

When Quitting Is Fitting: The Need for a Reformulated Sexual Harassment/Constructive Discharge Standard in the Wake of *Pennsylvania State Police v. Suders*

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The legal landscape with respect to constructive discharges resulting from sexually harassing conduct has been mired in confusion for the past two decades. Courts generally have applied a multistep analysis that requires plaintiffs to establish both the existence of severe or pervasive sexual harassment, as well as additional aggravating factors warranting an employee's resignation. The courts, however, have had a difficult time in defining the contours of the separate harassment and constructive discharge tests. The Supreme Court has weighed in on several occasions, but rather than opt for clarity, the Court has created new tests and new terminology that have compounded the confusion. The recent Pennsylvania State Police v. Suders decision is a case in point. In that 2004 decision, the Court ruled that an employer is strictly liable for harassment that results from a supervisor's official act, but is subject to liability for other types of supervisor harassment only if employer negligence is established. The Court's use of the "official action" and "constructive discharge" concepts in that case sets an unpredictable course and fails to correct the unfairness of the current multitiered analytical framework.

This Article attempts to simplify and recalibrate the sexual harassment/constructive discharge standard. We propose a Unitary Constructive Discharge Standard that would provide a single mode of analysis applicable to all claims of constructive discharge resulting from workplace sexual harassment. The proposal merges elements of the current strict liability and negligence tests and asks a single question: Did the employer fail to redress sexual harassment of which it was or should have been aware such that quitting was a fitting response for the employee subjected to the harassment? The proposal jettisons two of the most unfair elements of the current calculus, namely the requirement that the harassment victim must always utilize formal complaint procedures and the requirement in some circuits that an employee's resignation is actionable only if the employer subjectively intended that result. While thereby removing the necessity for employees to make out a case of "aggravated" harassment in the constructive discharge context, the Unitary Standard

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nonetheless protects employer interests by ensuring that no liability will ensue in the absence of causal fault attributed to an agent of the employer.

I. INTRODUCTION

Nancy Drew Suders' claim of sexual harassment presented a common scenario. Suders, who worked as a communications officer for the Pennsylvania State Police, alleged that three of her supervisors subjected her to a series of sexually-based harassing incidents.¹ Rather than file a formal complaint under her employer's sexual harassment policy, Suders attempted to resolve the situation informally by telling one of the supervisors to stop making objectionable gestures.² The harassing conduct, however, continued to escalate. Suders eventually contacted the employer's equal opportunity officer and reported the harassment. The officer told Suders to file a formal complaint, but Suders found the officer to be "insensitive and unhelpful."³ Two days later, Suders quit her job after the supervisors trumped up a theft charge and handcuffed Suders while at work.⁴ She subsequently filed suit under Title VII alleging that she had been constructively discharged as a result of the supervisors' sexual harassment.⁵

Suders' claim echoes a number of recurring themes prevalent in sexual harassment jurisprudence. First, the alleged harassing behavior was committed by supervisors. Given that employers entrust supervisors with special authority in the workplace, it is not uncommon for supervisors to misuse such authority either directly by inflicting harassment or indirectly by failing to curb harassment engaged in by others.⁶ Second, social science research confirms that most victims of harassment do not invoke formal complaint procedures, but instead attempt more informal methods of mitigating harassing behavior.⁷ Third, even though employers are encouraged by the prevailing legal standards to adopt sexual harassment reporting systems, employers are in a better position, legally speaking, if they

¹ Pa. State Police v. Suders, 124 S. Ct. 2342, 2347 (2004).

² Suders v. Easton, 325 F.3d 432, 437 (3d Cir. 2003), *vacated sub nom.* Pa. State Police v. Suders, 124 S. Ct. 2342 (2004).

³ *Suders*, 124 S. Ct. at 2348.

⁴ *Id.*

⁵ *Id.*

⁶ See generally Ramona L. Paetzold, *Supreme Court's 2003–04 Term Employment Law Cases: Clarifying Aspects of Anti-Discrimination Law and ERISA*, 8 EMP. RTS. & EMP. POL'Y J. 195, 201–02 (2004).

⁷ See Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 312–17 (2001); Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 374–77 (2004).

do not provide too much encouragement for employees to utilize those systems.⁸ Finally, very few sexual harassment victims initiate suit while they still are employed. Far more common is a resignation coupled with a subsequent claim of constructive discharge.⁹

In spite of the recurring nature of situations similar to that experienced by Suders, courts have had considerable difficulty in crafting a coherent framework for analyzing the viability of constructive discharge claims asserted in response to conduct that arguably constitutes hostile environment sexual harassment. In 1986, the Supreme Court first recognized sexual harassment as gender discrimination under Title VII.¹⁰ During the following decade, confusion plagued lower courts, which generally required employees to prove the elements of both a sexual harassment claim and a constructive discharge claim; a confusion compounded by the two-fold nature of the inquiry.¹¹ On the one hand, the courts struggled to identify the essential elements of actionable sexual harassment, with some courts focusing on the extent of employer knowledge of the harassing conduct and others focusing on whether the employer had adopted a visible sexual harassment grievance procedure.¹² In addition, the circuit courts adopted widely diverging standards for determining the existence of a constructive discharge.¹³

⁸ See David Sherwyn, Michael Heise, & Zev. J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 *FORDHAM L. REV.* 1265, 1293–94 (2001).

⁹ Beiner, *supra* note 7, at 317–23; Chamallas, *supra* note 7, at 310–11.

¹⁰ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66–67 (1986) (holding that hostile work environment sexual harassment is a form of sex discrimination actionable under Title VII). In *Meritor Savings Bank v. Vinson*, the Supreme Court abstained from issuing an employer liability standard, and instead, directed lower courts to use agency principles when determining employer liability. *Id.* at 72.

¹¹ See Sara Kagay, Note, *Applying the Ellerth Defense to Constructive Discharge: An Affirmative Answer*, 85 *IOWA L. REV.* 1035, 1040–41 (2000).

¹² See, e.g., *Webb v. Cardiothoracic Surgery Assocs.*, 139 F.3d 532, 538–39 (5th Cir. 1998) (failing to address complaint procedures, but holding that if an employee complains of a hostile work environment, the employer may insulate itself from liability by taking prompt action to remedy the discrimination); *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 63 (2d Cir. 1992) (holding that the “plaintiff must prove that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it”).

¹³ See generally Sarah H. Perry, Note, *Enough is Enough: Per Se Constructive Discharge for Victims of Sexually Hostile Work Environments Under Title VII*, 70 *WASH. L. REV.* 541, 546–50 (1995); Steven D. Underwood, Comment, *Constructive Discharge and the Employer's State of Mind: A Practical Standard*, 1 *U. PA. J. LAB. & EMP. L.* 343, 344–56 (1998).

In an effort to clarify employer liability standards, the Supreme Court in two 1998 decisions developed a new test for sexual harassment grounded in a new term: “tangible employment action.”¹⁴ On the surface, the *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton* decisions appeared to provide a clear test: A court must hold an employer strictly liable if a supervisor’s harassment results in a tangible employment action which effects a significant change in an employee’s employment status.¹⁵ If the court does not find a tangible employment action, however, an employer can escape liability by establishing an affirmative defense that shows that the employer took reasonable measures to prevent and correct the harassment, and that the employee unreasonably failed to use the preventative or corrective opportunities provided by the employer.¹⁶

Instead of simplifying employer liability standards, however, the *Ellerth* and *Faragher* decisions generated a circuit split over the meaning of what constitutes a tangible employment action. In particular, lower courts disagreed about whether a constructive discharge constitutes a tangible employment action.¹⁷ Lower courts also continued to disagree over the appropriate standard for proving constructive discharge.¹⁸

In a 2004 decision, *Pennsylvania State Police v. Suders*, the Supreme Court addressed the former issue and held that employers are strictly liable when an employee quits in response to an adverse discriminatory action

¹⁴ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

¹⁵ *Ellerth*, 524 U.S. at 760; *Faragher*, 524 U.S. at 807. According to the Court, “[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Ellerth*, 524 U.S. at 761 (emphasis added).

¹⁶ *Ellerth*, 524 U.S. at 760; *Faragher*, 524 U.S. at 807. The Court stated that “[t]he 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 preventative or corrective opportunities provided by the employer or to avoid harm otherwise.” *Ellerth*, 524 U.S. at 765.

¹⁷ The Third, Seventh, and Eighth Circuits have held that tangible employment actions encompass constructive discharge, while the Second and Sixth Circuits have held otherwise. See, e.g., *Suders v. Easton*, 325 F.3d 432, 435 (3d Cir. 2003), *vacated sub nom.* Pa. State Police v. Suders, 124 S. Ct. 2342 (2004); *Robinson v. Sappington*, 351 F.3d 317, 336 (7th Cir. 2003); *Jackson v. Ark. Dep’t of Educ.*, 272 F.3d 1020, 1027 (8th Cir. 2002); *Turner v. Dowbrands, Inc.*, No. 99-3984, 2000 WL 924599, at *1 (6th Cir. June 26, 2000); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999).

¹⁸ See *infra* notes 57–68 and accompanying text.

officially changing her employment status or situation.¹⁹ Absent an official act, however, employers may assert the two-prong affirmative defense described in the *Ellerth* and *Faragher* decisions.²⁰

The *Suders* decision, unfortunately, did little to clean up the muddle surrounding the sexual harassment/constructive discharge inquiry. As discussed below, the current array of standards governing this area are overly complicated, unpredictable, and unfairly difficult for a harassed employee to satisfy. While the *Suders* Court did provide a response to the question of whether a constructive discharge constitutes a tangible employment action, the official action test announced by the Court provides a fuzzy line of demarcation that likely will spawn considerable litigation.²¹ In addition, the *Suders* decision failed to fix three continuing problems in the sexual harassment/constructive discharge analysis. First, because most constructive discharges do not result from an official act altering an employee's job status, most employees cannot currently prevail if they have not filed a timely formal report of harassment under their employer's sexual harassment policy.²² This application of the *Ellerth* and *Faragher* affirmative defense, however, flies in the face of social science research which reveals that a formal reporting requirement is an unrealistic touchstone for determining sexual harassment liability.²³ Second, as recent lower court cases have demonstrated, the *Suders* decision has not eliminated the ongoing circuit split with respect to the appropriate test for determining the existence of a constructive discharge.²⁴ Finally, *Suders* perpetuates the necessity for courts to engage in a multistep inquiry to determine first, whether the conduct in question constitutes sexual harassment and, secondly, whether the harassment made the employee's working conditions so intolerable as to make quitting a fitting response. The combination of requiring these separate but overlapping inquiries results in a standard of liability that is more onerous for constructive discharge claimants to establish than for other victims of workplace harassment.²⁵

This Article addresses the shortcomings of the *Suders* decision and offers an alternative standard aimed at streamlining the sexual harassment/constructive discharge analysis. In Part II, the Article examines the principal sources of the current confusion—namely the development of

¹⁹ Pa. State Police v. *Suders*, 124 S. Ct. 2342, 2355 (2004).

²⁰ *Id.*

²¹ See Stephen F. Befort, *The Labor and Employment Law Decisions of the Supreme Court's 2003–04 Term*, 20 LAB. LAW. 177, 186–87 (2004).

²² See generally Kagay, *supra* note 11, at 1056.

²³ See *infra* notes 249–66 and accompanying text.

²⁴ See *infra* notes 220–31 and accompanying text.

²⁵ See *infra* notes 309–10 and accompanying text.

separate, yet overlapping, tests for constructive discharge and Title VII sexual harassment liability. Part III describes the Court's attempt to clarify the confusion in *Suders* and its ultimate failure to do so. Part IV then proposes a revised and simplified sexual harassment/constructive discharge mode of analysis. This Article proposes that courts adopt a Unitary Constructive Discharge Standard applicable to all claims of constructive discharge resulting from workplace sexual harassment, regardless of whether perpetrated by a supervisor or by a co-worker. The proposal would work a significant change in existing sexual harassment law by merging elements of the current strict liability and negligence standards to impose liability whenever an employer fails to redress harassment of which it was or should have been aware such that quitting was a fitting response for the employee subjected to the harassing conduct.

II. SOURCES OF CONFUSION: THE DEVELOPMENT OF CONSTRUCTIVE DISCHARGE AND TITLE VII SEXUAL HARASSMENT STANDARDS

A. *Constructive Discharge*

The doctrine of constructive discharge first emerged as a tool for employees to use under the National Labor Relations Act (NLRA). As courts began applying the doctrine to other employment contexts, several different constructive discharge standards developed.

1. *Development of the Constructive Discharge Doctrine Under the NLRA*

Congress enacted the NLRA in 1935 as part of the New Deal to increase employee rights in the workplace.²⁶ Section 8(a)(3) of the NLRA explicitly prohibits employers from engaging in certain unfair labor practices including "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."²⁷ Employers violate § 8(a)(3) if they terminate an employee because of an employee's support of or membership in a union.²⁸

Soon after the passage of the NLRA, the National Labor Relations Board (NLRB) recognized that if it permitted employers to impose threatening conditions to force an employee's resignation, the employers could indirectly

²⁶ National Labor Relations Act, 29 U.S.C. §§ 151–69 (2000).

²⁷ 29 U.S.C. § 158(a)(3).

²⁸ See ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING § 7.3 (2d ed. 2004).

achieve what the NLRA forbids them from doing directly.²⁹ In response to this possibility, the NLRB developed the constructive discharge doctrine to ensure that the NLRA would protect employees from a broader range of discriminatory conduct.³⁰ In particular, the NLRB held that an employer violates § 8(a)(3)'s antidiscrimination ban not only when it directly terminates an employee, but also when it constructively discharges an employee by purposefully creating intolerable working conditions.³¹

Although the NLRB began applying the constructive discharge doctrine in the 1930s, the appellate courts did not formally acknowledge the doctrine for another decade.³² In *NLRB v. Waples-Platter Co.*, the Fifth Circuit became the first federal court to recognize the term "constructive discharge."³³ In that case, the court addressed allegations that the employer had transferred two union organizers to different work locations in an attempt to prevent union activity.³⁴ Although the NLRB found that the employer constructively discharged the organizers, the Fifth Circuit disagreed, finding

²⁹ Martin W. O'Toole, Note, *Choosing a Standard for Constructive Discharge in Title VII Litigation*, 71 CORNELL L. REV. 587, 590 (1986); see also 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).

³⁰ See Roslyn C. Lieb, *Constructive Discharge Under Section 8(a)(3) of the National Labor Relations Act: A Study in Undue Concern over Motives*, 7 INDUS. REL. L.J. 143, for a detailed history of constructive discharge under the NLRA. The NLRB accepted the concept of constructive discharge as early as 1936. See *In re Canvas Glove Mfg. Works, Inc.*, 1 N.L.R.B. 519 (1936); see also Lieb, *supra*, at 146. Two years later the NLRB invoked the term "constructive discharge" for the first time and ordered an offending employer to reinstate four employees who had been coerced to quit because of their union sympathies. See *Sterling Corset Co.*, 9 N.L.R.B. 858 (1938); Lieb, *supra*, at 147.

³¹ The Supreme Court noted in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 894 (1984):

The Board, with the approval of lower courts, has long held that an employer violates this provision not only when, for the purpose of discouraging union activity, it directly dismisses an employee, but also when it purposefully creates working conditions so intolerable that the employee has no option but to resign—a so-called "constructive discharge."

Id. For other early NLRB cases explicitly accepting the constructive discharge doctrine, see *A. Sartorius & Co.*, 40 N.L.R.B. 107 (1942); *Press Co.*, 13 N.L.R.B. 630 (1939), enforced as modified by 118 F.2d 937 (D.C. Cir. 1940).

³² Shuck, *supra* note 29, at 407–08; see *NLRB v. Waples-Platter Co.*, 140 F.2d 228 (5th Cir. 1944). Following *Waples-Platter Co.*, several other circuits also acknowledged the constructive discharge doctrine, but none of them upheld an NLRB finding of constructive discharge before 1953.

³³ *Waples-Platter Co.*, 140 F.2d at 230.

³⁴ *Waples-Platter Co.*, 49 N.L.R.B. 1156, 1174–75 (1943), enforced as modified by 140 F.2d 228 (5th Cir. 1944).

that the employer transferred the employees to positions with equally good working conditions, hours, and pay.³⁵ A mere transfer or change in working conditions, the court ruled, was not sufficient to constitute a constructive discharge.

Following *Waples-Platter Co.*, several other circuits also acknowledged the constructive discharge doctrine, but none of them upheld an NLRB finding of constructive discharge until 1953.³⁶ In *NLRB v. Saxe-Glassman Shoe Corp.*, the First Circuit became the first federal circuit court to hold that a § 8(a)(3) NLRA violation constituted a constructive discharge.³⁷ In that case, one of the most ardent union advocates quit her job following several union-related interrogations by her employer.³⁸ The court found that the employer constructively discharged the employee because she “was forced to quit in the face of discriminatory treatment calculated to make her job unbearable.”³⁹ Significant to that case, the harassment was so severe that it affected the employee’s health.⁴⁰ Courts’ reluctance to uphold a constructive discharge finding before *Saxe-Glassman Shoe Corp.* suggests that the courts did not want to hold employers liable without extreme discriminatory conditions aimed at forcing an employee’s resignation.

By the 1960s, most courts recognized that constructive discharge constituted an NLRA violation.⁴¹ Like *Saxe-Glassman Shoe Corp.*, some early NLRB constructive discharge cases involved intentional discriminatory acts by an employer.⁴² In those cases, plaintiffs had to prove (a) that the working conditions were so difficult or unpleasant as to force the employee to resign, (b) that the employer intended to create those conditions because of

³⁵ *Waples-Platter Co.*, 140 F.2d at 230.

³⁶ *See, e.g.*, *NLRB v. Russell Mfg. Co.*, 191 F.2d 358 (5th Cir. 1951); *Progressive Mine Workers of Am., Int’l Union v. NLRB*, 187 F.2d 298 (7th Cir. 1951); *NLRB v. Winona Knitting Mills, Inc.*, 163 F.2d 156 (8th Cir. 1947).

³⁷ *NLRB v. Saxe-Glassman Shoe Corp.*, 201 F.2d 238, 244 (1st Cir. 1953).

³⁸ *Id.* at 242–43.

³⁹ *Id.* at 243. The First Circuit enforced the NLRB’s order directing the employer to make the employee whole for any loss of pay she suffered by reason of the employer’s discrimination. *Id.* at 244.

⁴⁰ *Id.* at 243.

⁴¹ Shuck, *supra* note 29, at 408; *see, e.g.*, *NLRB v. Century Broad. Corp.*, 419 F.2d 771 (8th Cir. 1969); *Retail Store Employees Union Local 880 v. NLRB*, 419 F.2d 329 (D.C. Cir. 1969); *NLRB v. Vacuum Platers, Inc.*, 374 F.2d 866 (7th Cir. 1967); *NLRB v. Lipman Bros., Inc.*, 355 F.2d 15 (1st Cir. 1966); *NLRB v. Tenn. Packers, Inc.*, 339 F.2d 203 (6th Cir. 1964).

⁴² *See, e.g.*, *Tenn. Packers, Inc.*, 339 F.2d at 204 (supervisor directed others to “make it as hard as possible” on the employee so that she would quit); *Saxe-Glassman Shoe Corp.*, 201 F.2d at 243 (employee “was forced to quit in the face of discriminatory treatment calculated to make her job unbearable”).

the employee's union activities, and (c) that the employer *intended to force the employee to resign*.⁴³ Over time, however, the NLRB also adopted a second approach to constructive discharge cases, one that did not oblige the employee to offer direct proof of the employer's intent to cause the employee's resignation.⁴⁴ Instead, the employee had to prove only that the "employer imposed onerous working conditions on an employee it knew had engaged in union activity, which it *reasonably should have foreseen* would induce that employee to quit."⁴⁵

2. *Constructive Discharge and Title VII: A Growing Welter of Standards*

Once the courts recognized the constructive discharge doctrine's crucial role in NLRA enforcement, they began applying the doctrine to other discrimination contexts as well.⁴⁶ In applying the doctrine beyond the NLRA, however, the courts developed several different standards for determining the existence of a constructive discharge.

Initially, some courts continued to focus on intentional discrimination as they first had when analyzing constructive discharge cases under the NLRA.⁴⁷ For example, in *Muller v. United States Steel Corp.*, the Tenth Circuit implicitly adopted a specific intent standard for Title VII constructive discharge claims.⁴⁸ In that case, the plaintiff alleged that the employer's failure to promote him constituted a violation of Title VII and that his subsequent resignation constituted a constructive discharge.⁴⁹ The Tenth Circuit disagreed and held that the employee failed to present sufficient evidence to establish that the employer made a "deliberate effort to make things difficult for the employee so as to bring about his separation."⁵⁰ Thus, for the plaintiff's claim to have succeeded, he needed to present further proof

⁴³ *Crystal Princeton Ref. Co.*, 222 N.L.R.B. 1068, 1069 (1976); *Underwood*, *supra* note 13, at 349.

⁴⁴ *See Keller Mfg. Co.*, 237 N.L.R.B. 712, 723 (1978).

⁴⁵ *Id.* (emphasis added). In *Pennsylvania State Police v. Suders*, 124 S. Ct. 2342, 2357–58 (2004) (Thomas, J., dissenting), Justice Thomas criticized the majority opinion in part because its constructive discharge standard did not incorporate the NLRB intent element. Justice Thomas, however, failed to recognize that the NLRB did not always require that the employee prove that his employer intended to force his resignation. *See Keller Mfg. Co.*, 237 N.L.R.B. at 723.

⁴⁶ *See O'Toole*, *supra* note 29, at 591; *Underwood*, *supra* note 13, at 346.

⁴⁷ *See, e.g., Muller v. U.S. Steel Corp.*, 509 F.2d 923 (10th Cir. 1975).

⁴⁸ *See id.* at 929.

⁴⁹ *Id.* at 925–26.

⁵⁰ *Id.* at 929.

not only of discriminatory actions, but also that the employer's actions were "designed to coerce his resignation."⁵¹

Although the Tenth Circuit originally adopted a specific intent standard,⁵² as other courts continued to analyze Title VII constructive discharge claims, some shifted away from that standard.⁵³ These courts began requiring only that the plaintiff prove that the employer deliberately engaged in discrimination without necessarily showing that the employer also intended to force a resignation.⁵⁴ Some of these courts eventually refocused their inquiry away from the question of employer intent and toward the question of the reasonableness of the employee's resignation.⁵⁵ For example, in *Bourque v. Powell Electrical Manufacturing Co.*, the Fifth Circuit explicitly rejected the specific intent requirement of *Muller*, and urged courts to analyze the constructive discharge question from the perspective of a reasonable employee, focusing on the imposed work conditions rather than on the employer's state of mind.⁵⁶

In the wake of *Bourque*, the circuit courts continued to split, resulting in two competing constructive discharge standards: the "reasonable employee" standard and the "employer intent" standard.⁵⁷ The "reasonable employee" test requires that the employee demonstrate that her working conditions were so intolerable that "a reasonable person in the employee's position would feel compelled to resign."⁵⁸ In contrast, the "employer intent" standard requires the plaintiff to demonstrate that the employer specifically intended to compel the employee's resignation in addition to satisfying the "reasonable

⁵¹ *Id.*

⁵² In *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986), the Tenth Circuit rejected the specific intent standard that it used in *Muller v. U.S. Steel Corp.*, 509 F.2d 923, 929 (10th Cir. 1975), and explicitly endorsed the objective reasonable employee standard.

⁵³ See Perry, *supra* note 13, at 548.

⁵⁴ See, e.g., *Calcote v. Tex. Educ. Found., Inc.*, 578 F.2d 95, 95 (5th Cir. 1978) (involving allegations of racial pay discrimination and harassment); *Young v. Sw. Sav. & Loan Ass'n*, 509 F.2d 140, 143-44 (5th Cir. 1975) (involving allegations of religious discrimination). Neither *Calcote* nor *Young* addressed the employer's state of mind; instead, the Fifth Circuit focused on whether the employer deliberately imposed intolerable conditions. See *Calcote*, 578 F.2d at 97-98; *Young*, 509 F.2d at 143-44.

⁵⁵ See, e.g., *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980).

⁵⁶ *Id.*

⁵⁷ Perry, *supra* note 13, at 548; Shuck, *supra* note 29, at 413; Underwood, *supra* note 13, at 349; see also *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 343 (10th Cir. 1986).

⁵⁸ *Derr*, 796 F.2d at 344. The employer's subjective intent is irrelevant; instead, "[the employer] must be held to have intended those consequences it could reasonably have foreseen." *Id.* (quoting *Clark v. Marsh*, 665 F.2d 1168, 1175 n.8 (D.C. Cir. 1981)).

employee” test.⁵⁹ While a majority of the circuits adopted versions of the reasonable employee standard,⁶⁰ the Second and Fourth Circuits continued to require that employees prove that the employer specifically intended to compel their resignation.⁶¹

As the circuits continued to interpret the constructive discharge doctrine, however, even those standards became muddled. For instance, in those circuits that applied the reasonable employee test, some also imposed additional requirements such as the duty to mitigate or the duty to notify the employer of the intolerable conditions.⁶² Other circuits required that the employee prove that the employer knowingly permitted the intolerable working conditions or otherwise deliberately made the working conditions intolerable.⁶³ The Sixth and Eighth Circuits now require proof that the

⁵⁹ See *Chertkova v. Conn. Gen. Life Ins.*, 92 F.3d 81, 89 (2d Cir. 1996); *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985). The “employer intent” standard requires a plaintiff to prove two elements: “deliberateness of the employer’s action, and intolerability of the working conditions.” *Bristow*, 770 F.2d at 1255. Deliberateness exists if the plaintiff proves that the employer specifically intended to force the employee to leave. *Id.* Courts assess intolerability of working conditions based on the “objective standard of whether a ‘reasonable person’ in the employee’s position would have felt compelled to resign.” *Id.*

⁶⁰ See, e.g., *Brooks v. City of San Mateo*, 229 F.3d 917, 924 (9th Cir. 2000); *Ramos v. Davis & Geck*, 167 F.3d 727, 732 (1st Cir. 1999); *Lindale v. Tokheim Corp.*, 145 F.3d 953, 955 (7th Cir. 1998); *Jurgens v. EEOC*, 903 F.2d 386, 390 (5th Cir. 1990); *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1154 (10th Cir. 1990); *Steele v. Offshore Shipbuilding Inc.*, 867 F.2d 1311, 1317 (11th Cir. 1989).

⁶¹ See, e.g., *Chertkova*, 92 F.3d at 89; *Bristow*, 770 F.2d at 1255.

⁶² See, e.g., *Gawley v. Ind. Univ.*, 276 F.3d 301, 315 (7th Cir. 2001) (finding no constructive discharge despite the employee’s informal efforts to protect herself because she did not use the formal complaint procedure); *Lindale v. Tokheim Corp.*, 145 F.3d 953, 955–56 (7th Cir. 1998) (holding that the standard of reasonableness imposes a mitigation requirement on plaintiffs); *Kilgore v. Thompson & Brock Mgmt., Inc.*, 93 F.3d 752, 754 (11th Cir. 1996) (suggesting that a reasonable employee must give the employer sufficient time to remedy the situation); *Boze v. Branstetter*, 912 F.2d 801, 805 (5th Cir. 1990) (holding that a reasonable employee would have completed the company’s internal grievance process or filed a complaint with the Equal Employment Opportunity Commission (EEOC)); *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987) (holding that, under the circumstances, a reasonable employee would have complained to her store manager or filed an EEOC complaint before quitting). An exception to the notice requirement may include instances in which an employee correctly believes that her unlawful termination is imminent. See *EEOC v. Univ. of Chi. Hosps.*, 276 F.3d 326, 331–32 (7th Cir. 2002).

⁶³ See, e.g., *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1558 (D.C. Cir. 1997) (“[A] ‘finding of constructive discharge depends on whether the employer deliberately made working conditions intolerable and drove the employee’ out.” (quoting *Clark v. Marsh*, 665 F.2d 1168, 1173 (D.C. Cir. 1981))); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1084 (3d Cir. 1996) (“In order to establish a constructive discharge,

employer specifically intended to force the employee's resignation,⁶⁴ but have broadened the definition of "specific intent" to include situations in which "quitting was a foreseeable consequence of the employer's actions."⁶⁵ As further indication of the confusion among the circuits, even the two circuits that originally applied an employer intent requirement, the Second and Fourth Circuits, recently have shifted away from this strict standard.⁶⁶ The Second Circuit now requires that when a plaintiff cannot show specific intent, she "must at least demonstrate that the employer's actions were 'deliberate' and not merely 'negligen[t] or ineffective[.]'"⁶⁷ The Fourth Circuit also relaxed its standard and now allows the plaintiff to prove that her resignation was a reasonably foreseeable consequence of the defendant's harassment.⁶⁸

With the development of these various standards, confusion plagues the parties as well as the courts who are required to decide their cases.⁶⁹ Plaintiffs do not have clear guidance as to what they need to prove to bring a successful constructive discharge claim. Employees in similar circumstances may have different chances of success depending on where they live. Additionally, with so many competing standards, employers lack predictable guidelines for determining how they should respond to workplace harassment in order to avoid liability.

a plaintiff must show that 'the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign.')

 (quoting *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 888 (3d Cir. 1984)).

⁶⁴ See, e.g., *Baker v. John Morrell & Co.*, 382 F.3d 816, 829 (8th Cir. 2004); *Goldmeier v. Allstate Ins. Co.*, 337 F.3d 629, 636 (6th Cir. 2003); *Moore v. Kuka Welding Sys.*, 171 F.3d 1073, 1080 (6th Cir. 1999); *Hukkanen v. Int'l Union of Operating Eng'rs*, 3 F.3d 281, 284–85 (8th Cir. 1993).

⁶⁵ *Moore*, 171 F.3d at 1080; see also *Hukkanen*, 3 F.3d at 285 ("Constructive discharge plaintiffs thus satisfy [the] intent requirement by showing their resignation was a reasonably foreseeable consequence of their employers' discriminatory actions.').

⁶⁶ See *Petrosino v. Bell Atl.*, 385 F.3d 210, 229–30 (2d Cir. 2004); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1355 (4th Cir. 1995).

⁶⁷ *Petrosino*, 385 F.3d at 230 (quoting *Whidbee v. Garzarelli Food Specialities, Inc.*, 223 F.3d 62, 74 (2d Cir. 2000)).

⁶⁸ *Martin*, 48 F.3d at 1355.

⁶⁹ See *Shuck*, *supra* note 29, at 424 (asserting that it is difficult to determine from the circumstances of a case whether an employee's resignation is a reasonable response to workplace harassment).

B. Development of Employer Liability for Sexual Harassment Under Title VII

1. The Early Years

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers from “discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”⁷⁰ The statute does not explicitly prohibit sexual harassment and does not provide guidance as to the meaning of the phrase “because of . . . sex.” Since Congress added the prohibition against sex discrimination as a last minute amendment to Title VII,⁷¹ little legislative history exists to guide courts in determining what the ban on sex discrimination was intended to encompass.⁷²

Initially, courts did not recognize sexual harassment as a form of sex discrimination under Title VII because they feared that they would be inviting a flood of litigation against employers.⁷³ By the late 1970s, however, the Third Circuit concluded that Title VII’s “congressional mandate that the federal courts provide relief [for actionable sex discrimination] . . . must not be thwarted by concern for judicial economy.”⁷⁴ Agreeing, the federal courts generally began to recognize that sexual harassment was actionable where the employer explicitly conditioned employment benefits on sexual favors or punished employees who refused to comply with sexual demands.⁷⁵ Courts labeled this type of harassment as *quid pro quo* sexual harassment.⁷⁶

⁷⁰ 42 U.S.C. § 2000e-2(a)(1) (2000).

⁷¹ 110 CONG. REC. 2577–2584 (daily ed. Feb. 8, 1964); *see also* *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63 (1986).

⁷² *Meritor Sav. Bank*, 477 U.S. at 64.

⁷³ *See, e.g.*, *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 557 (D.N.J. 1976) (“[If sexual harassment constituted sex discrimination under Title VII], no superior could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time.”), *rev’d*, 568 F.2d 1044 (3d Cir. 1977); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (“[A]n outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another.”), *vacated by* 562 F.2d 55 (9th Cir. 1977); *see also* Kagay, *supra* note 11, at 1038; Jaimie Leaser, Note, *The Causal Role of Sex in Sexual Harassment*, 88 CORNELL L. REV. 1750, 1753–54 (2003).

⁷⁴ *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1049 (3d Cir. 1977).

⁷⁵ *See, e.g., id.* (holding that plaintiff stated a cause of action under Title VII when she alleged that the defendant conditioned her continued employment upon submitting to sexual advances by her supervisor); *Barnes v. Costle*, 561 F.2d 983, 989–90 (D.C. Cir. 1977) (holding that plaintiff stated a valid cause of action under Title VII when she

In *Meritor Savings Bank v. Vinson*, the Supreme Court held that another type of sexual harassment, hostile work environment harassment, is also actionable under Title VII.⁷⁷ Hostile work environment harassment arises when sexually demeaning behavior alters an employee's conditions or terms of employment.⁷⁸ In *Meritor Savings Bank*, the plaintiff, Mechelle Vinson, brought an action against her former employer, Meritor Savings Bank, alleging that the bank's vice president sexually harassed her.⁷⁹ According to Vinson, the vice president repeatedly demanded sexual favors from her, and she eventually acquiesced out of fear of losing her job.⁸⁰ Additionally, Vinson alleged that the vice president fondled her in front of other employees, followed her to the women's restroom, exposed himself to her, and forcibly raped her on several occasions.⁸¹ Vinson argued that these unwelcome sexual advances created "an offensive or hostile working environment" that violated Title VII, and the Court agreed.⁸²

The Court rejected the defendant's assertion that actionable discrimination must cause a tangible, economic loss,⁸³ but also noted that hostile environment claims only violate Title VII if the sexual harassment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"⁸⁴ The Court did not, however, provide any further guidance as to how to determine when harassment rises to the level of a hostile work environment. Additionally, the Court declined to issue a definitive rule on employer liability for sexual harassment claims, but instead directed lower courts to look to agency

alleged that her supervisor terminated her in retaliation for refusing his sexual advances). Courts initially only focused on quid pro quo sexual harassment. Kagay, *supra* note 11, at 1039.

⁷⁶ See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751–52 (1998).

⁷⁷ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). The Supreme Court explained that the language of Title VII "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Id.* at 64 (quoting *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

⁷⁸ *Id.* at 64

⁷⁹ *Id.* at 59–60.

⁸⁰ *Id.* at 60.

⁸¹ *Id.*

⁸² *Id.* at 64.

⁸³ *Meritor Sav. Bank*, 477 U.S. at 64.

⁸⁴ *Id.* at 67 (citations omitted). The "severe or pervasive" harassment requirement is specific to hostile work environment claims. When an employer explicitly threatens an employee, thus establishing quid pro quo sexual harassment, the plaintiff does not need to show "severe and pervasive" harassment. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998).

principles for guidance.⁸⁵ The Court noted that under Title VII, Congress defined “employer” to include any “agent” of an employer, and thus intended to limit the range of employee acts for which courts may hold employers liable. As a result, lower courts should not hold employers automatically liable when their supervisors sexually harass employees, but instead, should impose liability only where the harassment stems from the supervisor’s agency relationship with the employer.⁸⁶

Nevertheless, after *Meritor Savings Bank*, lower courts developed employer responsibility standards according to the type of harassment at issue rather than focusing on agency principles.⁸⁷ Where the plaintiff established a quid pro quo claim, most federal courts held the employer strictly liable regardless of whether the employer knew or should have known about a supervisor’s actions.⁸⁸ In hostile environment cases, on the

⁸⁵ *Meritor Sav. Bank*, 477 U.S. at 72. The Court agreed with the view of the Equal Employment Opportunity Commission (EEOC) that Congress intended agency principles to form the basis for employer liability rules. *Id.* According to the EEOC, “where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them.” *Id.* at 70 (citing Brief for United States and the EEOC as Amici Curiae, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979)).

⁸⁶ *Id.* Where the supervisor acts outside of his delegated authority, or discriminates in a way that does not affect his subordinates’ employment, the supervisor is not an agent of the employer, and courts should not hold the employer liable. *See id.*

⁸⁷ *See Ellerth*, 524 U.S. at 752–53; Susan Grover, *After Ellerth: The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J.L. REFORM 809, 813–14 (2002); Kagay, *supra* note 11, at 1040–41; Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 202–03 (2004).

⁸⁸ *Ellerth*, 524 U.S. at 752–53; *see, e.g.*, *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 495 (7th Cir. 1997) (“[T]he standard for employer liability in cases of hostile-environment sexual harassment by a supervisory employee is negligence, not strict liability, and [the] liability for quid pro quo harassment is strict even if the supervisor’s threat does not result in a company act.”); *Davis v. Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997) (“In the situation of quid pro quo sexual harassment by a supervisor, where the harassment results in a tangible detriment to the subordinate employee, liability is imputed to the employer.”); *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir. 1994) (“Because the quid pro quo harasser, by definition, wields the employer’s authority to alter the terms and conditions of employment—either actually or apparently—the law imposes strict liability on the employer for quid pro quo harassment.”); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106–07 (3d Cir. 1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185–86 (6th Cir. 1992); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989).

other hand, courts failed to articulate a clear liability standard,⁸⁹ evaluating cases instead on a variety of factors.⁹⁰ The Tenth Circuit, for example, at one time articulated a standard whereby an employer was liable for its supervisor's sexual harassment if any of the following conditions was met:

(1) The supervisor committed the harassment while acting in the scope of his employment.

(2) The employer knew about, or should have known about, the harassment and failed to respond in a reasonable manner.

(3) If the employer manifested in the supervisor the authority to act on its behalf, such manifestation resulted in harm to the plaintiff, and the plaintiff acted or relied on the apparent authority in some way.

(4) If the employer delegated the authority to the supervisor to control the plaintiff's work environment and the supervisor abused that delegated authority by using that authority to aid or facilitate his perpetration of the harassment.⁹¹

Other courts limited their inquiries to the employer's knowledge of the harassment or whether the employer had established an available grievance procedure.⁹² In response to the disarray of employer liability standards, the

⁸⁹ See *Davis*, 115 F.3d at 1367 ("In the situation of quid pro quo sexual harassment by a supervisor, . . . liability is imputed to the employer. . . . In situations . . . alleging hostile environment sexual harassment by a supervisor, however, the standard for imputed liability is less clear."); *Karibian*, 14 F.3d at 779–80 ("A rule of employer liability deriving from traditional agency principles cannot be reduced to a universal, pat formula. It will certainly be relevant to the analysis, for example, that the alleged harasser is the plaintiff's supervisor rather than her co-worker. Yet, even such a distinction will not always be dispositive.") (citations omitted).

⁹⁰ See *Kagay*, *supra* note 11, at 1041.

⁹¹ *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1446 (10th Cir. 1997), *vacated*, 524 U.S. 947 (1998) (citations omitted).

⁹² See, e.g., *Webb v. Cardiothoracic Surgery Assocs.*, 139 F.3d 532, 538 (5th Cir. 1998) (holding that "an employer may insulate itself from Title VII liability by taking prompt action to remedy the complaint"); *Gary v. Long*, 59 F.3d 1391, 1398 (D.C. Cir. 1995) (holding that an employer may not be liable when the employer adopted policies in such a way that "the victimized employee either knew or should have known that the employer did not tolerate such conduct and that she could report it to the employer without fear of adverse consequences"); *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994) (holding that "where a . . . supervisor does not rely on his supervisory authority to carry out the harassment . . . the employer will not be liable unless 'the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it'" (quoting *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 63 (2d Cir. 1992))).

Supreme Court granted certiorari in two cases that involved questions of when liability for a supervisor's sexual harassment should be imputed to the employer.

2. Faragher and Ellerth: Attempts to Clarify Employer Liability Standards

On June 26, 1998, the Supreme Court decided companion cases *Faragher v. City of Boca Raton*⁹³ and *Burlington Industries, Inc. v. Ellerth*.⁹⁴ In its holdings, the Court differentiated between situations in which employers are strictly liable for a supervisor's sexual harassment and those in which the employer may invoke an affirmative defense to escape liability. Despite the Court's attempt to create a consistent liability standard across circuits, *Faragher* and *Ellerth* continued and added to the confusion.

a. Faragher v. City of Boca Raton

Between 1985 and 1990, Beth Ann Faragher worked as an ocean lifeguard for the city of Boca Raton, Florida.⁹⁵ Faragher alleged that her supervisors, Bill Terry and David Silverman, created a "sexually hostile atmosphere" at the beach by repeatedly subjecting Faragher to offensive touching, lewd remarks, and by speaking of women in offensive terms.⁹⁶ Faragher recalled that Terry stated at one point that he would never promote a woman to the rank of lieutenant and that Silverman once told Faragher to "[d]ate me or clean the toilets for a year."⁹⁷

In February 1986, the City adopted a sexual harassment policy addressed to all employees.⁹⁸ Four years later, the City revised the policy, but failed to disseminate its policy among all employees.⁹⁹ As a result, Terry, Silverman, and many lifeguards were unaware of the policy.¹⁰⁰ Faragher never complained to higher management about Terry or Silverman, but she did

⁹³ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

⁹⁴ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

⁹⁵ *Faragher*, 524 U.S. at 780.

⁹⁶ *Id.*

⁹⁷ *Id.* at 780. Faragher also alleged that Terry would repeatedly "put his arm around Faragher with his hand on her buttocks, . . . and once commented disparagingly on Faragher's shape." *Id.* at 782. Silverman apparently acted in similar ways by tackling Faragher and remarking that he would have sexual relations with her if he did not find one of her physical characteristics unattractive. *Id.* Both men also allegedly made similar remarks to other female employees. *Id.*

⁹⁸ *Id.* at 781–82.

⁹⁹ *Id.* at 782.

¹⁰⁰ *Id.*

have informal discussions with Robert Gordon, another one of her immediate supervisors.¹⁰¹ Gordon failed to report Faragher's complaints to Terry, his own supervisor, or any other city official.¹⁰² In April 1990, a former lifeguard wrote to the City's Personnel Director, "complaining that Terry and Silverman had harassed her and other female lifeguards."¹⁰³ The City investigated the complaint, found that Terry and Silverman had acted inappropriately, and reprimanded them.¹⁰⁴ Faragher resigned in June 1990 and later sued the City under Title VII for sexual harassment based on her supervisors' conduct.¹⁰⁵

The district court held the City liable for Terry's and Silverman's discriminatory harassment.¹⁰⁶ A panel of the Court of Appeals for the Eleventh Circuit reversed, finding that the City was not liable for the harassment despite the abusive work environment.¹⁰⁷ The full Court of Appeals, sitting en banc, adopted the panel's findings.¹⁰⁸ The Supreme Court reversed and remanded for entry of judgment in Faragher's favor.¹⁰⁹

b. Burlington Industries, Inc. v. Ellerth

From March 1993 until May 1994, Kimberly Ellerth worked as a salesperson at Burlington Industries, at which point she quit, alleging that one of her supervisors, Ted Slowik, constantly subjected her to sexual harassment.¹¹⁰ Slowik was not Ellerth's immediate supervisor, but Ellerth's

¹⁰¹ *Faragher*, 524 U.S. at 782–83.

¹⁰² *Id.* at 783.

¹⁰³ *Id.*

¹⁰⁴ *Id.* The City required Terry and Silverman to choose between a suspension without pay or forfeiting annual leave. *Id.*

¹⁰⁵ *Id.* at 780.

¹⁰⁶ *Id.* at 783. The district court found three justifications for holding the City liable: (1) the harassment was pervasive enough that the City had knowledge or constructive knowledge of it; (2) Terry and Silverman were acting as agents of the City when they committed the acts; and (3) Gordon, a City supervisor, had knowledge of the harassment but failed to act. *Id.*

¹⁰⁷ *Faragher*, 524 U.S. at 783. The Eleventh Circuit panel ruled:

Terry and Silverman were not acting within the scope of their employment when they engaged in the harassment, that they were not aided in their actions by the agency relationship, and that the City had no constructive knowledge of the harassment by virtue of its pervasiveness or Gordon's actual knowledge.

Id. at 784 (citations omitted).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 786.

¹¹⁰ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 747 (1998).

immediate supervisor reported to Slowik.¹¹¹ During one business trip, Slowik allegedly invited Ellerth to the hotel lounge where he made remarks about her breasts, told her to “loosen up” and warned her that he could make her life “very hard or very easy at Burlington.”¹¹² In another instance, Slowik rubbed Ellerth’s knees during a promotion interview and made comments about Ellerth not being “loose enough.”¹¹³ Two months later Ellerth called Slowik to ask permission to insert a customer’s logo into a fabric sample.¹¹⁴ He denied the request, and when Ellerth repeated the request a few days later, Slowik asked, “are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier.”¹¹⁵ After Ellerth’s immediate supervisor reprimanded her regarding a work-related matter, Ellerth quit.¹¹⁶ Three weeks later she sent a letter explaining that she quit because of Slowik’s behavior.¹¹⁷

During her employment at Burlington, Ellerth knew that Burlington had a policy against sexual harassment but failed to inform anyone about Slowik’s behavior.¹¹⁸ She chose not to notify her immediate supervisor because she knew he would then have a duty to report the sexual harassment incidents to Slowik.¹¹⁹ On one occasion, Ellerth told Slowik directly that he had made an inappropriate comment.¹²⁰

The district court granted summary judgment in favor of Burlington.¹²¹ The court found that Slowik’s behavior was severe and pervasive enough to create a hostile work environment, but that Burlington neither knew nor should have known about the harassment.¹²² Sitting en banc, the Court of Appeals for the Seventh Circuit reversed, but failed to reach a consensus for a controlling rationale.¹²³ The Supreme Court affirmed the Seventh Circuit’s decision, finding that summary judgment was not appropriate.¹²⁴

¹¹¹ *Id.* at 747. Slowik was a midlevel manager and had authority to make hiring and promotion decisions subject to the approval of his supervisor. *Id.*

¹¹² *Id.* at 748.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Ellerth*, 524 U.S. at 748.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 749.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Ellerth*, 524 U.S. at 749.

¹²³ *Id.*

¹²⁴ *Id.* at 766.

c. *The Holdings: New Standards for Employer Liability*

Although the Supreme Court delivered two separate opinions, the Court decided the cases concurrently, issuing the same holding for both. The Court first addressed the bothersome distinction between quid pro quo and hostile work environment cases.¹²⁵ The Court explained that while the terms are helpful in determining whether the alleged violation consists of an explicit or constructive alteration in employment status,¹²⁶ they do not, by themselves, establish an employer liability standard for employment discrimination purposes.¹²⁷ Instead of using those terms as guides when determining vicarious liability, the *Ellerth* Court directed courts to apply agency principles in their analysis.¹²⁸

In its agency discussion, the Court addressed possible grounds for imposing employer liability.¹²⁹ The Court recognized that “[n]egligence sets a minimum standard for employer liability under Title VII.”¹³⁰ Under the negligence standard, a court may hold an employer liable when the employer’s own negligence is the cause of the harassment.¹³¹ For example, an employer will be liable for the harassment caused by a co-worker or a supervisor acting outside the scope of employment if the employer “knew or

¹²⁵ *Id.* at 751. See *supra* notes 87–92 and accompanying text for a discussion of how courts developed different employer liability standards for quid pro quo and hostile work environment cases.

¹²⁶ Employers violate Title VII when they either (a) explicitly alter the terms or conditions of employment, or (b) constructively alter the terms and conditions by imposing severe and pervasive sexual harassment on their employees. *Ellerth*, 524 U.S. at 752.

¹²⁷ *Id.* The Court stated that the terms “quid pro quo” and “hostile work environment” remain relevant when there is a threshold question about whether a plaintiff can prove discrimination in violation of Title VII. *Id.* at 753.

¹²⁸ *Id.* at 754. The Court addressed its agency discussion in *Meritor* and turned to the RESTATEMENT (SECOND) OF AGENCY (1957) for further discussion. *Id.* at 755. The Court noted that an employer may be liable for the torts an employee commits within the scope of his or her employment. *Id.* at 756. The *Restatement* articulates conduct within the scope of employment when “‘actuated, at least in part, by a purpose to serve the [employer],’ even if is forbidden by the employer.” *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 228(1)(c) (1957)). The Court also noted that “[i]n limited circumstances, agency principles impose liability on employers even where employees commit torts outside the scope of employment.” *Id.* at 758. As an example, the Court stated that employers may be vicariously liable when the employee “was aided in accomplishing the tort by the existence of the agency relation.” *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957)).

¹²⁹ See *id.* at 758–59.

¹³⁰ *Id.* at 759.

¹³¹ *Id.*

should have known about the conduct and failed to stop it.”¹³² The Court then explained that although negligence may be a source of liability, the plaintiff, Ellerth, had raised a different issue: whether the employer was strictly liable for the harassment in question.¹³³

While dodging the issue of strict liability for co-worker harassment,¹³⁴ the Court turned its attention to supervisor harassment and held that employers are vicariously liable where a supervisor with immediate authority over the employee creates an actionable hostile environment resulting in a “tangible employment action.”¹³⁵ A “tangible employment action,” according to the Court, is “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”¹³⁶ The Court rationalized imposing liability upon the employer by explaining that a supervisor cannot make a tangible employment decision absent the agency relation; therefore, “[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.”¹³⁷ Justifying its focus on supervisor harassment, the Court noted that a tangible employment action usually inflicts direct economic harm, the sort of injury that only a supervisor or another authority of the company can impose.¹³⁸

¹³² *Ellerth*, 524 U.S. at 759.

¹³³ *See id.*

¹³⁴ The Court noted that lower courts uniformly judge employer liability for co-worker harassment under a negligence standard. *Faragher v. City of Boca Raton*, 524 U.S. 775, 799 (1998). Most circuit courts continue to apply a negligence standard for co-worker harassment. *See, e.g.*, *McCombs v. Meijer, Inc.*, 395 F.3d 346, 353 (6th Cir. 2005); *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 976 (7th Cir. 2004); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 333–34 (4th Cir. 2003); *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 401 (1st Cir. 2002); *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 518 (6th Cir. 2001); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 265–66 (5th Cir. 1999); *see also* 29 C.F.R. § 1604.11(d) (2005) (“With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.”).

¹³⁵ *Ellerth*, 524 U.S. at 765.

¹³⁶ *Id.* at 761.

¹³⁷ *Id.* at 761–62.

¹³⁸ *Id.* at 762. The Court noted:

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.

Where the supervisor does not take a “tangible employment action” against the employee, the employer may raise an affirmative defense to liability or damages.¹³⁹ Under the affirmative defense, the employer must prove both “that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and “that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.”¹⁴⁰ Although the Court intended to clarify employer liability standards, it instead added to the confusion by creating another term, “tangible employment action,” for lower courts to interpret.

3. Circuit Split: Does “Tangible Employment Action” Include Constructive Discharge?

Rather than simplifying the confusion surrounding the terms “quid pro quo” and “hostile work environment,” the Court facilitated a circuit split over the meaning of “tangible employment action,” specifically over whether the definition encompasses constructive discharge. If constructive discharge is a tangible employment action, employers do not have access to the *Ellerth-Faragher* affirmative defenses, and courts then must hold employers strictly liable for sexual harassment that induces employees to quit.¹⁴¹ The Second¹⁴² and Sixth¹⁴³ Circuits held that constructive discharges are not tangible employment actions, while the Third,¹⁴⁴ Seventh,¹⁴⁵ and Eighth¹⁴⁶ Circuits held that they are. The First Circuit refused to follow either side of the circuit split and held that courts should decide constructive discharge cases on a

Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act.

Id.

¹³⁹ *Id.* at 765.

¹⁴⁰ *Id.* The Court held that the existence of an antiharassment policy would be an important consideration for determining liability. *Id.* Additionally, an employee’s failure to complain would normally allow the employer to meet its burden under the second element of the affirmative defense. *Id.*

¹⁴¹ *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293–94 (2d Cir. 1999).

¹⁴² *Id.*

¹⁴³ *Turner v. Dowbrands, Inc.*, No. 99-3984, 2000 WL 924599, at *1 (6th Cir. June 26, 2000).

¹⁴⁴ *Suders v. Easton*, 325 F.3d 432, 448 (3d Cir. 2003), *vacated sub nom.* *Pa. State Police v. Suders*, 124 S. Ct. 2342 (2004).

¹⁴⁵ *Robinson v. Sappington*, 351 F.3d 317, 336 (7th Cir. 2003).

¹⁴⁶ *Jackson v. Ark. Dep’t of Educ.*, 272 F.3d 1020, 1026 (8th Cir. 2002).

case-by-case basis.¹⁴⁷ The two decisions discussed below illustrate the diversity of opinion on this issue.

a. *Second Circuit: Constructive Discharge Is Not a Tangible Employment Action*

In *Caridad v. Metro-North Commuter Railroad*, the Second Circuit became the first circuit to consider whether constructive discharge constitutes a tangible employment action.¹⁴⁸ In that case, Veronica Caridad brought a Title VII sexual harassment action against her former employer, Metro-North Commuter Railroad (Metro-North).¹⁴⁹ Caridad worked as an electrician at Metro-North as the only woman in a thirteen-person shift.¹⁵⁰ She alleged that for several months her supervisor sexually harassed her with unwanted conduct including sexual touching.¹⁵¹ Caridad also alleged that her male co-workers treated her hostilely, telling Caridad that “nobody cares what happens to you” and that “she walked into a lion’s den.”¹⁵² Despite the availability of an employer-promulgated sexual harassment policy and complaint procedures, Caridad initially failed to report the harassment.¹⁵³ She eventually complained of being sexually harassed to Metro-North’s Director of Affirmative Action after the company confronted Caridad concerning her absenteeism, but Caridad did not share the specifics of the

¹⁴⁷ See *Reed v. MBNA Mktg. Sys. Inc.*, 333 F.3d 27, 33 (1st Cir. 2003). That court explained:

Nothing is gained by arguing in the abstract about whether a constructive discharge is or is not a discharge; for some purposes or rubrics, it might be so treated, and for others not. What matters is the Supreme Court’s rationale for excluding tangible employment actions from the affirmative defense, namely, that a supervisor who takes *official* action against an employee should be treated as acting for the employer. There might indeed be cases in which *official* actions by the supervisor—*e.g.*, an extremely dangerous job assignment to retaliate for spurned advances—could make employment intolerable

Id. (citations omitted).

¹⁴⁸ See *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293–94 (2d Cir. 1999).

¹⁴⁹ *Id.* at 290. *Caridad* also involved a Title VII racial discrimination class action lawsuit. *Id.* at 286. A group of present and former African American employees brought an action against their employer, Metro-North, alleging that Metro-North’s company-wide discipline and promotion policies delegated substantial authority to department supervisors that they exercised in a racially discriminatory manner. *Id.* at 286.

¹⁵⁰ *Id.* at 290.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

attacks.¹⁵⁴ Metro-North proposed to transfer her to another shift and also offered her another position.¹⁵⁵ Caridad declined the offers because she did not think that Metro-North's offers would solve her problems; she resigned two months later.¹⁵⁶ The district court dismissed Caridad's sexual harassment claim on summary judgment, basing its decision on a finding that Caridad had failed to utilize Metro-North's formal complaint procedures.¹⁵⁷ After applying the *Ellerth-Faragher* framework, the Second Circuit Court of Appeals affirmed the lower court's judgment regarding the sexual harassment claim.¹⁵⁸

In reaching its conclusion, the Second Circuit held that constructive discharge is not a tangible employment action under the Title VII sexual harassment framework.¹⁵⁹ The Second Circuit emphasized the importance of an agency relationship and argued that the Supreme Court only intended to extend strict liability to employers where "an official act of the enterprise" occurs.¹⁶⁰ Quoting *Ellerth*, the Second Circuit noted that "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."¹⁶¹ Therefore, according to the court, a tangible employment action may only result where a supervisor harasses an employee, not where a co-worker is the harasser.¹⁶² Because "[c]o-workers, as well as supervisors, can cause the constructive discharge of an employee," the court declined to extend tangible employment actions to constructive discharge.¹⁶³ Doing so, the court reasoned, would extend employer liability

¹⁵⁴ *Caridad*, 191 F.3d at 290.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* Caridad argued that a job transfer would not resolve her harassment problems because the other sites were also predominantly male. *Id.*

¹⁵⁷ *Id.* at 290–91.

¹⁵⁸ *Id.* at 296.

¹⁵⁹ *Id.* at 294–95.

¹⁶⁰ *Caridad*, 191 F.3d at 294 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998)).

¹⁶¹ *Id.* (quoting *Ellerth*, 524 U.S. at 762). The court also noted that "unlike demotion, discharge, or similar economic sanctions, an employee's constructive discharge is not ratified or approved by the employer." *Id.*

¹⁶² *See id.*

¹⁶³ *Id.* The court further explained: "[A]lthough we have stated in another context that '[w]hen a constructive discharge is found, an employee's resignation is treated . . . as if the employer had actually discharged the employee,' constructive discharge is not a tangible employment action warranting the imposition of strict liability under the *Ellerth/Faragher* standard." *Id.* at 295 (quoting *Lopez v. S.B. Thomas, Inc.* 831 F.2d 1184, 1188 (2d Cir. 1987)).

to co-worker harassment cases and violate agency principles.¹⁶⁴ The court, therefore, held that Metro-North was entitled to use the *Ellerth-Faragher* affirmative defense.¹⁶⁵

b. Third Circuit: Constructive Discharge Is a Tangible Employment Action

In *Suders v. Easton*, the Third Circuit responded to the Second Circuit's co-worker concerns by concluding that the Supreme Court distinguished between supervisors and co-workers in *Ellerth* and *Faragher*, and that strict liability should attach only to supervisor harassment.¹⁶⁶ In *Suders*, the plaintiff alleged that she suffered severe mistreatment and sexual harassment from her supervisors while she worked as a police communications operator with the Pennsylvania State Police (State Police).¹⁶⁷ Suders recounted several instances of "name-calling, repeated episodes of explicit sexual gesturing, obscene and offensive sexual conversations, and the posting of vulgar images."¹⁶⁸ For example, one supervisor repeatedly talked about people having sex with animals and had discussions in front of Suders where he stated that "if someone had a daughter, they should teach her how to give a good blow job!"¹⁶⁹ Another supervisor made obscene gestures towards Suders, several times a night for five months, sometimes "grab[bing] hold of his private parts and yell[ing], suck it."¹⁷⁰

Suders confronted one of the defendants and asked him to stop, but she did not report any of the incidents to others at the barracks.¹⁷¹ Later, after her supervisors accused Suders of misplacing a file and failing to complete an assignment, Suders contacted the Equal Employment Opportunity Officer for the State Police, mentioning that her superiors were harassing her.¹⁷² The officer was "insensitive and unhelpful," and instructed Suders to file a complaint without providing any assistance.¹⁷³ Ultimately, after the other

¹⁶⁴ *Id.* at 294.

¹⁶⁵ *Id.* at 296.

¹⁶⁶ *Suders v. Easton*, 325 F.3d 432, 450 (3d Cir. 2003), *vacated sub nom.* Pa. State Police v. Suders, 124 S. Ct. 2342 (2004).

¹⁶⁷ *Id.* at 436.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 437.

¹⁷¹ *Id.* at 438. As Suders explained, "there was no one on that station that I could go to." *Id.*

¹⁷² *Suders*, 325 F.3d at 438, *vacated sub nom.* Pa. State Police v. Suders, 124 S. Ct. 2342 (2004).

¹⁷³ *Id.*

officers later falsely accused Suders of theft and subsequently handcuffed, photographed, and questioned her, Suders resigned from her position.¹⁷⁴ Based on the lower court's findings of fact, the Third Circuit reversed the lower court's summary judgment order.¹⁷⁵ The Third Circuit held that genuine issues of material fact precluded summary judgment on Suders' claims of hostile work environment and constructive discharge.¹⁷⁶

Relying on the same agency principles that the Second Circuit had discussed, the Third Circuit held that constructive discharge created by supervisor harassment constitutes a tangible employment action.¹⁷⁷ The Third Circuit opined that the Supreme Court intended the notion of a tangible employment action to be a flexible concept because it provided a nonexclusive definition of that term.¹⁷⁸ Although the Supreme Court's definition did not specifically reference constructive discharge, it did reference firing.¹⁷⁹ Therefore, reasoned the Third Circuit, constructive discharge is a tangible employment action because constructive discharge "operates as the functional equivalent of an actual termination."¹⁸⁰ When an employee is constructively discharged, noted the court, that employee suffers the identical economic harm that a formally discharged employee suffers.¹⁸¹ Additionally, as a practical matter, the employer often ratifies the constructive discharge because an employer will have some ability to monitor the paperwork involved when an employee quits.¹⁸²

The Third Circuit then dismissed the Second Circuit's concern about expanding employer liability beyond supervisor constructive discharge.¹⁸³ The court explained that "for purposes of liability, only supervisors, because

¹⁷⁴ *Id.* at 439.

¹⁷⁵ *Id.* at 462.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* In *Robinson v. Sappington*, the Seventh Circuit affirmed the Second Circuit's supervisor/co-worker distinction and held that "it is appropriate to draw a distinction between a constructive discharge caused by co-employees and a constructive discharge caused by supervisors. Specifically, in circumstances where 'official actions by the supervisor . . . make employment intolerable,' we believe a constructive discharge may be considered a tangible employment action." *Robinson v. Sappington*, 351 F.3d 317, 335–36 (7th Cir. 2003).

¹⁷⁸ See *Suders*, 325 F.3d at 456, *vacated sub nom.* *Pa. State Police v. Suders*, 124 S. Ct. 2342 (2004).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 458.

¹⁸¹ *Id.* (citing *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1075 (3d Cir. 2003)).

¹⁸² *Id.* at 459 (citing *Jansen v. Packaging Corp. of America*, 123 F.3d 490, 506 (7th Cir. 1996) (Posner, J., concurring and dissenting)).

¹⁸³ *Id.* at 457.

of the authority vested in them by their employers and because of the rank they possess over others, may be aided by the agency relation in the commission of actionable harassment.”¹⁸⁴ The Third Circuit explained that “[i]t is of no consequence that constructive discharge may be caused by a co-worker because we are only concerned here with that which is caused by a supervisor.”¹⁸⁵ The court further explained that “our inquiry is not whether an action may be caused by a co-worker or supervisor, it is whether the supervisor’s action constitutes a ‘significant change in employment status.’”¹⁸⁶

Although the two circuit courts disagreed as to the final outcome, both agreed that they did not want to extend employer vicarious liability to situations where co-worker harassment facilitates constructive discharge. Thus, both circuits agreed that a constructive discharge may only be a tangible employment action in cases where supervisor conduct triggered the resignation.

III. *PENNSYLVANIA STATE POLICE V. SUDERS*: AN ATTEMPT TO CLARIFY THE CONFUSION

On December 1, 2003, the United States Supreme Court granted a petition for certiorari to the Third Circuit to decide the constructive discharge issue in the *Suders* case.¹⁸⁷ The Court attempted to finally settle the confusion surrounding constructive discharge standards and the definition of a tangible employment action. Despite its good intentions, the Court once again failed to resolve the confusion plaguing the sexual harassment/constructive discharge arena.

A. *The Holdings*

In its decision, the Supreme Court held for the first time that Title VII includes employer liability for constructive discharge.¹⁸⁸ Quoting *Meritor Savings Bank v. Vinson*, the Court reiterated its previous holding that to

¹⁸⁴ See *Suders*, 325 F.3d at 450, *vacated sub nom.* Pa. State Police v. Suders, 124 S. Ct. 2342 (2004). The court recognized that the agency relationship aids all harassment in the sense that “most workplace harassment occurs because men and women are brought together as co-workers in close quarters.” *Id.* However, the court declined to incorporate all workplace harassment under the agency relation standard because it did not wish to hold employers vicariously liable for all co-worker harassment. *Id.* at 451 (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760 (1998)).

¹⁸⁵ *Id.* at 457.

¹⁸⁶ *Id.* (quoting *Ellerth*, 524 U.S. at 761).

¹⁸⁷ Pa. State Police v. Suders, 124 S. Ct. 803 (2003).

¹⁸⁸ Pa. State Police v. Suders, 124 S. Ct. 2342, 2352 (2004).

establish a hostile work environment, a plaintiff must show harassing behavior “sufficiently severe or pervasive to alter the conditions of [their] employment.”¹⁸⁹ To establish a constructive discharge, however, a plaintiff alleging sexual harassment must make a further showing—she must demonstrate that the hostile work environment became so intolerable that her resignation qualified as “a fitting response.”¹⁹⁰ In recognizing constructive discharge under Title VII, the Court reasoned that it already recognized constructive discharge in the labor law context,¹⁹¹ and that “Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment.”¹⁹² Applying constructive discharge to the Title VII context, the Court concluded, was a logical extension of that doctrine.

The Court then addressed the tangible employment action debate, reversing the Third Circuit’s holding that the *Ellerth-Faragher* affirmative defense is never available in constructive discharge cases.¹⁹³ The Court held that an employer may assert the *Ellerth-Faragher* affirmative defense unless the plaintiff quit in response to an adverse action officially changing her employment status or situation.¹⁹⁴ Such an official action may include “a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.”¹⁹⁵ The Court affirmed the agency principles that it articulated in *Ellerth* and *Faragher*, noting that employers should be strictly liable only where the agency relation aids the supervisor’s misconduct.¹⁹⁶ “Absent . . . an official act, the extent to which the supervisor’s misconduct has been aided by the agency relation . . . is less certain.”¹⁹⁷ That uncertainty, the Court argued, justifies allowing the employer the opportunity to resort to the affirmative defense to avoid vicarious liability.¹⁹⁸ The Court stated that depending on the circumstances, courts should make available the affirmative defense for constructive

¹⁸⁹ *Id.* at 2347 (alteration in original) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 2352.

¹⁹² *Id.* (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998)).

¹⁹³ *Id.* at 2347, 2357. To assert a successful affirmative defense, an employer must show both “(1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventative or remedial apparatus.” *Id.* at 2347.

¹⁹⁴ *Suders*, 124 S. Ct. at 2355.

¹⁹⁵ *Id.* at 2347.

¹⁹⁶ *See id.* at 2353 (citing *Ellerth*, 524 U.S. at 758; *Faragher v. City of Boca Raton*, 524 U.S. 775, 801 (1998)).

¹⁹⁷ *Id.* at 2355.

¹⁹⁸ *Id.*

discharge cases because “[u]nlike an actual termination, which is *always* effected through an official act of the company, a constructive discharge need not be.”¹⁹⁹ Sexual harassment rising to the level of a constructive discharge may arise from co-worker conduct or unofficial supervisory conduct, neither of which the Court found to comprise an official act.²⁰⁰ The Court then vacated the Third Circuit’s judgment and remanded the case for further proceedings consistent with the opinion.²⁰¹

B. *Good Intentions, Negative Effects*

The Supreme Court undoubtedly wrote the *Suders* decision with good intentions, but the decision will inevitably produce more uncertainty. On the surface, the opinion appears well-grounded in policy considerations and consistent with earlier Court decisions. The *Suders* standard builds on the policy articulated in *Ellerth* and *Faragher* of only imposing strict liability when a supervisor engages in some objective use of agency authority on behalf of an employer.²⁰² When a supervisor’s official action results in harassment, the employer bears a greater degree of responsibility because it has empowered its “agent to make economic decisions affecting other employees under his or her control.”²⁰³ In addition, the employer in this context has a greater ability to detect and prevent harassment because official actions ordinarily are “documented in official company records, and . . . subject to review by higher level supervisors.”²⁰⁴ In contrast, courts will not hold employers strictly liable where they have little opportunity to countermand the harassing behavior.

In addition to remaining true to agency principles, one could also argue that the *Suders* decision adds clarity to the harassment debate by drawing a bright line between supervisor and co-worker harassment. The Court suggested that only supervisor harassment can be “effected through an official act of the company,” and therefore has the potential to be “aided by the agency relation.”²⁰⁵ Regardless of whether this distinction is ultimately appropriate, bright line distinctions give employers and lower courts notice as to when strict liability is appropriate. Courts no longer have to fear, as the Second Circuit once did, that they are extending employer liability too far by

¹⁹⁹ *Id.*

²⁰⁰ *Suders*, 124 S. Ct. at 2355.

²⁰¹ *Id.* at 2357.

²⁰² See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998).

²⁰³ *Ellerth*, 524 U.S. at 762.

²⁰⁴ *Id.*

²⁰⁵ *Suders*, 124 S. Ct. at 2355.

holding employers liable every time a co-worker harasses another co-worker.²⁰⁶

Despite the *Suders* decision's consistency with precedent and the arguable clarity of the co-worker/supervisor distinction, the *Suders* decision created two new imprecise terms that will likely spawn considerable litigation: "official action" and "fitting response." Because the Court utilized vague terms without providing much guidance to help decipher their meanings, the *Suders* decision, like *Ellerth* and *Faragher* before it, likely will create more confusion than it will resolve.

1. Official Action

In *Suders*, the Court held that employers are strictly liable for constructive discharge cases caused by supervisor sexual harassment where an official act underlies the constructive discharge.²⁰⁷ The Court, however, gave little guidance to plaintiffs as to how they can prove that an official action caused the constructive discharge. Unlike a traditional tangible employment action such as a discharge or a demotion that is objectively ascertainable, the question of whether an "official action" precipitated a constructive discharge in a particular case entails a subjective assessment of causation. This assessment may pose a difficult factual issue in many circumstances. Take, for example, the situation of a male supervisor who transfers a female employee to a previously all-male work team that is not receptive to a female member. The co-workers engage in a pattern of harassing behavior that makes the female employee's work life miserable. After three or four months, the female employee resigns and asserts a hostile work environment claim. The *Suders* opinion offers no guidance as to how to assess whether this constructive discharge flows from the supervisor's official transfer action or from the harassment perpetrated by the nonsupervisory members of the work team. Perhaps the Court would want to consider whether the supervisor knew that the team was not friendly to females, or whether the transfer is also a promotion. Without further guidance from the Court, these ideas are mere speculation. The causation element in this example, as it will be in many other instances, simply is not clear.

²⁰⁶ See *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294–95 (2d Cir. 1999); see also *Robinson v. Sappington*, 351 F.3d 317, 335 (7th Cir. 2003) (noting the common concern among the circuits that "equating constructive discharge with other types of tangible employment actions will impose liability on employers when the offending employee has not been empowered by the employer to take the actions at issue").

²⁰⁷ See *Suders*, 124 S. Ct. at 2355.

Additionally, the Court gave little insight concerning the required causal relationship between the sexual harassment and the official action. The opinion suggests that employers will be liable where the sexual harassment “culminates in a tangible employment action” such as where a supervisor transfers an employee to an extremely dangerous job assignment in retaliation for the employee’s rebuffing the supervisor’s advances.²⁰⁸ The Court, however, did not indicate whether an employer will also be liable where an official action causes, but does not constitute, the sexual harassment in question.²⁰⁹ For example, the Court did not specify whether an employer is strictly liable when a supervisor transfers an employee to a different work environment that results in sexual harassment. Perhaps the Court will hold the employer liable if the plaintiff can prove that the official action caused the sexual harassment. The Court, however, did not adopt a proximate cause or other causation standard, and, therefore, did not state how strong the link between the official action and the sexual harassment must be. Instead, the lower courts must make these decisions without guidance from the Supreme Court.

2. *Fitting Response*

The lack of predictability in the “official action” analysis is aggravated by another aspect of the *Suders* decision. The Court in *Suders* ruled for the first time that a constructive discharge is actionable under Title VII.²¹⁰ Justice Ginsburg stated that to establish a constructive discharge, the plaintiff “must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response.”²¹¹ The opinion, however, does not define “fitting response,” and instead adopts the constructive discharge doctrine without much discussion.²¹² Further, the Court does not

²⁰⁸ See *id.* at 2352 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)); see also *id.* at 2356 (adopting the rationale in *Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27, 33 (1st Cir. 2003)).

²⁰⁹ The Court merely said that the affirmative defense will not be available if the “plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation.” *Id.* at 2347. Additionally, the Court stated that the *Ellerth* and *Faragher* decisions delineated “two categories of hostile work environment claims: (1) harassment that ‘culminates in a tangible employment action,’ for which employers are strictly liable, . . . and (2) harassment that takes place in the absence of a tangible employment action, to which employers may assert an affirmative defense” *Id.* at 2352 (citations omitted). Neither of these categories includes situations in which the tangible employment action culminates in harassment.

²¹⁰ *Id.* at 2352.

²¹¹ *Id.* at 2347.

²¹² See *id.* at 2347, 2351–52.

address the various standards that the circuits have adopted, but instead, only references briefly the reasonable person standard, which it describes as embodying an objective inquiry.²¹³

Because the Court only mentioned the reasonable person standard, the *Suders* opinion does not make explicit whether the Court intended the fitting response standard to eliminate the requirement previously adopted by several courts of showing that the employer intended to force the employee's resignation.²¹⁴ The Court's failure to address this issue could be interpreted in several ways. First, the Court may have unintentionally ignored the intent requirement. This interpretation seems unlikely though because Justice Thomas made the intent requirement an issue in his dissent. Justice Thomas suggested that if courts want to "attach the same legal consequences to a constructive discharge as to an actual discharge," a plaintiff should have to prove that "his employer subjected him to an adverse employment action with the specific intent of forcing the employee to quit."²¹⁵ Because Justice Thomas squarely raised the intent issue, it is unlikely that the majority failed to recognize the importance of this circuit-dividing issue.

A second option is that the Court did not address the intent issue because it intended to adopt the constructive discharge concept under Title VII without resolving the circuit split by setting a specific substantive constructive discharge standard. In that case, lower courts could continue to use their previously articulated standards. This interpretation is not likely, however, as the Court easily could have said as much in the opinion, thus avoiding any confusion.

Finally, the Court might have deliberately excluded the issue of employer intent from its discussion because it intended to endorse the reasonable person standard and did not want to incorporate an employer intent requirement as part of the fitting response equation. This interpretation seems most consistent with the Court's explicit reference to the reasonable person standard and with its failure to address Justice Thomas's dissent regarding the requirement of an employer intent element.²¹⁶

²¹³ See *Suders*, 124 S. Ct. at 2351. In explaining the history of the constructive discharge doctrine, the Court noted: "Under the constructive discharge doctrine, an *employee's reasonable decision* to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. . . . The inquiry is objective: Did working conditions become so intolerable that a *reasonable person* in the employee's position would have felt compelled to resign?" *Id.* (citations omitted) (emphasis added). See *supra* notes 58, 60 and accompanying text for a discussion of the reasonable employee constructive discharge test.

²¹⁴ See *supra* notes 47–51, 57–68 and accompanying text.

²¹⁵ *Suders*, 124 S. Ct. at 2358 (Thomas, J., dissenting).

²¹⁶ See Christy M. Hanley, Comment and Casenote, *A "Constructive" Compromise: Using the Quid Pro Quo and Hostile Work Environment Classifications to Adjudicate*

The Court's lack of clarity on this issue is problematic on at least two levels. First, it is not clear whether the Court has endorsed a particular substantive constructive discharge standard. Such a result, of course, leaves the lower courts in a state of uncertainty. Second, even if the Court's "fitting response" pronouncement represents the adoption of a reasonable employee standard, the Court's test is nonetheless problematic because it is a loose one that provides little guidance for future outcomes. The Court did not provide any indication, for example, of what is "fitting" or "reasonable" from the perspective of either the employee or the employer. The lower courts already have differing ideas of what duties, if any, a reasonable employee must fulfill.²¹⁷ In some circuits, a reasonable employee must attempt to mitigate the harassment or notify her employer of the intolerable conditions, while others suggest that a reasonable employee may quit without giving notice if she believes her unlawful termination is imminent.²¹⁸ The Court did not address any of these nuances of the reasonableness standard. The "fitting response" benchmark also does not explain how intolerable the harassment must be—the Court only stated that the plaintiff must establish hostile work environment conditions plus "a further showing . . . that the abusive working environment became so intolerable that her resignation qualifies as a fitting response."²¹⁹

Because the Court has not acted clearly, lower courts have issued various interpretations, usually ones that allow them to continue applying the same constructive discharge analysis that they used prior to the *Suders* decision. For instance, the Fifth and Tenth Circuits have continued to use the same objective reasonable employee standard that they used before *Suders*.²²⁰ Those circuits have interpreted "fitting response" as the equivalent of a reasonable employee inquiry, and therefore assess whether the working conditions are so intolerable that a reasonable employee would have no other choice but to quit.²²¹ More surprising is that the Sixth and Eighth Circuits

Constructive Discharge Sexual Harassment Cases, 73 U. CIN. L. REV. 259, 280 (2004) (interpreting the majority opinion in *Suders* as "announc[ing] the objective standard for analyzing a constructive discharge claim").

²¹⁷ See *supra* note 62 and accompanying text.

²¹⁸ *Id.* (discussing the various versions of the reasonable employee test).

²¹⁹ See *Suders*, 124 S. Ct. at 2347. Justice Thomas describes the majority's constructive discharge standard as a "'hostile work environment plus' framework." *Id.* at 2358 (Thomas, J., dissenting).

²²⁰ Compare *Jurgens v. EEOC*, 903 F.2d 386, 390 (5th Cir. 1990), and *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1154 (10th Cir. 1990), with *Handy v. Brownlee*, No. 04-50545, 2004 WL 2980347, at *3 (5th Cir. Dec. 22, 2004), and *Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1135–36 (10th Cir. 2004).

²²¹ *Handy*, 2004 WL 2980347, at *3; *Exum*, 389 F.3d at 1135–36.

also have continued to apply their pre-*Suders* standards.²²² Although the majority opinion in *Suders* never mentions employer intent as a component of the constructive discharge calculus, those circuits continue to require that plaintiff-employees show that their employers either specifically intended to force their resignation or that their resignation was a foreseeable consequence of their employers' actions.²²³ The Second Circuit also has continued to require that plaintiffs establish that the employer intended to force the employee's resignation, or at the very least, show that the employer's adverse actions were deliberate.²²⁴

A few courts in the Second Circuit have dismissed the apparent inconsistency of requiring evidence of employer intent post-*Suders*, stating that *Suders* did not negate the intent or deliberateness requirements.²²⁵ According to those courts, employer intent and an employee's fitting response are elements of a two-part constructive discharge inquiry, with the plaintiff bearing the burden of proof on both issues. For example, in *Petrosino v. Bell Atlantic*, the Second Circuit stated that a plaintiff first must establish that the employer intended the conduct that led to the resignation by showing either specific intent or deliberate actions.²²⁶ The plaintiff then must show that the employer's actions rendered the working conditions so intolerable as to compel resignation.²²⁷ The court indicated that it assessed intolerability based on whether a reasonable employee would have felt compelled to resign under the circumstances.²²⁸ In *Collette v. Stein-Mart, Inc.*, an unpublished Sixth Circuit opinion, the court adopted a similar multiple-part inquiry.²²⁹ In that case, the court stated that a constructive discharge analysis required an evaluation of (1) the employee's feelings and whether they were objectively a "fitting response," (2) the employer's intent,

²²² Compare *Moore v. Kuka Welding Sys.*, 171 F.3d 1073, 1080 (6th Cir. 1999), and *Hukkanen v. Int'l Union of Operating Eng'rs*, 3 F.3d 281, 284-85 (8th Cir. 1993), with *Collette v. Stein-Mart, Inc.*, No. 03-2101, 2005 WL 293662, at *3-4 (6th Cir. Feb. 8, 2005), and *Mennis v. Prime Hospitality Corp.*, No. Civ. 03-4191, 2004 WL 1987229, at *9 (D. Minn. Sept. 7, 2004).

²²³ See, e.g., *Collette*, 2005 WL 293662, at *3-4; *Mennis*, 2004 WL 1987229, at *9.

²²⁴ See, e.g., *Petrosino v. Bell Atlantic*, 385 F.3d 210, 229-30 (2d Cir. 2004) (requiring plaintiffs to show employer intent or deliberateness).

²²⁵ E.g., *Thomas v. Bergdorf Goodman, Inc.*, No. 03-Civ.3066, 2004 WL 2979960, at *9 n.5 (S.D.N.Y. Dec. 22, 2004); *EEOC v. Grief Bros. Co.*, No. 02-CV-468S, 2004 WL 2202641, at *15 n.11 (W.D.N.Y. Sept. 30, 2004).

²²⁶ *Petrosino*, 385 F.3d at 229-30.

²²⁷ *Id.* at 230.

²²⁸ *Id.*

²²⁹ *Collette v. Stein-Mart, Inc.*, No. 03-2101, 2005 WL 293662, at *3-4 (6th Cir. Feb. 8, 2005).

and (3) the foreseeability of the conduct's impact on the employee.²³⁰ These multiple-part inquiries are surprising considering that Justice Thomas's dissent criticized the majority in *Suders* for failing to adopt an intent or deliberateness requirement.²³¹

In sum, the Court in *Suders* once again has failed to articulate clear standards for determining employer liability for constructive discharge sexual harassment cases. Before *Suders*, lower courts were split over the meaning of "tangible employment action" and whether that term incorporates constructive discharges. After *Suders*, courts continue to be uncertain as to what constitutes a constructive discharge. Further, by creating new ambiguous terms, "official action" and "fitting response," the Court not only has failed to redress the ongoing confusion that afflicts the sexual harassment/constructive discharge realm, but has created new areas of unpredictability and the need for future litigation.

IV. A PROPOSED SOLUTION: STREAMLINING AND STANDARDIZING THE SEXUAL HARASSMENT/CONSTRUCTIVE DISCHARGE ANALYSIS

To bring predictability to the sexual harassment/constructive discharge analysis, the Court should revisit *Suders* and adopt a standard whereby a constructive discharge always involves an employer's official action. This approach would combine the previously separate sexual harassment and constructive discharge inquiries into a simplified unitary test that would apply to all constructive discharge actions but not to situations that already involve a tangible employment action such as "discharge, demotion, or undesirable reassignment."²³² Under this new standard, the Unitary Constructive Discharge Standard (the Unitary Standard), a plaintiff must establish that the employer is at fault by directly or indirectly causing gender-based intolerable working conditions. A plaintiff proves fault by showing that the employer knew or should have known of the severe or pervasive harassment, but failed to adequately respond to the conditions. If the plaintiff succeeds in making that showing, the court will automatically hold the employer liable and the employer will not have access to the *Ellerth-Faragher* affirmative defense.

The Unitary Standard combines certain elements of the vicarious liability approach and the employer-negligence standard into one unitary constructive discharge rule that applies to supervisors and nonsupervisors alike. Similar to a vicarious liability standard, once the plaintiff establishes that the employer

²³⁰ *Id.*

²³¹ See *Pennsylvania State Police v. Suders*, 124 S. Ct. 2342, 2358 (Thomas, J., dissenting) for Justice Thomas's discussion of the specific intent standard.

²³² *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

is at fault, the employer does not have an affirmative defense for its use. But like the negligence standard, the plaintiff must prove that the employer knew or should have known of the harassment, and failed to take appropriate corrective action before liability may attach. As the Supreme Court stated in *Ellerth*, “[n]egligence sets a minimum standard for employer liability”²³³ Uniting elements from both standards into one Unitary Standard would streamline the courts’ evaluation of sexual harassment/constructive discharge cases. If courts adopt this standard, they would no longer have to decide which constructive discharges involve official actions or under what circumstances the employer may assert an affirmative defense. Instead, all courts would apply one constructive discharge standard to all sexual harassment cases, regardless of whether they involved supervisor or nonsupervisor conduct. As a result, employers and plaintiffs would receive predictable, fair, and equal treatment across the circuits.

A. *The Unitary Standard*

Under the proposed Unitary Standard, plaintiffs may establish that their constructive discharge was an official action by showing that the employer directly or indirectly caused an intolerable environment of sexual harassment. The Unitary Standard utilizes a two-pronged analysis. First, the plaintiff must show that the employer knew or should have known of the severe or pervasive harassment, and then she must prove that the employer failed to adequately respond to the harassing conditions. Once a plaintiff establishes these elements, the court must hold the employer liable regardless of whether the harassment stemmed from supervisor or nonsupervisor conduct.

1. *Employer Knowledge*

A plaintiff satisfies the first part of the Unitary Standard by showing that the employer had actual or constructive knowledge of the harassment. An employer has actual knowledge where an agent of the employer, such as an officer, director or supervisory employee, becomes aware of the intolerable conditions.²³⁴ To assess actual knowledge, a court may consider a variety of factors including whether someone reported the misconduct to an agent of the employer, or whether an agent made comments or took actions that indicated actual knowledge. Additionally, a supervisor’s overt action itself

²³³ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998).

²³⁴ See 29 C.F.R. § 1604.11(d) (1999); *Williamson v. City of Houston*, 148 F.3d 462, 464–67 (5th Cir. 1998).

may demonstrate or establish actual knowledge. For example, when a supervisor changes her employees' work schedules or transfers one or more employees, those actions may be evidence of an attempt to alter intolerable conditions, and therefore, demonstrate knowledge.

Alternatively, the plaintiff can show constructive knowledge by establishing that the sexual harassment was so severe and pervasive that the employer should have known of the harassment.²³⁵ For example, the harassment might reach such an intolerable level that an employer would not know of the misconduct only if the employer was negligent or deliberately ignored the circumstances surrounding the harassment. Accordingly, a plaintiff could satisfy prong one of this standard by providing evidence of the severity of the harassment and that a reasonable employer would be aware of such conditions under the circumstances. Suppose, for instance, that a group of male employees at a manufacturing plant routinely sexually assault new female employees in the locker room. The supervisors have heard rumors about the locker room conduct but do not have first-hand knowledge of the assaults, and no one has directly complained to them. In hopes of avoiding confrontation, the supervisors ignore the rumors and do not investigate. Under these circumstances, plaintiffs would satisfy prong one of the Unitary Standard. The supervisors did not have actual knowledge of the harassment only because they ignored the circumstances surrounding the intolerable conditions.

The knowledge standard is more flexible than many previously articulated constructive discharge standards because it does not require evidence of employer intent. The plaintiff would not have to prove the employer's subjective state of mind other than to show that the employer had actual or constructive knowledge of the harassment. The harassment then becomes an official action when the employer permits the harassment to continue by not providing an adequate remedy.²³⁶ In contrast, several circuits require that the plaintiff establish that the employer either intended to force the employee's resignation or intended to create an intolerable work

²³⁵ See Stacey Dansky, Note, *Eliminating Strict Liability in Quid Pro Quo Sexual Harassment Cases*, 76 TEX. L. REV. 435, 455 (1997) (stating that "the employer [is put] on constructive notice when the harassment is blatant"); J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 317 (1995) (noting that constructive notice occurs when the harassment took place "so openly and frequently that the employer would be expected to have observed the conduct").

²³⁶ See Shuck, *supra* note 29, at 440 (arguing that a constructive discharge that results from the employer's failure to correct harassing behavior should be deemed a tangible employment action of that employer); Comment, *First Circuit Holds That Classification of Constructive Discharge as a Tangible Employment Action Should Be Left to a Case-By-Case Determination*, 117 HARV. L. REV. 1004, 1010 (2004) (same).

atmosphere.²³⁷ These additional requirements are unnecessary because the Unitary Standard already accounts for an analysis of the severity of sexual harassment and the employer's knowledge of that harassment. If the employer does not have actual or constructive knowledge of severe or pervasive harassment, a finding of constructive discharge is not warranted. But, if the employer is or should be aware of such harassment and does not take appropriate remedial steps, then the employer should not escape liability simply because it does not want or intend the employee to leave employment.

Some examples may help to illustrate this point. A harassing agent of the employer may specifically want the victim to stay with the company so that he can continue to harass the victim. Alternatively, the employer may be aware of the harassment, not want it to continue, but fail to make any efforts to stop it. The employer may think that addressing the harassment will disrupt the workplace more than ignoring it would. The harasser, for example, may be the employer's star performer who creates a majority of the company's business. In that case, the employer may be reluctant to address the harassment, especially when it knows that an appropriate response may be to ask for the star performer's resignation. Finally, the employer may have antiquated views of harassment and may not consider sexual harassment discriminatory; instead, it may believe that any sexual conduct is a private matter regardless of where it takes place. In all of these scenarios, the employer has control over its work environment, but chooses to allow the intolerable conditions to continue. In such circumstances, the employer should not escape liability merely because it did not intend for the employee to quit or for the harassment to continue. A knowledge standard, on the other hand, appropriately deters these various situations in which the employer, even if it did not intend for the discrimination to continue, nonetheless directly or indirectly caused it to occur.

2. Adequate Response

Under the proposed Unitary Standard, once a plaintiff establishes employer knowledge, she must next demonstrate that the employer failed to respond adequately to the intolerable conditions. An adequate response is an action or a set of actions that should be sufficient to stop the harassment.²³⁸ Responding, by itself, should not excuse an employer from liability. If a

²³⁷ See *supra* notes 47–51, 59–68, 222–24 and accompanying text for a discussion of the various intent standards.

²³⁸ See generally Glen Allen Staszewski, Note, *Using Agency Principles for Guidance in Finding Employer Liability for a Supervisor's Hostile Work Environment Sexual Harassment*, 48 VAND. L. REV. 1057, 1084–85 (1995) (discussing what actions constitute an adequate response by the employer).

supervisor has a long history of inappropriately touching his female subordinates, the employer should not escape liability merely by issuing a verbal warning when verbal warnings failed to alter the supervisor's behavior in the past. The response must fit the situation.

Under exceptional circumstances, the employer may respond adequately, but the harassment may not actually stop. For example, suppose a long-time employee, Jim, began making inappropriate comments to his co-worker, Sue, who worked in a neighboring cubicle. When Sue's supervisor learned of the comments, she immediately transferred Jim to another building where he would have no contact with Sue and no reason to enter Sue's building. Suppose Jim entered Sue's building anyway and began stalking her outside of the restroom that Sue usually used. If the employer had no reason to believe that Jim was likely to escalate his behavior to this level, the employer's response was adequate and no liability should attach to the employer at this point. Such a result is appropriate because under normal circumstances, the transfer *should have* remedied the situation.²³⁹

3. Mitigation Requirement?

Under the majority reasonable employee constructive discharge standard, several courts have imposed upon the employee a duty to mitigate or notify the employer of the intolerable conditions.²⁴⁰ In addition, the *Ellerth-Faragher* affirmative defense includes the requirement that an employee whose harassment does not result in a tangible employment action must "take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."²⁴¹ The proposed Unitary Standard treats employee mitigation differently, imposing a variable requirement depending on whether the employer had actual or constructive knowledge of the harassment. When the plaintiff attempts to prove that the employer had actual knowledge of the harassment, the plaintiff may use her mitigation efforts as evidence of the employer's knowledge. The courts, however, should not require the plaintiff to formally notify the employer in instances in which the employer already has first-hand knowledge of the harassment, such as by learning of it from someone other than the victim. An employee's failure to use the employer's internal grievance procedures, sexual harassment policies, or otherwise report the harassment to a specific person, by itself, should not absolve the employer of liability in such circumstances. The employer is in the best position to control the work environment and has

²³⁹ Of course, the employer is now responsible for responding to the newly escalated situation once it is aware of it.

²⁴⁰ See *supra* note 62 and accompanying text.

²⁴¹ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

a duty to ensure the safety of its workers in the workplace. If a duty to mitigate is imposed upon the employee even when the employer had actual knowledge of the harassment, the burden of maintaining workplace safety would shift inappropriately from the employer to the employee.

In cases in which the employer only has constructive knowledge of the harassment, however, the employee should have a duty to mitigate. Requiring mitigation in this context will assist the employer in acquiring sufficient information to take adequate measures in response to the harassment. This mitigation duty, however, should not be construed as requiring employees to use the employer's formal grievance procedures in all instances. The proposed Unitary Standard only requires that the employee "do something" to inform the employer of the harassment. "Doing something" can involve talking to an immediate supervisor, a member of the human resources department, or another agent of the company, or even having another co-worker report the harassment on behalf of the victim. As long as an agent of the employer is put on notice of the working conditions, the employer has a duty to respond adequately. Courts should not penalize an employee merely because the employee did not use a specific procedure when the employer, in a practical sense, is in a position to remedy the problem.

This mitigation requirement is far more flexible than the rigid reporting requirement that has evolved under the *Ellerth-Faragher* affirmative defense. Under the second prong of the affirmative defense, an employer may be able to avoid liability for workplace harassment if it can establish "that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."²⁴² Although the plain language used by the Court in *Ellerth* would appear to enable a victim of harassment to defeat the affirmative defense by making any type of reasonable effort to "avoid harm," the federal courts essentially have rewritten the proviso to require the victim formally to report the harassment in all instances.²⁴³ A statistical analysis of published federal court decisions issued after *Ellerth* and *Faragher* concludes that "employees can almost guarantee a [summary judgment] victory for the employer if they fail to report."²⁴⁴ The study found that "courts granted an employer's motion for summary judgment in each of the twenty cases in which employers satisfied the first prong [by adopting a sexual harassment grievance policy] and the employee failed to report [by utilizing the formal grievance policy]."²⁴⁵ Similarly, many federal courts have decided as a

²⁴² *Id.*

²⁴³ Lawton, *supra* note 87, at 242; Sherwyn, *supra* note 8, at 1286, 1290.

²⁴⁴ Sherwyn, *supra* note 8, at 1286.

²⁴⁵ *Id.*; *see also* Lawton, *supra* note 87, at 243.

matter of law that an employee's delay in reporting harassment is unreasonable under the second prong of the affirmative defense, regardless of the reason for such delay.²⁴⁶ Some courts also expect employees to use the employer's formal grievance procedures even when the harasser is the highest person of authority in a workplace or when the harassment is so severe and pervasive that it has become a part of the workplace culture.²⁴⁷ As a result of these interpretations, the mandatory reporting requirement actually enables workplace harassment by allowing employers to escape responsibility even when a victim has legitimate reasons for not using official procedures.²⁴⁸

A more flexible mitigation requirement is consistent with the realities of workplace harassment. Empirical studies consistently have shown that the normal response of harassment victims is to not make a formal report of the harassment.²⁴⁹ These studies have found that only somewhere between two percent on the low end and eighteen percent on the high end of employee victims utilize formal grievance procedures.²⁵⁰ The mandatory reporting expectation of the affirmative defense, accordingly, distorts the realities of social relationships at work by adopting a standard that few harassment victims will satisfy.

One of the most common reasons that victims do not use official reporting procedures is because they fear that reporting will make the situation worse.²⁵¹ Empirical research shows that some victims fear that reporting will invite retaliation that would amplify the harassment and could adversely affect their careers.²⁵² These fears may increase when the employer's harassment policy requires the employee to report to the person who is responsible for the harassment.²⁵³ Retaliation fears are not unfounded.²⁵⁴ One study found that employees who used official complaint procedures had "significantly lower promotion rates and performance ratings and significantly higher turnover rates" than those employees who did not

²⁴⁶ Sherwyn, *supra* note 8, at 1297–98; Lawton, *supra* note 87, at 253–54.

²⁴⁷ Chamallas, *supra* note 7, at 374.

²⁴⁸ Lawton, *supra* note 87, at 199 (noting also that the court's construction of the *Ellerth-Faragher* affirmative defense "improperly shift[s] the burden of proof on reasonableness from the employer to the employee").

²⁴⁹ Chamallas, *supra* note 7, at 374; Lawton, *supra* note 87, at 208–09; Beiner, *supra* note 7, at 312.

²⁵⁰ Chamallas, *supra* note 7, at 374.

²⁵¹ *Id.* at 375; Lawton, *supra* note 87, at 257.

²⁵² Chamallas, *supra* note 7, at 375; Lawton, *supra* note 87, at 257.

²⁵³ *See, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72–73 (1986) (addressing a harassment case in which the employer's grievance procedure required the plaintiff to complain first to her supervisor, the harassing vice president).

²⁵⁴ Chamallas, *supra* note 7, at 375–76; Lawton, *supra* note 87, at 258.

use an employer grievance process.²⁵⁵ In a 1981 federal study, one-third of employees who filed formal harassment complaints claimed that they experienced retaliation.²⁵⁶ A state study similarly reported that almost sixty-two percent of employees who formally reported harassment experienced retaliation.²⁵⁷

Harassment reporters may experience other types of negative personal impacts as well. For example, victims may develop Post Traumatic Stress Disorder from exposure to sexual harassment and may be further traumatized by engaging in a formal grievance procedure.²⁵⁸ These grievance procedures often require victims to recount and relive their experiences.²⁵⁹ As a result, an overwhelming majority of victims do not report the misconduct due to privacy concerns and a fear that no one will believe them.²⁶⁰ Harassment victims who do complain to employer agents frequently are humiliated by being “laughed at, called slanderous liars, or considered ‘fair game’ for all male employees.”²⁶¹

Rather than use formal grievance systems to report harassment, victims more frequently use informal alternatives in response to harassing behavior.²⁶² More than one-third of all harassment victims, for example, respond in a manner similar to that of Nancy Drew Suders,²⁶³ by asking the harasser to correct the offending behavior.²⁶⁴ Other victims seek advice and support by talking to colleagues at work.²⁶⁵ Still others defer filing formal reports hoping that avoidance or making a joke of the matter will allow them to cope with the situation.²⁶⁶

²⁵⁵ David Lewin, *Dispute Resolution in the Nonunion Firm: A Theoretical and Empirical Analysis*, 31 J. CONFLICT RESOL. 465, 498 (1987).

²⁵⁶ Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122 (1995).

²⁵⁷ *Id.* Further evidence that employees perceive retaliation can be inferred from the fact that employees often include retaliation charges with their sexual harassment claims. Lawton, *supra* note 87, at 257.

²⁵⁸ Jennifer L. Vinciguerra, Note, *The Present State of Sexual Harassment Law: Perpetuating Post Traumatic Stress Disorder in Sexually Harassed Women*, 42 CLEV. ST. L. REV. 301, 328 (1994).

²⁵⁹ *See id.*

²⁶⁰ Chamallas, *supra* note 7, at 375; Vinciguerra, *supra* note 258, at 328 (noting a 1988 study that found that over 95% of victims do not complain).

²⁶¹ Vinciguerra, *supra* note 258, at 328.

²⁶² Chamallas, *supra* note 7, at 376–77.

²⁶³ *See supra* note 2 and accompanying text.

²⁶⁴ Beiner, *supra* note 7, at 312.

²⁶⁵ Chamallas, *supra* note 7, at 376–77.

²⁶⁶ Beiner, *supra* note 7, at 312.

The Unitary Standard attempts to reduce the burden on victims by requiring only a more flexible mitigation requirement. Employees no longer need to report the misconduct immediately, and when they do complain, they may use unofficial channels to do so. These options, quite simply, are more in tune with the realities of the workplace.

B. Constructive Discharge Under the Unitary Standard Always Involves an Official Action

The proposed Unitary Standard treats all constructive discharges as official employer actions. This is appropriate and consistent with legal precedent for two reasons. First, a constructive discharge operates as the functional equivalent of a formal discharge, a step which courts already recognize as an official action. Second, under the Unitary Standard, a resignation will only qualify as a constructive discharge when doing so does not violate employer agency principles. These factors should alleviate any concerns that the Unitary Standard would extend strict liability to situations in which the employer is not at fault.

1. Constructive Discharges Are Functionally Equivalent to Formal Discharges

The Supreme Court has consistently held that an employer is vicariously liable for sexual harassment when the court finds that an official action was a source of the discrimination.²⁶⁷ In *Ellerth*, the Court used the term “tangible employment action” and defined it as a “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”²⁶⁸ Because a “firing” is an official action, courts also should be comfortable in treating a constructive discharge as an official action.

The underlying premise of a constructive discharge is that it “operates as the functional equivalent of a [formal] discharge.”²⁶⁹ Three characteristics of constructive discharge support this conclusion. First, actual and constructive discharges result in the same type of economic harm.²⁷⁰ In *Ellerth*, the Court held that an employer is vicariously liable when it commits a discriminatory tangible employment action in part because those actions “constitute a

²⁶⁷ *Pa. State Police v. Suders*, 124 S. Ct. 2342, 2352–53 (2004); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

²⁶⁸ *Ellerth*, 524 U.S. at 761 (emphasis added).

²⁶⁹ *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1075 (3d Cir. 1996).

²⁷⁰ See *Chamallas*, *supra* note 7, at 337–38.

significant change in employment status” and “inflict direct economic harm.”²⁷¹ Both actual and constructive discharges satisfy these requirements because in both instances, the employer’s actions cause the employee’s involuntary job loss.²⁷²

Second, a constructive discharge is “legally, the employer’s own ‘deliberate act,’”²⁷³ and therefore, it makes sense to attach the same legal consequences to both actual and constructive discharges. The NLRB originally developed the doctrine in response to situations in which employers intimidated their employees into resigning to rid their workforce of employees involved in union activities.²⁷⁴ Courts applied the doctrine in other contexts, including Title VII, to hold employers accountable where they engaged in severe and pervasive discrimination that forced their employees to quit.²⁷⁵ In essence, the NLRB and the courts used the doctrine to prevent employers from achieving indirectly (discriminating by forcing a resignation) what the statutes forbid them to do directly (discriminating by firing).²⁷⁶

Finally, constructive discharge warrants the same remedies as a termination. Courts first began applying the constructive discharge doctrine to the Title VII context so that they could assign the same legal consequences to both types of job losses. The constructive discharge doctrine allowed plaintiffs to recover monetary awards previously available only to someone actually terminated.²⁷⁷ Originally, when an employer subjected an employee to severe discrimination, that employee could obtain monetary relief under Title VII only if she proved that the discrimination resulted in termination, lower pay, denied promotions, or other economic detriment.²⁷⁸ Title VII did not provide her with a remedy if she quit in response to severe discrimination.²⁷⁹ As a result, plaintiffs turned to the constructive discharge doctrine as a means of recovery, and courts began treating constructive and

²⁷¹ See *Ellerth*, 524 U.S. at 761–62 (“A tangible employment action constitutes a *significant change in employment status* A tangible employment action in most cases inflicts *direct economic harm*.”) (emphasis added).

²⁷² See, e.g., *Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160, 1173 (N.D. Iowa 2000).

²⁷³ *Id.* at 1174.

²⁷⁴ See *supra* Part II.A.1.

²⁷⁵ See *supra* Part II.A.2.

²⁷⁶ See *supra* notes 29–31 and accompanying text.

²⁷⁷ See *Kagay*, *supra* note 11, at 1047.

²⁷⁸ Callie Anderson Marks, Comment, *Artful Dodger: Tenth Circuit Finds Hostile Work Environment but No Constructive Discharge* [*Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996 (10th Cir. 1996)], 36 WASHBURN L.J. 152, 153 n.9 (1996).

²⁷⁹ *Kagay*, *supra* note 11, at 1047.

actual discharge remedies similarly.²⁸⁰ Courts now acknowledge that the employer commits discriminatory acts equivalent to an actual discharge for remedial purposes when an employer imposes conditions that force an employee to resign.²⁸¹

In his dissent in *Suders*, Justice Thomas argued that constructive discharge has evolved away from its original form, to the point that it no longer acts as the functional equivalent of a formal discharge.²⁸² He stated that “it makes sense to attach the same legal consequences to a constructive discharge as to an actual discharge” if the constructive discharge doctrine requires proof that the “employer subjected [the employee] to an adverse employment action with the specific intent of forcing the employee to quit.”²⁸³ He further argued, however, that “[t]he Court has now adopted a definition of constructive discharge . . . that does not in the least resemble actual discharge.”²⁸⁴ He then noted that the circuits have adopted a variety of standards, the majority of which do not impose a specific intent or reasonable foreseeability requirement.²⁸⁵ Justice Thomas seemed to fear that a standard without an intent requirement would permit a finding of employer liability without requiring an official company act.²⁸⁶

The Unitary Standard alleviates Justice Thomas’s concerns by striking an appropriate balance between employer and employee interests. Courts may not find a constructive discharge under the Unitary Standard without first concluding that the employer caused the intolerable working conditions. If an employer does not have knowledge of workplace harassment or takes appropriate steps to remedy severe and pervasive harassment, the employer is not legally responsible for the conduct. If an employer fails to respond to the

²⁸⁰ *Id.*; Comment, *supra* note 236, at 1007–08; *see, e.g.*, *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1002 (10th Cir. 1996); *Bourque v. Powell Elec. Mfr. Co.*, 617 F.2d 61, 65 (5th Cir. 1980). Originally under Title VII, the only remedies available for sexual harassment claims were reinstatement, front pay, back pay, and injunctive and declaratory relief. *Perry*, *supra* note 13, at 552 n.62. The Civil Rights Act of 1991 expanded relief to include punitive and compensatory damages for pain and suffering or emotional distress. *Id.* at 552. Proving constructive discharge, however, still remains essential to obtaining full recovery. *Id.* Plaintiffs may recover back pay and be reinstated only if the employer actually or constructively discharges the employee. *Id.* Without proving constructive discharge, a sexual harassment victim may only obtain a limited amount of compensatory and punitive damages. *Id.*

²⁸¹ *See Kagay*, *supra* note 11, at 1047; Comment, *supra* note 236, at 1010.

²⁸² *Pa. State Police v. Suders*, 124 S.Ct. 2342, 2357–58 (2004) (Thomas, J., dissenting).

²⁸³ *Id.* at 2358.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *See id.* at 2358–59.

intolerable conditions adequately, however, the employer's actions in effect endorse the conditions, and the constructive discharge functions, in practical terms, as an official action of the employer.²⁸⁷ Accordingly, constructive discharge under the Unitary Standard operates just as Justice Thomas suggested it should: as the functional equivalent of an actual discharge.

2. *The Unitary Standard Is Consistent with Agency Principles*

The Unitary Standard also conforms to legal precedent because the standard does not violate agency principles. Throughout *Pennsylvania State Police v. Suders*; *Burlington Industries, Inc. v. Ellerth*; *Faragher v. City of Boca Raton*; and *Meritor Savings Bank v. Vinson*, the Court repeatedly stressed the importance of agency principles in determining employer liability standards.²⁸⁸ As the Court held in *Suders*, employers should be strictly liable only when the agency relation aids the misconduct.²⁸⁹ The Court then required an official act before holding the employer strictly liable, explaining that “[a]bsent . . . an official act, the extent to which the supervisor’s misconduct has been aided by the agency relation . . . is less certain.”²⁹⁰ These agency principles ensure that courts hold employers liable only in instances in which they are at fault and can control the work environment. As a result, any new sexual harassment/constructive discharge standard, at the very least, must remain consistent with these principles.

Thus far, courts have been unwilling to find strict liability for all constructive discharges, because they have feared that doing so would extend employer liability to situations in which the agency relation did not aid the misconduct. For instance, in *Caridad v. Metro-North Commuter Railroad*, the Second Circuit refused to find that constructive discharges are tangible employment actions because it did not find that co-worker constructive discharge involved misconduct aided by an agency relation.²⁹¹ The court explained that employers empower supervisors, but not co-workers, to act as agents of the employer; therefore, only supervisors can engage in “official acts.” Without an official action or other evidence of an agency relation, the court was unwilling to hold employers strictly liable.

²⁸⁷ See Shuck, *supra* note 29, at 440 (arguing that a constructive discharge that results due to the employer’s failure to correct harassing behavior should be deemed a tangible employment action of that employer); Comment, *supra* note 236, at 1010–11 (same).

²⁸⁸ *Suders*, 124 S. Ct. at 2352–56; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 801–02 (1998); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986).

²⁸⁹ *Suders*, 124 S. Ct. at 2353, 2355.

²⁹⁰ *Id.* at 2355 (emphasis added).

²⁹¹ *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999).

The *Suders* Court adopted a similar reasoning when it commented that “[u]nlike an actual termination, which is *always* effected through an official act of the company, a constructive discharge need not be.”²⁹² According to the Court, constructive discharges can arise from three situations: co-worker conduct, unofficial supervisory conduct, or an official company act.²⁹³ The Court declined to extend automatic employer liability to all constructive discharges because it argued that only an official company act sufficiently incorporates agency principles. An “official company act,” according to the Court, must involve an adverse change of employment status or situation because only then does the employer have the ability to monitor and change adverse conditions.²⁹⁴

While the courts have valid concerns for limiting employer liability to situations in which an official company act is involved, the Court’s official action definition is too restrictive and does not incorporate all situations in which the employer empowers its employees to discriminate. Indeed, the *Suders* Court did not rule that employer responsibility is limited to a supervisor’s official acts, but only that employer responsibility “*is less certain*” beyond that particular context.²⁹⁵ The Unitary Standard appropriately adopts a more encompassing dividing line between those constructive discharges aided by supervisor action or inaction on the one hand, and other types of sexual harassment not caused or assisted by the employer’s agents on the other hand. The Unitary Standard, in short, expands the “official act” definition to include all employer-caused constructive discharges. Because employer fault must always be present in order to make out a violation of the Unitary Standard, that test is consistent with agency principles.

Under the Unitary Standard, a court should never impose liability on an employer unless the employer has some control over the conduct in question and is in a position to remedy the harassment. Contrary to the Court’s suggestion in *Suders*,²⁹⁶ an employer may be in this position in cases involving what the Court labeled “co-worker” and “unofficial supervisory conduct.” For example, if a co-worker routinely harasses another employee in the privacy of one of their homes, the employer has no control over the

²⁹² *Suders*, 124 S. Ct. at 2355.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* (emphasis added). The Court in *Ellerth* similarly acknowledged that a supervisor’s tangible employment action was not the exclusive realm of employer responsibility, but simply “a class of cases where, *beyond question*, more than the mere existence of the employment relation aids in commission of the harassment.” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760 (1998) (emphasis added).

²⁹⁶ *See Suders*, 124 S. Ct. at 2355.

forum and should not bear any responsibility for the co-worker's actions. The employer's responsibility changes, however, when the co-worker brings his inappropriate behavior into the workplace, and the employer has knowledge of it. In this instance, the employer has the power to remedy the situation because the conditions exist in an environment that the employer controls. The employer also has a duty to maintain a harassment-free workplace. If the employer fails to act, the employer empowers the co-worker harasser to continue harassing the victim and sends a message to its workforce that the misconduct is acceptable.

For similar reasons, an employer should be liable when it knows or should know that one of its supervisors is harassing an employee in the workplace. The Court in *Suders* stated that supervisor harassment by itself does not involve an official action because it "involve[s] no direct exercise of company authority."²⁹⁷ When, however, employer knowledge attaches to the harassment, the employer directly exercises company authority. By allowing known intolerable conditions to continue, the employer indirectly causes the employee's resignation. As a result, a demotion or transfer need not attach to the harassment to establish the degree of culpability that warrants a finding of employer liability.

The Court uses agency principles as a guide to ensure that courts do not hold employers liable for harassment that is not their fault. The Unitary Standard does not violate these principles, because the standard only allows courts to find a constructive discharge when the employer is at fault by directly or indirectly causing the intolerable conditions. The Unitary Standard protects employers that take appropriate steps to remedy the harassment.

C. The Unitary Standard: Vicarious Liability, Negligence, or Neither?

As mentioned above, the proposed Unitary Standard incorporates elements of both the vicarious liability and negligence standards. The Unitary Standard, however, departs from both approaches to create a new employer liability paradigm, one that redresses victims' injuries without holding employers liable for workplace conduct which they could not control. Consequently, it is inappropriate to categorize the Unitary Standard as either a strict liability or negligence standard of liability. For example, despite the Unitary Standard's resemblance to a vicarious liability standard, the Unitary Standard draws on elements of the affirmative defense and, therefore, departs from strict liability.²⁹⁸ Under the Unitary Standard, the plaintiff cannot

²⁹⁷ *Id.* at 2356 (quoting *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 33 (1st Cir. 2003)).

²⁹⁸ See *supra* note 16 for a description of the elements of the affirmative defense.

establish employer fault without proving that the employer knew or should have known of the sexually harassing behavior and failed adequately to respond to such behavior. In some cases, the plaintiff also must show an effort to mitigate. These elements bear a similarity to the *Ellerth-Faragher* affirmative defense,²⁹⁹ but they offer more flexibility. First, the employee only needs to establish mitigation when the employer had constructive knowledge of the harassment and not in cases in which the employer had actual knowledge of the harassment. Additionally, the Unitary Standard only requires the employee to “do something” to inform the employer of workplace harassment. Rather than forfeiting all legal rights by failing to follow strictly an employer’s formal reporting procedures, the employee can satisfy the mitigation requirement by taking such steps as may be practicable to alert the employer to the existence of the harassment.

Eliminating the *Ellerth-Faragher* affirmative defense is also important because the defense has created an almost insurmountable barrier for victims of sexual harassment to overcome. Empirical studies have shown that although employers have the burden of proof when raising the affirmative defense, they have been overwhelmingly successful in establishing the defense, especially at the summary judgment stage.³⁰⁰ Two patterns have emerged. First, in determining whether “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,”³⁰¹ lower courts typically find that an employer’s implementation of a sexual harassment policy by itself satisfies this first prong of the defense.³⁰² Additionally, as discussed above, employers often establish the second element of the defense, that the “employee unreasonably failed to take advantage of any preventative or corrective opportunities,”³⁰³ whenever an employee fails to use the policy’s grievance mechanism to report harassment immediately upon its occurrence.³⁰⁴ In effect, the courts’ interpretation of the affirmative defense prevents plaintiffs from surviving summary judgment unless they disprove the affirmative defense in addition to proving the elements of their harassment claim.³⁰⁵ The Unitary Standard attempts to

²⁹⁹ A number of scholars have noted that the constructive discharge inquiry duplicates certain elements of the *Ellerth-Faragher* affirmative defense. See Shari M. Goldsmith, *The Supreme Court’s Suders Problem: Wrong Question, Wrong Facts Determining Whether Constructive Discharge Is a Tangible Employment Action*, 6 U. PA. J. LAB. & EMP. L. 817, 836–39 (2004); Kagay, *supra* note 11, at 1059–60; Shuck, *supra* note 29, at 444–45.

³⁰⁰ Chamallas, *supra* note 7, at 354.

³⁰¹ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

³⁰² Beiner, *supra* note 7, at 285; Sherwyn, *supra* note 8, at 1290.

³⁰³ *Ellerth*, 524 U.S. at 765.

³⁰⁴ See *supra* notes 243–45 and accompanying text.

³⁰⁵ Lawton, *supra* note 87, at 199.

reduce this inequitable burden by eliminating the affirmative defense and providing a more flexible mitigation requirement.

Although the Unitary Standard also resembles the negligence standard for employer liability, it departs from that standard as well. Courts have applied the negligence standard to situations in which an employer negligently responds to the harassment of a co-worker or a supervisor acting outside the scope of employment.³⁰⁶ Courts hold the employer liable under the negligence standard when the employer knew or should have known of the harassment but failed to take immediate and appropriate corrective action.³⁰⁷ The Unitary Standard seeks to extend a similar analysis to all harassment, regardless of whether it is perpetrated by a supervisor or a nonsupervisory co-worker. But “negligence” is an inappropriate label for the Unitary Standard because it addresses a range of employer culpability, from situations in which the employer is negligent to cases where the employer deliberately encourages the harassment or intends for it to continue. The Unitary Standard will not, however, impose liability on an employer, unless the employer is at fault for sexual harassment that causes an employee to resign. In essence, the Unitary Standard incorporates elements of the affirmative defense into its constructive discharge analysis, thereby alleviating any concern that liability will extend to employers under inappropriate circumstances.³⁰⁸

Ultimately, the Unitary Standard’s flexibility will provide a remedy to harassed employees in a wider variety of situations in which an official action is involved. The standard streamlines employer liability analysis because courts only need to ask one question: Did the employer, by causing or failing to correct known harassment, constructively discharge the employee?

This simplification of the sexual harassment/constructive discharge analysis comes with two particular advantages. First, the Unitary Standard cuts through the Gordian Knot of confusion that has surrounded the sexual harassment/constructive discharge arena for decades. The Unitary Standard does away with the cumbersome, multistep analysis currently necessitated by the separate, yet overlapping sexual harassment and constructive discharge inquiries. Courts will no longer need to grapple with various constructive discharge standards, decide if the particular situation involves an official action, and then apply the *Ellerth-Faragher* affirmative defense if the answer to that question is in the negative. The Unitary Standard, in short, replaces

³⁰⁶ See *Ellerth*, 524 U.S. at 758; *Faragher v. City of Boca Raton*, 524 U.S. 775, 799 (1998); see also *supra* note 134 (listing examples of negligence standard cases).

³⁰⁷ See *Ellerth*, 524 U.S. at 758; see also 29 C.F.R. § 1604.11(d) (2005).

³⁰⁸ See *infra* notes 298–99 and accompanying text.

the current confusion with a single test applicable to all constructive discharges resulting from sexually harassing conduct.

The Unitary Standard also provides a more equitable substantive standard for the sexual harassment/constructive discharge context. Under the current analytical framework, a harassment victim bears a heavier burden to establish a constructive discharge than do employees asserting other types of harassment claims.³⁰⁹ As the Supreme Court stated in *Suders*, a constructive discharge claimant must establish “an aggravated case of sexual harassment” by showing not only severe or pervasive harassment, but also that such harassment reached such intolerable heights that quitting became a fitting response.³¹⁰ In many instances, the employee must also establish that the employer intended that outcome and that the employee promptly reported the harassment through formal channels. The Unitary Standard more equitably lowers the substantive bar for constructive discharge claims to a level commensurate with that of other types of sexual harassment claims. Further, by requiring the employer to halt harassing behavior, however known, the Unitary Standard best implements a policy of deterring and preventing workplace harassment.

V. CONCLUSION

The legal landscape with respect to constructive discharges resulting from sexually harassing conduct has been mired in confusion for the past two decades. Courts generally have applied a multistep analysis that requires plaintiffs to establish the existence of severe or pervasive sexual harassment as well as additional aggravating factors warranting a constructive discharge response. The courts, however, have trod a meandering path in attempting to define the contours of the separate harassment and constructive discharge tests. The Supreme Court has weighed in on several occasions, but rather than opting for clarity, the Court has created new tests and new terminology that have compounded the confusion. The *Suders* decision is a case in point. The Court’s use of the “official action” and “constructive discharge” concepts sets an unpredictable course and fails to correct the unfairness of the current multitiered analytical framework.

This Article attempts to simplify and recalibrate the sexual harassment/constructive discharge standard. We propose a Unitary Constructive Discharge Standard that would provide a single mode of analysis applicable to all claims of constructive discharge resulting from workplace sexual harassment. The proposal merges elements of the current

³⁰⁹ See Chamallas, *supra* note 7, at 315–16; Kagay, *supra* note 11, at 1048–50; Perry, *supra* note 13, at 552–57.

³¹⁰ Pa. State Police v. Suders, 124 S. Ct. 2342, 2354 (2004).

strict liability and negligence tests and asks a single question: Did the employer fail to redress sexual harassment of which it was or should have been aware such that quitting was a fitting response for the employee subjected to the harassment? The proposal jettisons two of the most unfair elements of the current calculus, namely the requirement that the harassment victim must always utilize formal complaint procedures and the requirement in some circuits that harassment is actionable only if the employer subjectively intended that result. While thereby removing the necessity for employees to make out a case of “aggravated” harassment in the constructive discharge context, the Unitary Standard nonetheless protects employer interests by ensuring that no liability will ensue in the absence of causal fault attributed to an agent of the employer. The result is a test that is both simpler and more fair.