September 2004, the jury is still out on how courts will interpret the new language from *Suders*, but early cases suggest courts will have to make a far deeper inquiry than one might expect from the relatively simple language of Title VII.<sup>149</sup> The Eighth Circuit gave a

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144. *Suders*, 124 S. Ct. at 2355.

145. No one has seriously suggested that employers should be strictly liable for the actions of non-supervisory personnel in creating hostile work environments. *See supra* note 103 and accompanying text; *see also Suders*, 124 S. Ct. at 2352 n.6.

146. *See Suders*, 124 S. Ct. at 2355. This is appropriate, according to Justice Ginsburg, because without this “official act,” whether the supervisor has been aided by the agency relationship is uncertain enough to make the affirmative defense proper. *Id.* It is worth noting, in defense of this argument, that an employer still retains the burden of proof with respect to the affirmative defense. *See id.*

147. *See id.* at 2355. Of course, this is the problem that constructive discharge creates; whereas a termination, demotion or hiring are unilateral decisions made by an employer, constructive discharge involves two prongs—the causal prong of unremitting abuse and the resulting prong of the unilateral resignation by the employee. *See id.*; *see also infra* Part III.C.

148. *Suders*, 124 at 2357 n.11.

149. Of course, Title VII merely prohibits an employer from “discriminat[ing] against any individual . . . because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2 (2000).

Instructive is a state appellate decision, which held that the following allegations did *not* rise to the level of an official act:

She was given a heavier workload than others; she was required to maintain a daily log of her work and work locations; she was not invited to meetings with vendors; her office keys were taken when the locks were changed on the Education Center; she was not given a performance evaluation; and she received numerous critical, insulting e-mails from her supervisor.

*Barra v. Rose Tree Media School Dist.*, 858 A.2d 206, 209 (Pa. Commw. Ct. 2004). The court in *Barra*, after enumerating these allegations, held without explanation that none of them (or, as one might persuasively argue, all of them together) rose to the level of an “official act of a supervisor” as required by *Suders*. *Id.* at 217; *see also McPherson v. City of Waukegan*, 379 F.3d 430, 440–41 (7th Cir. 2004) (holding under a weak set of facts that the plaintiff could not prove constructive discharge and the affirmative defense applied); *Luciano v. Coca-Cola Enterprises*, No. Civ. A.02-10895-RGS, 2004 WL 1922137 (D. Mass. Aug. 30, 2004) (holding that the plaintiff could not establish constructive discharge as a matter of law because her working conditions were not sufficiently unpleasant); *Baker*

prescient example just a month after *Suders* by creating its own exception to the affirmative defense.<sup>150</sup> Surely, this is not the last time such an exception or new interpretation will occur.

### III. ANALYSIS

#### A. Agency and Policy

The Supreme Court was correct to focus on § 219(2)(d) of the Restatement of Agency (the tortfeasor “was aided in accomplishing the tort by the existence of the agency relation”) in beginning its analysis in *Ellerth*.<sup>151</sup> To discover which instances of harassment possess the “aided-in-agency” relationship, prior case law offers some advice.<sup>152</sup> There was wide agreement pre-*Ellerth* that vicarious liability was appropriate in the

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v. Boeing Helicopters, No. Civ. A. C1-3565, 2004 WL 1490358, at \*4 (E.D. Pa. June 30, 2004) (holding the affirmative defense applicable because the harassing party was not the plaintiff’s supervisor).

150. In *McCurdy v. Arkansas State Police*, 375 F.3d 762 (8th Cir. 2004), Judge Riley’s opinion for the majority expressed his view that even though the employer could not prove the second prong of the affirmative defense, this did not matter—the employer should be able to use the defense anyway. *Id.* at 771. Judge Riley’s strong language almost bristles with the frustration that must follow decisions like *Suders*, which fail to demonstrate guidance to lower courts: “[j]udicially adopted defenses should not be viewed in a vacuum and blindly applied to all future cases.” *Id.* Instead, the facts of *McCurdy*, which involved only a single episode of harassment, apparently justify dispensing with the second prong, even though *McCurdy* did promptly report her harassment. *Id.* at 774.

Judge Melloy dissented in *McCurdy*, stating that although the first prong of the affirmative defense was met, this only “mitigate[s] damages; . . . it does not create a complete defense to liability.” *Id.* at 776. Examining the relevance of the affirmative defense’s prongs with respect to damages is beyond the scope of this Note.

151. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 759 (1998). “[T]he servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or *he was aided in accomplishing the tort by the existence of the agency relation.*” RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958) (emphasis added). The italicized language is at issue here. *See supra* notes 55, 104. The “apparent authority” language of § 219(2)(d) is not relevant to this matter because most, if not all, supervisors who harass subordinates are doing so not with apparent authority, but with real authority to impact the subordinate’s career. *See also* RESTATEMENT (SECOND) OF AGENCY § 219, cmt. e (1958) (“[t]his subsection enumerates the situations in which a master may be liable for torts of servants acting *solely for their own purposes* and hence not in the scope of employment”) (emphasis added). The importance of this comment is apparent, as it validates the supposition that the aided-in-agency standard is appropriate when supervisors engage in behavior outside the traditional scope of their employment, such as sexual harassment.

*See also* *Henson v. Dundee*, 682 F.2d 897, 909 (11th Cir. 1982) (“[t]he modern corporate entity consists of the individuals who manage it, and little, if any, progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual employee action”).

152. *Ellerth*, 524 U.S. at 760. On the one hand, supervisors are aided by the agency relationship for the simple fact that the relationship puts them in close contact with the victim of harassment. *See Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir. 1995). However, the mere existence of close contact afforded by the agency relationship was not enough to impose vicarious liability pre-*Ellerth*. *Id.* at 1397–98.

context of discriminatory discharges, where the supervisor was only able to discharge the complainant because of his or her agency relationship with the employer.<sup>153</sup> This is primarily because supervisors are vested with the power to hire and fire which flows directly from their agency relationship with the employer.<sup>154</sup>

The fact that supervisors are vested with discharge powers should not be confused by requiring that the use of these powers be a necessary component of a discrimination claim. In many cases that do not rise to the level of quid pro quo harassment, it is the mere *presence* of discharge authority that makes the harassment possible or makes the victim less likely to speak out.<sup>155</sup> The ultimate question in a case like *Suders* ought to be “was the supervisor aided in committing the harassment by his or her supervisory authority?”<sup>156</sup> The Supreme Court may have understood this to be the same as asking whether the constructive discharge was precipitated by an official act, but their focus on whether employer liability was appropriate suggests that they considered it more important to determine whether the employer could exercise control over such an act.<sup>157</sup> In reality,

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153. *Ellerth*, 524 U.S. at 760. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 70–71 (1986) (“the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor’s actions”). *Meritor* cited the EEOC guidelines for employer liability, 29 C.F.R. § 1604.11(c), which were repealed in 1999 after *Ellerth* and *Faragher*. 64 Fed. Reg. 58,334 (Oct. 29, 1999).

154. See *Ellerth*, 524 U.S. at 762 (explaining that tangible employment decisions can only be made by supervisory personnel, in contrast to other tortious conduct, such as battery, that can be done by any co-worker).

155. Of course, the affirmative defense requires that the victim speak out, or more technically, requires that the employer be able to prove that the victim did not speak out. See *Pa. State Police v. Suders*, 124 S. Ct. 2342, 2354 (2004). Justice Marshall addressed this very point in *Meritor*:

A supervisor’s responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases, it is the *authority vested in the supervisor by the employer* that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer’s authority that he is able to impose unwelcome sexual conduct on subordinates.

*Meritor*, 477 U.S. at 76–77 (Marshall, J., concurring) (emphasis added).

156. See *infra* note 157.

157. See *Suders*, 124 S. Ct. at 2355. Justice Ginsburg points out that “absent . . . an official act, the extent to which the supervisor’s misconduct has been aided by the agency relation . . . is less certain.” *Id.* This may be so, but there is no obstacle to using the constructive discharge inquiry itself to inform this analysis. If the high standard for constructive discharge can be shown by an employee, this should satisfy the need to show that a supervisor’s harassment was aided by his supervisory authority.

Of course, this is not to say that this is the only appropriate test that could be fashioned. Because *Suders* leaves it to the district courts to determine what is and what is not an official act, the Court could have simply charged district courts with answering a but-for version of the question in the text:

attention should be focused on whether supervisory authority aided the harassment, regardless of what actions were taken. Supervisors are just as capable of using their authority to harass subordinates without taking any action at all beyond unspoken threats.<sup>158</sup>

This discussion points to an important reason why Congress is best equipped to deal with the confusion arising in these types of cases.<sup>159</sup> Ultimately it is a normative judgment whether a specific employer ought to be liable for the misconduct of its supervisory staff. In a case like *Reed*,<sup>160</sup> honest people can have different opinions about whether the employer, MBNA, ought to be responsible for the reprehensible behavior of its employee Mr. Appel. This is why the political branches of government ought to resolve this issue, rather than the independent judiciary.<sup>161</sup>

### *B. Constructive Discharge is Still a Discharge*

On its face, the proposition that a constructive discharge and actual discharge damage the employee in the same manner seems clear.<sup>162</sup> A person constructively discharged suffers the same economic injury as a

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“but for the supervisor’s authority qua supervisor, would the harassment have been possible?”

158. *Reed* is the paradigm example of this. *Reed* was intimidated from reporting the harassment at issue primarily because of Appel’s threats. *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 33 (1st Cir. 2003) (“Appel’s supervisory status may have facilitated his harassment”). *See supra* note 81. Of course facilitation is not all that far from aid.

159. *See infra* Part IV.

160. *Reed*, 333 F.3d 27; *see also supra* Part II.B.

161. *See, e.g.*, *McCurdy v. Arkansas State Police*, 375 F.3d 762 (8th Cir. 2004). The *McCurdy* court found itself forced to undertake such an analysis and concluded, *inter alia*:

[W]e critically ask whether Title VII envisions strict employer liability for a supervisor’s single incident of sexual harassment when the employer takes swift and effective action to insulate the complaining employee from further harassment the moment the employer learns about the harassing conduct. As we answer this question, we begin with the obvious understanding that the Supreme Court, when it used the *Ellerth* and *Faragher* facts to craft the two-prong affirmative defense to strict liability, was not addressing an employer who takes swift and effective action the minute it learns of a single incident of supervisor sexual harassment. Judicially adopted defenses should not be viewed in a vacuum and blindly applied to all future cases. Instead, we should analyze these defenses based on the unique facts involved in the cases in which courts adopt the defenses.

*Id.* at 771. Judge Riley also noted that “[i]t is a fair question to ask who should bear the responsibility for a single incident of supervisor sexual harassment, an innocent employee like *McCurdy* or an employer like the A[rkansas] S[tate] P[olice].” *Id.* at 772. Not only is this a fair question—it is one that should be answered in the first instance by the policy-making body best situated to do so: Congress. *See infra* Part IV.

162. *Suders*, 124 S. Ct. at 2355 (“a constructive discharge is functionally the same as an actual termination in damages-enhancing respects.”).



person who is terminated, i.e., the loss of her job.<sup>163</sup> In similar areas of the law, this proposition is well established. For example, under the ADEA,<sup>164</sup> termination and constructive discharge are dealt with using the same provisions, and while constructive discharge has its own burden of proof issues, the remedies are the same regardless of which is pled and proved.<sup>165</sup> Furthermore, at least one Circuit Court of Appeals has ruled that the tangible economic harm involved in a tangible employment action might even be lower than that level required to support a constructive discharge.<sup>166</sup> It seems apparent then that two actions which harm the employee in the same manner ought to be treated the same by the law, especially because actions such as a demotion or change in work assignment affect an employee's economic status less than do constructive discharges or actual terminations.<sup>167</sup>

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163. See *Melendez-Arroyo v. Cutler Hammer de P.R. Co.*, 273 F.3d 30, 36 (1st Cir. 2001). Here, in an ADEA claim, the court ruled that “[o]ften used in cases of racial or sexual harassment, [the constructive discharge] doctrine provides a basis for computing damages not based merely on the temporary suffering but on the deprivation of employment.” *Id.* (emphasis added). This is the same ground for computing damages when someone is directly fired. See, e.g., *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 97 (2003) (in a case where the aggrieved employee was fired, “[t]he jury rendered a verdict for respondent, awarding backpay, compensatory damages, and punitive damages,” and the Supreme Court affirmed this verdict).

164. The Age Discrimination in Employment Act of 1967 (as amended), 29 U.S.C. § 621 et seq. (2000). In fact, an Iowa District Court came to the same conclusion in December 2003. See *Ricklefs v. Orman*, No. C02-3061-MWB, 2003 WL 23004997 (N.D. Iowa Dec. 19, 2003). Noting the similarities between the ADEA and Title VII, the court concluded “the Supreme Court made [it] clear that the principles it was articulating applied with equal force in discrimination cases based on Title VII as well as in cases based on the ADEA.” *Id.* at \*12 n.9 (citing *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 357–58 (1995)).

165. See *Suarez v. Pueblo Intern., Inc.*, 229 F.3d 49, 54 (1st Cir. 2000) (“[a]n employer cannot accomplish by indirection what the law prohibits it from doing directly. Just as the ADEA bars an employer from dismissing an employee because of his age, so too it bars an employer from engaging in a calculated, age-inspired effort to force an employee to quit.”); *Young v. Southwestern Sav. & Loan Ass’n.*, 509 F.2d 140, 144 (5th Cir. 1975) (“if the employer deliberately makes an employee’s working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee.”); see generally *Ira M. Saxe, Note, Constructive Discharge Under the ADEA: An Argument for the Intent Standard*, 55 *FORDHAM L. REV.* 963, 968 (1987).

166. See *Mallinson-Montague v. Pocrnick*, 224 F.3d 1224 (10th Cir. 2000). The Tenth Circuit first recognized that the term tangible employment action was itself vague and “heavy with judicial gloss.” *Id.* at 1231. It continued by pointing out that “[a]lthough the [Supreme Court’s opinion in *Ellerth*] . . . was careful to note that the resultant economic injury must be ‘tangible,’ ‘significant,’ and/or ‘material,’ it never even hinted that the injury must be of the magnitude necessary to support a constructive discharge claim.” *Id.* (internal citation omitted).

167. The Supreme Court addressed a similar argument in *Suders*, arguing that the Third Circuit’s decision below would make claims of constructive discharge easier to prove than garden variety hostile work environment claims. *Suders*, 124 S. Ct. at 2356. This addresses the issue of how evidence concerning the affirmative defense would be presented to a jury, e.g., evidence that the employee did or did not go through the employer’s procedures for reporting incidents of harassment. Justice

Justice Thomas argues that while this may have been the case at some point in the history of constructive discharge law, it is no longer the case with the more lenient standards he accuses the majority of promulgating.<sup>168</sup> Because constructive discharge requires no specific intent on the part of the employer, he argues that it is not the effective equivalent of an actual discharge, which, by its nature, obviously includes specific intent.<sup>169</sup> While this argument has some force, it seems that the relevant inquiry under Title VII is not what an employer intended, but what consequences an aggrieved employee suffered and what compensation he or she ought to be entitled to. After all, Congress chose to write Title VII, as many courts have noted, not as a punitive statute, but as a preventive one.<sup>170</sup>

### C. Prudential Considerations

The next question to ask is what courts are likely to do in the wake of *Suders*.<sup>171</sup> It is useful as a starting point to consider what happens in a suit that does not involve constructive discharge but still raises the same issues. An employee who alleges hostile work environment sexual harassment must plead and prove such an environment existed. The employer then may attempt to argue the *Ellerth* affirmative defense, but the employee may protest if there was a tangible employment action. Thus, assuming that there was actionable harassment, the inquiry rests on whether the employer committed a tangible employment action against the employee.<sup>172</sup> If so, the analysis is complete. If not, the employer then bears the burden of proving the two prongs of the affirmative defense.<sup>173</sup>

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Ginsburg argued that “[u]nder the Third Circuit’s decision, a jury, presumably, would be cautioned to consider the affirmative-defense evidence only in reaching a decision on the hostile work environment claim, and to ignore or at least downplay that same evidence in deciding the closely associated constructive discharge claim.” *Id.*

168. *Id.* at 2358 (“[t]he Court has now adopted a definition of constructive discharge, however, that does not in the least resemble actual discharge”).

169. *Id.*

170. *Faragher v. City of Boca Raton*, 524 U.S. 775, 777 (1998) (holding that the affirmative defense system “implement[s] Title VII sensibly by giving employers an incentive to prevent and eliminate harassment and by requiring employees to take advantage of the preventive or remedial apparatus of their employers”).

171. *See supra* note 146 and cases cited therein.

172. This is properly understood as a unilateral action on the part of the employer that brings the “official power of the enterprise to bear on subordinates.” *Suders*, 124 S. Ct. at 2353.

173. *Id.* at 2353–54. This burden has been correctly allocated to employers based both on mitigation principles and the fact that an “employer is in the best position to know what remedial procedures it offers to employees.” *Id.* at 2354 n.7; *see also* 9 JOHN H. WIGMORE, EVIDENCE § 2486 (J. Chadbourn rev. ed. 1981).

When the employee protests that the tangible employment action was constructive discharge, the analysis becomes unnecessarily murky. *Suders* instructs that the analysis begins by focusing first on whether a constructive discharge occurred, and then proceeds to the question of whether an official act was implicated in the discharge.<sup>174</sup> The murkiness enters the picture when an employer attempts to fight the first part of this analysis by introducing evidence to show that no constructive discharge occurred, which essentially is the same evidence it would use to prove the affirmative defense.<sup>175</sup>

#### IV. PROPOSAL

On one level it seems a syllogism to say that because Congress wrote Title VII, it ought to fix its defects and clarify the judiciary's interpretation of it. On the other hand, judgments about the most efficient and effective ways to combat workplace harassment really are best left to the political branches—and in this case, to Congress.<sup>176</sup>

Title VII was originally passed in 1964, and has been amended six times since, most recently in 1991.<sup>177</sup> The 1991 amendment included four

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174. See *Suders*, 124 S. Ct. at 2355 (suggesting that the absence of an official act justifies offering the employer the opportunity to use the affirmative defense).

175. *Id.* at 2357. Surprisingly, this part of the Court's opinion in *Suders* is its sparsest, consisting of only one paragraph instructing that plaintiffs may choose whether to present these types of mitigating facts, but ultimately it rests with defendants to plead and prove the specific elements of the affirmative defense if it is applicable.

The plaintiff still bears the burden of alleging a tangible employment action, but presumably in defending a constructive discharge claim on the merits, an employer would counter the plaintiff's claims of reasonableness by introducing evidence that an employee failed to take advantage of easily accessible remedial measures. The allocation of burdens may be clear, but how this would play out in a trial is still unclear.

176. See *supra* Part III.A. The Supreme Court has noted in recent years that when Congress passes a law that takes into account intervening decisions the Supreme Court has made, this makes the principle of *stare decisis* stronger. See *supra* note 160.

177. See Pub. L. No. 88-352, 78 Stat. 253 (1964); Pub. L. No. 89-554, 80 Stat. 662 (1966); Pub. L. No. 92-261, 86 Stat. 103 (1972); Pub. L. No. 95-555, 92 Stat. 2076 (1978); Pub. L. No. 95-598, 92 Stat. 2679 (1978); Pub. L. No. 99-514, 100 Stat. 2095 (1986); Pub. L. No. 102-166, 105 Stat. 1071 (1991). The 1991 amendment's findings section stated:

The Congress finds that—

- (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;
- (2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and
- (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

Pub. L. No. 102-166, § 2, 105 Stat. 1071 (1991). Furthermore, Congress attempts to amend Title VII on a regular basis. See, e.g., S. 1053, 108th Cong. (1st Sess. 2003); H.R. 3285, 108th Cong. (1st Sess.

purposes, one of which was to “respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.”<sup>178</sup> Specifically, this amendment worked to overrule portions of *Wards Cove Packing Co. v. Atonio*<sup>179</sup> by shifting the burden of persuasion from employees to employers in specific circumstances.<sup>180</sup> Congress can and should do this again. While courts will obviously continue to decide future claims of constructive discharge in connection with sexual harassment, deference to legislative action will guide courts in the proper direction.<sup>181</sup> To be sure, Title VII is a complex piece of legislation, but there is room to clarify and expand the Supreme Court’s holdings in *Ellerth*, *Faragher*, and *Suders* so that adequate protection is provided for victims of workplace discrimination.

Whether constructive discharges should force employers to accept strict liability for workplace harassment is, at its core, a normative question.<sup>182</sup> Based on risk allocation and ability-to-pay principles, Congress should emphasize Title VII’s remedial structure and preventive purpose. Employers are better positioned not only to take steps to eliminate harassment before it rises to the level necessary to substantiate constructive discharge, but also better positioned to bear the financial burden that comes from rampant harassment. Such legislative emphasis

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2003); S. 1705, 108th Cong. (1st Sess. 2003). Perhaps the current political atmosphere stymies these attempts for other reasons. Many of these bills attempt to add sexual orientation to the attributes which may not be discriminated on the basis of. *See, e.g.*, H.R. 214, 108th Cong. (1st Sess. 2003). This may explain why these bills do not reach a floor vote. However, a bipartisan compromise can certainly be established to protect the rights of workers to be free of forms of discrimination that are already prohibited, and which tangibly harm both employees and employers.

178. Pub. L. No. 102-166, § 3, 105 Stat. 1071 (1991). Certainly this finding pertains to the circumstances of this Note as well.

179. 490 U.S. 642 (1989).

180. *See, e.g.*, *Cota v. Tucson Police Dept.*, 783 F. Supp. 458, 472 n.14 (D. Ariz. 1992) (“In the 1991 Act, Congress effectively overruled that portion of *Wards Cove* that lessened an employer’s burden once plaintiffs articulate a prima facie case of disparate impact. Congress has now codified the higher . . . burden—the burden of production and persuasion”).

181. Justice Souter’s opinion in *Faragher* explicitly notes this deference and accords it worthy respect. *Faragher v. City of Boca Raton*, 524 U.S. 775, 804 n.4 (1998) (“We thus have to assume that in expanding employers’ potential liability under Title VII, Congress relied on our statements in *Meritor* about the limits of employer liability. To disregard those statements now . . . would . . . substitute our revised judgment . . . for Congress’s considered decision on the subject”).

182. This is precisely the point that Justice Scalia made at oral argument in *Suders*. *Suders* Oral Argument, *supra* note 137, at \*\*29–30. As Justice Scalia pointed out, in the constructive discharge context, there is a line that gets drawn between harassment that does not rise to the level required to substantiate a constructive discharge and that which does. His direct question was why there ought to be this line, and why harassment that goes over the line ought to make the employer liable without regards to the affirmative defense. *Id.*

will best serve the original goals of Title VII, which are as needed today as they were forty years ago.

#### V. CONCLUSION

Returning once again to the plight of Rosemary Martin, employees similarly situated to her are currently in a precarious position. Depending on the progression of precedent in the wake of *Suders*, employees who have been forced from their jobs without explicitly being fired may be in a position where no remedy is available to them, while employees who were merely transferred to a less attractive assignment or failed to be promoted may effectively litigate their claims.<sup>183</sup> The dissimilar situation of these two groups of employees is evident, and the disparate result they may achieve in an attempt to gain redress is unfair. Congress should step into this battle now to aid those employees faced with discrimination of the type Rosemary Martin faced. Doing so would be a positive step forward in eliminating what is today a fatal gap in Title VII's jurisprudence.

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183. *See supra* note 167. Employees who are transferred may prevent employers from raising the affirmative defense because they will have suffered a tangible employment action. Employers of supervisors who severely sexually harass subordinates without taking action will still be able to raise the affirmative defense in some situations even if the harassment rises to the level necessary to justify a constructive discharge.

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