PENNSYLVANIA STATE POLICE V. SUDERS

124 S. CT. 2342 (2004)

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INTRODUCTION

Title VII of the Civil Rights Act of 1964[1] made it unlawful for employers to discriminate against people on the basis of sex.[2] Those who suffer workplace sexual harassment may establish a claim for the violation of Title VII because courts recognize harassment as a form of discrimination based on sex..[3] When sex discrimination occurs in the context of employment, employers can be held liable and the victim-

1. *See* 42 U.S.C. §§ 2000e to 2000e-17 (2004) (noting that discrimination on the basis of race, color, religion, and national origin is also unlawful).

2. *See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (noting that discrimination in the workplace often occurs with respect to compensation, terms, conditions or privileges of employment).

3. *See Meritor*, 477 U.S. at 64, 73 (recognizing a Title VII cause of action for "hostile environment sex discrimination"). The Court stated that "[w]ithout question, when a supervisor sexually harasses a subordinate because of that subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.*

employee can recover monetary damages.[4]

Therefore, many employers have sought to insulate themselves from Title VII suits by establishing policies prohibiting sexual harassment.[5] Such policies, which often forbid "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,"[6] have not been completely effective in eradicating harassing behavior.[7] However, it appears that anti-harassment policies are having some effect, as there has been a recent downward trend in the number of sexual harassment charges filed since 1997.[8] In fact, in 2003, the number of charges filed was at the lowest point in almost ten years.[9]

In cases of sexual harassment, an employer is not automatically liable for a supervisor's harassment of a subordinate. Rather, liability hinges on whether the supervisor used the official power bestowed upon him by the employer in creating the hostile work environment, thereby causing the subordinate to resign, in effect, a constructive discharge. Those issues have been addressed by the Supreme Court in several cases, the most recent of which is *Pennsylvania State Police v. Suders.*[10]

I. LEGAL BACKGROUND

It is important to understand a series of events that often leads to

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4. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)) (providing for compensatory and punitive damages when an individual who suffers discrimination in the workplace makes the requisite showing).

5. *See generally* Daniel J. Harmelink, Note, *Employer Sexual Harassment Policies: The Forgotten Key to the Prevention of Supervisor Hostile Environment Harassment*, 84 IOWA L. REV. 561 (1999) (examining several cases where an employers' sexual harassment policies were at issue).

6. 29 C.F.R. § 1604.11 (2004) (noting that this conduct becomes harassment when an employee's submission to harassment becomes a term or condition of employment, rejection of the conduct is the basis for an employment decision, or the conduct creates an intimidating, hostile or offensive work environment that interferes with the performance).

7. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SEXUAL HARASSMENT CHARGES (2003) [herinafter SEXUAL HARASSMENT] (charting the number of sexual harassment charges filed and processed with administrative agencies from 1992 to 2003 and denoting the filing of 15,889 charges in 1997, which was the highest in history), *available at* http://eeoc.gov/stats/harass.html (last visited Oct. 28, 2004).

8. *Id.* (showing the decline of sexual harassment charges from 15,889 in 1997 to 13,566 in 2003).

9. *See id.* (demonstrating that the 13,566 charges filed in 2003 was the lowest amount since 1993 when 11,908 charges of sexual harassment were made).

10. 124 S. Ct. 2342, 2350 (2004) (examining whether an employee's claim of constructive discharge constitutes a tangible employment action, thereby precluding the employer's affirmative defense to harassment).

someone filing charges of sexual harassment and constructive discharge.[11] First, someone in a supervisory position sexually harasses an employee.[12] The sexual harassment escalates to a higher level. When the employee reaches a breaking point, the employee resigns as a result of the work conditions created by the harassment. The resignation occurs regardless of whether the employee reports the harassment to someone in a position of authority. Finally, the employee files charges with a governmental agency, giving rise to the employee's right to bring suit for constructive discharge and sexual harassment.

A. Constructive Discharge

Alleged victims of sexual harassment often claim that they were forced to resign, or were constructively discharged, as a result of the hostile working environment created by the harassment. [13] In order to prevail on such a claim, a plaintiff must prove that "working conditions [are] so intolerable that a reasonable employee would be forced to resign."[14] Prior to the Supreme Court issuing its decision in *Suders*, a split within the Courts of Appeals existed as to whether a constructive discharge, when proven, was a tangible employment action,[15] thereby requiring an employer to be held strictly liable for harassment suffered by the employee.[16]

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11. *See, e.g.*, Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 747-49 (1998) (explaining that after being repeatedly harassed by a supervisor from 2003 to 2004, a salesperson finally quit and filed a sexual harassment claim with the EEOC, who gave her permission to sue her employer); Faragher v. City of Boca Raton, 524 U.S. 775, 780-83 (1998) (stating that a lifeguard who was continuously harassed by her supervisors from 1985 to 1990, quit her job in 1990 and filed suit in 1992); Suders v. Easton, 325 F.3d 432, 435-38 (3d Cir. 2003) (noting that a police communications operator suffered severe sexual harassment for five months, which forced her to resign and file suit against her supervisors and employer).

12. This paper does not deal with sexual harassment caused by co-workers or others that an employee may come into contact with in the context of employment.

13. *See generally* Cathy Shuck, Comment, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKELEY J. EMP. & LAB. L. 401 (2002) (explaining the history behind and the reasoning for constructive discharge claims).

14. *See Easton*, 325 F.3d at 443-44 (noting that some circuits require the proof of specific intent to cause discharge of the employee on the part of the employer).

15. *See Ellerth*, 524 U.S. at 761 (defining a tangible employment action as something that causes direct economic harm because of "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").

16. *Compare* Jaros v. LodgeNet Entertainment Corp., 294 F.3d 960, 962 (8th Cir. 2002) (affirming judgment in favor of the employee who claimed constructive discharge as a result of sexual harassment), *with* Caridad v. Metro-North Commuter Railroad, 191 F.3d 283, 286 (2d Cir. 1999) (dismissing plaintiff's sexual harassment

Prior to the decision in *Suders*, the Second and Sixth Circuits held that a constructive discharge did not qualify as a tangible employment action.[17] Directly opposing that view, the Third and Eighth Circuits concluded that a constructive discharge was a tangible employment action because it had consequences identical to that of an actual termination.[18] A third position emerged within the federal judicial circuit, which qualified constructive discharges as tangible employment actions only when precipitated by an employer's official act.[19] The Supreme Court granted certiorari to resolve this disagreement among the circuits.[20]

B. Hostile Work Environment Claims

In 1998, the Supreme Court decided the two leading cases examining the issues of employer liability for a hostile work environment created by an employee in a supervisory role. Both *Burlington Industries, Inc. v. Ellerth*[21] and *Faragher v. City of Boca Raton*[22] hold that an employer is strictly liable for discriminatory harassment if that harassment results in a tangible employment action.[23] However, if no tangible employment action has occurred, employers may assert an affirmative defense.[24]

In *Ellerth*, a salesperson asserted a hostile work environment claim,

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claim because a constructive discharge was not a tangible employment action).

17. *See, e.g.*, *Caridad*, 191 F.3d at 294; Turner v. DowBrands, Inc., No. 99-3984, 2000 U.S. App LEXIS 15733, at *1 (6th Cir. June 26, 2000) (allowing assertion of the *Ellerth-Faragher* affirmative defense because no tangible employment occurred); *see infra* notes 21-39 and accompanying text (discussing the *Ellerth-Faragher* affirmative defense).

18. *See, e.g.*, *Easton*, 325 F.3d at 447; *Jaros*, 294 F.3d at 966 (prohibiting the assertion of the *Ellerth-Faragher* affirmative defense and holding employers strictly liable).

19. *See, e.g.*, Reed v. MBNA Marketing Systems, Inc., 333 F.3d 27 (1st Cir. 2003) (noting that unfulfilled threats of termination are not official acts); Robinson v. Sappington, 351 F.3d 317 (7th Cir. 2003) (indicating that transferring a harassed employee to a position which would be "hell" for the first six months and encouraging her resignation could be construed as official acts).

20. *See* Pa. State Police v. Suders, 124 S. Ct. 803 (2004) (granting certiorari).

21. 524 U.S. at 742.

22. 524 U.S. at 775.

23. *See Ellerth*, 524 U.S. at 760-61 (relying on agency principles to conclude that when a supervisor acts within the scope of his responsibility, the employer is strictly liable for that supervisor's sexual harassment); *see also Faragher*, 524 U.S. at 807 (identifying discharge, demotion, and undesirable reassignment as tangible employment actions).

24. *See Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 805 (stating that the affirmative defense consists of two elements: 1) that the "employer exercised reasonable care to prevent and correct" harassment and 2) that the "employee unreasonably failed to take advantage" of employer sponsored corrective opportunity).

based on a supervisor's unwanted physical advances, offensive sexual comments, and threats to deny her tangible job benefits.[25] Although the male supervisor threatened to "make [the salesperson's] life very hard" unless she surrendered to his advances, he never engaged in conduct which rose to the level of a tangible employment action.[26] The salesperson eventually resigned without reporting the harassing conduct, later citing the supervisor's harassment as the reason for her resignation.[27]

In *Faragher,* a lifeguard claimed that her supervisor made unwanted and offensive physical contact, lewd remarks, and discriminatory comments regarding women.[28] The City, her employer, had an established sexual harassment policy but failed to disseminate it to all employees.[29] The lifeguard never filed a formal complaint and later resigned as a result of the harassment.[30]

The Supreme Court issued its decisions on *Ellerth* and *Faragher* on the same day.[31] To impute liability to employers for the acts of supervisors, the Court relied upon agency principles.[32] General agency principles require employer liability for acts of its agents when conduct falling within the scope of employment causes harm.[33] Sexual harassment by a supervisor is assumed to be outside the scope of employment.[34] However, when a supervisor is aided by the agency relationship in committing the discrimination, employers can be vicariously liable.[35]

Whether employers should be held strictly liable or can successfully

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25. *See Ellerth*, 524 U.S. at 747-49.

26. *See id.* at 748 (showing that the employer made sexual remarks about the employees anatomy and made physical contact).

27. *See id.* at 748-49 (claiming the supervisor's sexual harassment caused the employee's constructive discharge).

28. *See Faragher*, 524 U.S. at 780-81 (stating that the supervisor said he "would never promote a woman to the rank of lieutenant").

29. *See id.* at 781-82 (showing that the supervisor and employee involved had no knowledge of the anti-harassment policy).

30. *See id.* at 780-83 (noting that employees discussed the harassment with a training supervisor who responded to the complaints by stating that "the city just [doesn't] care") (alteration in original).

31. *See Ellerth*, 524 U.S. at 742 (deciding the case on June 26, 1998); *see also Faragher*, 524 U.S. at 775 (deciding the case on June 26, 1998).

32. *See Ellerth*, 524 U.S. at 759-63; *see also Faragher*, 524 U.S. at 793-97.

33. *See Ellerth*, 524 U.S. at 757; *Faragher*, 524 U.S. at 793.

34. *See Ellerth*, 524 U.S. at 757; *Faragher*, 524 U.S. at 793-94 (noting that sexual harassment furthers the harasser's interest, rather than the employer's interest).

35. *See Ellerth*, 524 U.S. at 758; *Faragher*, 524 U.S. at 791 (noting that promotion or termination of a subordinate is a decision which is aided by the agency relationship).

assert a defense to liability was an issue resolved in *Faragher* and *Ellerth*. An employer has no defense, and is strictly liable, when harassment takes the form of a tangible employment action.[36] However, an employer is not automatically liable for every charge of sexual harassment.[37] The Supreme Court articulated the *Ellerth-Faragher* affirmative defense, which could be used in instances of harassment that did not culminate in a tangible employment action.[38] When asserting the affirmative defense, the employer has the burden of proof to demonstrate by a preponderance of the evidence that (1) the "employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer."[39] If the employer can demonstrate both of these elements, it can completely avoid liability for the discriminatory harassment engaged in by its employee-supervisor.

II. FACTS OF *PENNSYLVANIA STATE POLICE V. SUDERS*[40]

The Pennsylvania State Police ("PSP") hired Nancy Drew Suders in March 1998 to work as a police communications operator ("PCO") in the McConnellsburg barracks.[41] Just a few months after she began work, Suders claimed that she suffered severe sexual harassment and mistreatment at the hands of supervising officers, which ultimately caused her to resign in August 1998.[42]

Three supervisors at the McConnellsburg barracks, Sergeant Eric Easton, Patrol Corporal William Baker and Corporal Eric Prendergast, were responsible for "instances of name calling, episodes of explicit sexual gesturing, obscene and offensive sexual conversation, [and

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36. *See, e.g.*, *Ellerth*, 524 U.S. at 761; *Faragher*, 524 U.S. at 807.

37. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807 (noting that automatic liability only occurs if the harassment culminated in a tangible employment action).

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

39. *See Ellerth*, 524 U.S. at 764-65 (reasoning that the purpose of Title VII would best be served if employers were encouraged to create anti-harassment policies and employees were encouraged to report harassment); *see also Faragher*, 524 U.S. at 805.

40. 124 S. Ct. at 2347 (maintaining that these facts are presented in a light most favorable to Nancy Drew Suders because the Pennsylvania State Police prevailed in its motion for summary judgment in the district court).

41. *See Easton*, 325 F.3d at 436 (noting that other officers opposed her candidacy because they viewed it as a political appointment, due to the assistance given to Suders by a Republican party official during the application process).

42. *See id.*

the] posting of vulgar images."[43] Sergeant Easton, the supervisor of the barracks, often initiated conversations with Suders regarding people having sex with animals.[44] On several occasions, Easton sat near Suders' workspace, leered at her, "put his hands behind his head, and spread his legs apart" while wearing spandex shorts.[45] In Suders' presence, Easton said to Corporal Prendergast, "if someone had a daughter, they should teach her how to give a good blow job!"[46] Corporal Baker, at least five to ten times per shift, would "grab hold of his private parts and yell, suck it."[47] He would also rub his buttocks and say to Suders, "'I have a nice ass, don't I!'"[48] Prendergast attempted to intimidate her and verbally harassed her by calling her a liar.[49]

Suders did not report the harassment to anyone at the McConnelsburg barracks.[50] In June 1998, Suders approached Virginia Smith-Elliott, the Equal Employment Opportunity Officer for the PSP.[51] Suders told Smith-Elliott that she might need help, but did not mention the details of her situation.[52] In August 1998, Suders had reached her "breaking point," so she contacted Smith-Elliott and informed her that she was being harassed and that she was afraid.[53] Smith-Elliott instructed Suders to file a complaint, but failed to tell Suders where she could obtain the necessary form.[54] Suders claims that she found Smith-Elliot "insensitive" about the harassment and "unhelpful" in resolving the situation.[55]

A few days later, Suders resigned after an incident in which she was set up and falsely accused of theft.[56] The incident stemmed from a

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43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *See id.* at 437 (explaining that Suders asked him to stop, but Baker responded by gesturing once again).

48. *See id.*

49. *See id.* (describing the intimidation technique as pounding on the furniture in Suders' workspace while wearing black gloves).

50. *See id.* at 438 (noting that the only people at Suders' place of employment to whom she could report the harassment were the ones she accused of harassment).

51. *Id.*

52. *See id.* (stating that neither party followed up on Suders' allegations of sexual harassment).

53. *Id.*

54. *See id.* (noting that Suders attempted to find the form on her own, but was unsuccessful).

55. *Id.*

56. *See id.* at 438-39.

computer proficiency examination Suders was required to take.[57] She had taken the exam a number of times and was told she failed each time.[58] One day, Suders found her tests in a drawer in the women's locker room and concluded that her supervisors had never forwarded the tests for grading and had lied about her failing scores.[59] Suders took the examinations from the drawer.[60] Her supervisors found out that she had removed the exams and apprehended her when she returned them.[61] The supervisors handcuffed, questioned, and held Suders against her will.[62] Following the accusation of theft, Suders resigned from her position as PCO.[63]

III. SUMMARY OF JUDICIAL DECISIONS RELATED TO SUDERS' CLAIM

A. *District Court Ruling and Analysis*

Suders brought suit in U.S. District Court for the Middle District of Pennsylvania in September 2000, claiming that she was sexually harassed and constructively discharged.[64] The district court granted the PSP's motion for summary judgment because Suders could not establish that the PSP was vicariously liable for the harassing conduct of the supervisors.[65]

On the issue of vicarious liability, the court concluded that the affirmative defenses set forth in *Ellerth* and *Faragher* were applicable.[66] As a matter of law, the PSP could successfully defend itself because Suders failed to report the harassing conduct and did

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57. *See Suders*, 124 S. Ct. at 2348.

58. *Id.*

59. *Id.*

60. *Id.*

61. *See id.* (noting that the officers dusted the drawer and file with theft detection powder which turned Suders' hands blue when she returned the exams).

62. *See id.* (explaining that the supervisors read Suders the *Miranda* warning); *Easton*, 325 F.3d at 439 (noting that the officers treated her as they would any theft suspect).

63. *See Suders*, 124 S. Ct. at 2348.

64. *See id.*; *see also Easton*, 325 F.3d at 439-40 (explaining that the court granted the PSP's motions for summary judgment on Suders' additional claims of discrimination based on age, sex, and political affiliation).

65. *See Suders*, 124 S. Ct. at 2349; *see also* Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (requiring a plaintiff who alleges a hostile work environment to prove that: (1) the plaintiff "suffered intentional discrimination;" (2) the "discrimination was pervasive and regular;" (3) the "discrimination detrimentally affected" the plaintiff; (4) the harassing conduct would affect a reasonable person in the same position as the plaintiff; and (5) the employer is vicariously liable for the conduct of the alleged harasser).

66. *See Easton*, 325 F.3d at 440.

not permit the PSP an opportunity to correct the situation.[67] The court cited Suders' contact with the PSP's Equal Employment Opportunity Officer as being insufficient to constitute use of the PSP's internal corrective process.[68] Because it granted summary judgment on the hostile work environment claim, the court did not reach the question of whether a valid constructive discharge claim would affect the availability of the *Ellerth-Faragher* affirmative defense.[69]

B. Appellate Court Ruling and Analysis

The U.S. Court of Appeals for the Third Circuit reversed the judgment of the district court and remanded the hostile work environment and constructive discharge claims for disposition on the merits.[70] In so concluding, the appellate court determined that Suders had alleged enough evidence for a trier of fact to conclude she was sexually harassed and the PSP could be held vicariously liable.[71] On the issue of vicarious liability, the Third Circuit held that summary judgment was improperly granted because genuine issues of material fact existed as to the elements of the *Ellerth-Faragher* affirmative defense.[72] Specifically, the court questioned the effectiveness of the PSP's remedial program and whether the PSP exercised reasonable care to prevent or correct the harassing behavior.[73]

The Court of Appeals ruled that "a constructive discharge, when proved, constitutes a tangible employment action."[74] In its analysis, the Third Circuit determined that the District Court erred in failing to address Suders' constructive discharge claim.[75] To prove a claim of constructive discharge, the plaintiff must prove that (1) the harassment became so intolerable that a reasonable person in the employee's position would resign[76] and (2) the plaintiff's decision to

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67. *Id.*

68. *Id.*

69. *Id.*

70. *See Suders*, 124 S. Ct. at 2350.

71. *See Easton*, 325 F.3d at 442-43.

72. *Id.* at 443.

73. *See id.* (questioning the conduct of the PSP's Equal Employment Opportunity Officer after being contacted by Suders).

74. *Id.* at 447.

75. *See id.*

76. *See id.* at 444 (comparing the objective standard to a standard that exists in other circuits, requiring specific intent of the employer to bring about the employee's discharge). The court advised that a threshold of intolerability exists and the plaintiff must show that a reasonable person would have felt compelled to resign. *Id.* at 444-45.

resign was reasonable under the circumstances.[77] Applying this standard to the alleged facts, including offensive comments, acts of intimidation, sexual gestures, and the accusation of theft, the court concluded that the constructive discharge claim should have been heard because Suders had raised a genuine issue of material fact.[78] If Suders proved that she suffered a constructive discharge, the PSP was precluded from using the *Ellerth-Faragher* affirmative defense.[79]

C. *Supreme Court Ruling and Analysis*

The Supreme Court granted certiorari to resolve the split among the Courts of Appeals regarding whether an employer must be held strictly liable when a supervisor's sexual harassment is the underlying cause of an employee's constructive discharge.[80] In an 8-1 decision, the Court held that an employer can only be held strictly liable for a supervisor's harassment if there has been an "official act" accompanying the employee's constructive discharge.[81] The Court vacated the judgment of the Third Circuit and remanded the case.[82]

Justice Ginsburg wrote for the majority and began the analysis by discussing the familiar framework set forth in *Ellerth* and *Faragher*.[83] The Court classified all hostile work environment claims on the basis of whether the employee had suffered a tangible employment action.[84] It did so because "tangible employment actions fall within the special province of the supervisor, who has been empowered by the company as . . . [an] agent to make economic decisions affecting

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77. *See id.* at 445 (noting that the employee's exploration of alternatives to resignation, including attempts to remedy the discrimination, might be relevant).

78. *See id.* at 446.

79. *See Suders*, 124 S. Ct. at 2350 (explaining that this holding precludes the use of the *Ellerth-Faragher* affirmative defense in *all* hostile work environment cases where the employee claims he or she suffered a constructive discharge).

80. *See id.* ("[W]hether a constructive discharge brought about by supervisor harassment ranks as a tangible employment action and therefore precludes assertion of the affirmative defenses articulated in *Ellerth* and *Faragher*"); *see also* Brief for Petitioner at 1, Pa. State Police v. Suders, 124 S. Ct. 2342 (2004) (No. 03-95) ("When a hostile work environment created by a supervisor culminates in a constructive discharge, may the employer assert the affirmative defenses recognized in [*Ellerth* and *Faragher*]?").

81. *See Suders*, 124 S. Ct. at 2355-57 (noting Justice Thomas as the sole dissenter).

82. *Id.* at 2357.

83. *Id.* at 2352.

84. *See id.* at 2352 (noting that when harassment results in a tangible employment action, an employer is strictly liable but when harassment occurs in the absence of a tangible employment action, an employer may assert an affirmative defense).

other employees under his or her control."[85]

Justice Ginsburg addressed the issue of whether a constructive discharge constitutes a tangible employment action. A plaintiff making a constructive discharge claim based on hostile work environment must show that "working conditions became so intolerable that a reasonable person would have felt compelled to resign."[86] Because a constructive discharge involves an employee's decision to leave, rather than an actual termination, the Court determined that constructive discharge may or may not be a tangible employment action.[87] In order for a constructive discharge to qualify as a tangible employment action, the supervisor must use his power to take some "official action."[88]

The Court draws a distinction on the basis of an "official act" because there may be some instances of harassment where the supervisor's position of authority has little to do with the harassing conduct.[89] If there is no "official act," it is uncertain to what extent the supervisor was aided by the agency relationship and used his position to the employee's disadvantage.[90] In that instance, an employer may assert the affirmative defense.

The Supreme Court vacated the Third Circuit's holding that a constructive discharge, when proven, is a tangible employment action because a constructive discharge does not always occur in the presence of a tangible employment action.[91] In its holding, the Third Circuit eliminated the use of the *Ellerth-Faragher* affirmative defense in all hostile work environment-constructive discharge claims, but permitted the defense in hostile work environment claims involving no tangible employment action.[92] As a result, "the *graver* claim of hostile-environment constructive discharge [would be] *easier* to prove than its lesser included component, hostile work environment."[93] The Supreme Court vacated the Third Circuit's judgment and

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85. *Id.* at 2353 (alteration in original) (internal quotation marks omitted).

86. *Id.*

87. *See id.* at 2355 (explaining that actual termination is always an official action but a decision to leave often involves no official action).

88. *See id.* at 2352-56 (providing examples of official acts, including demotion, failure to promote, termination, reduction in salary or benefits, dangerous job reassignment, and encouraging resignation rather than complying with employee's request for reassignment).

89. *Id.* at 2353.

90. *Id.* at 2355.

91. *Id.* at 2355-56.

92. *See id.* (explaining that jurors would be confused because of difficulty formulating coherent instructions).

93. *Id.* at 2356.

remanded the case for a finding of fact on both the hostile work environment and constructive discharge claims.[94]

In a brief dissent, Justice Thomas proposed that an employer should be liable only if the plaintiff proves that the employer negligently permitted the harassing conduct that caused a constructive discharge.[95] Therefore, he agreed that an employer should be strictly liable if the supervisor engages in an adverse employment action which directly causes a constructive discharge.[96] However, Justice Thomas disagrees with the majority's two-pronged affirmative defense and proposes that "where the alleged constructive discharge results *only* from a hostile work environment, an employer is liable if negligent."[97] He concludes that he would reverse the judgment by the Court of Appeals because Suders did not proffer sufficient evidence supporting her employer's negligence.[98]

IV. IMPLICATIONS

A. Implications for the Courts

The decision in *Suders* did not provide a definitive answer regarding the classification of constructive discharge as it relates to tangible employment actions, and the decision may have succeeded in further muddying the waters. When creating the "official act" standard, the Court did not indicate whether its list of "official acts" was all inclusive or if lower courts have discretion to expand upon them.[99] Certainly, "official acts" include the acts included in the *Ellerth* description of a tangible employment action, defined as a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[100] The Court in *Suders* expanded this list of "official acts" by announcing that "a humiliating demotion, extreme cut in pay, or transfer to a position in which [the employee] would face unbearable working conditions" would also qualify.[101] The Court indicated that

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94. *Id.* at 2357.

95. *Id.* at 2358 (Thomas, J., dissenting).

96. *Id.*

97. *See id.* at 2359 (emphasis added) (indicating that if an employer knows or should have known about the harassment, the employer can be held liable).

98. *Id.*

99. *Id.* at 2356.

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

101. *See Suders*, 124 S. Ct. at 2347.

"official acts" might include encouraging a harassed employee to resign, rather than accept reassignment, or placing a harassed employee in a dangerous job assignment as retaliation for not complying with sexual advances.[102]

More troubling, the Court offers no guidance as to whether the alleged facts in *Suders* would be sufficient for "official act" classification.[103] When three supervisors repeatedly engaged in offensive sexually-oriented conversations, obscene gesturing, and acts of intimidation, were those "official acts" under the Supreme Court's new standard? When Suders' supervisors failed to forward her proficiency examinations in efforts to thwart her success in her job, was that an "official act"? Would incidents likely to be reflected on personnel records qualify as "official acts," such as when Suders' supervisors accused her of theft, arrested and questioned her?[104] This new standard creates more questions and may be quite tricky when attempting to apply it to the facts in this or any other constructive discharge-hostile environment case.

B. Implications for Employers and Employees

The holding in *Suders* could be viewed as a win for employers, particularly in circuits where employers previously could not assert an affirmative defense to a claim of constructive discharge. Now, those employers have an opportunity to avoid liability by use of the *Ellerth-Faragher* affirmative defense. Although this does not mean that the employer will automatically prevail in the case, it affords the employer a chance to defend its actions.

Conversely, employees may celebrate this decision because they can now bring claims in circuits where a constructive discharge was forbidden from categorization as a tangible employment action.[105] In

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102. *See id.* at 2356 (pointing out that sexual assault would not qualify as an official act because it involved no exercise of company authority); *see also Reed*, 333 F.3d at 34 (stating that threatened tangible employment actions that are not carried out are not sufficient to qualify as official acts).

103. *See* Joanna Grossman, *Assessing a High Court Ruling on Employer Liability for Sex Harassment* (June 22, 2004) (proposing that the arrest stemming from proficiency examinations might satisfy the "official act" requirement), *available at* http://www.cnn.com/2004/LAW/06/22/grossman.scotus.harassment/index.html.

104. *See Suders*, 124 S. Ct. at 2353 ("Often, the supervisor will use the company's internal processes, and thereby obtain the imprimatur of the enterprise. Ordinarily, the tangible employment decision is documented in the official company records and may be subject to review by higher level supervisors.") (omitting internal quotations and citations).

105. *But see* Grossman, *supra* note 103 (arguing that this victory is useless because the Supreme Court, in its holding, "has made it almost impossible for 'constructive discharge' plaintiffs ever to win").

those circuits, employers were entitled to the *Ellerth-Faragher* affirmative defense. Now, the employer is strictly liable if the employee can show that some "official act" precipitated the constructive discharge.

No matter the jurisdiction, this decision encourages employers to keep a tight leash on their employees who hold supervisory positions because their actions could be viewed as "official acts" in the event a subordinate later alleges constructive discharge due to a hostile environment. In doing so, an employer may wish to install a system of checks and balances when decisions are made that result in an employee transfer, reassignment, demotion, reduction in pay, or termination.[106] In all of these instances, the change of employment status will likely be viewed as an "official act," and an employer may be held strictly liable for the constructive discharge as a result of a hostile environment.

Finally, some of the implications of this decision are unchanged from those of *Ellerth* and *Faragher,* which divided responsibilities between the employer and the victim-employee to prevent and correct harassment .[107] Still, the burden is on the victim-employee to use an employer-provided remedy in order to mitigate damages for harm the employee could have reasonably prevented.[108] The burden is on the employer to institute and enforce anti-harassment policies.[109]

CONCLUSION

Following the Court's decision in *Ellerth* and *Faragher*, the number of charges filed related to sexual harassment decreased significantly.[110] Likely, this trend occurred because employers realized the value of establishing anti-harassment policies and training employees as to the bounds of acceptable workplace behavior in efforts to insulate themselves from liability. In deciding *Suders,* the

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106. *See Suders*, 124 S. Ct. at 2347 (stating that "a humiliating demotion, extreme cut in pay, or transfer to a position in which [the employee] would face unbearable working conditions" would qualify as an "official act"); *see also Ellerth*, 524 U.S. at 761 (defining a tangible employment action as a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits").

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

108. *See Faragher*, 524 U.S. at 806-07.

109. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807 (noting that *effective* anti-harassment policies are necessary in order for the employer to successfully assert the *Ellerth-Faragher* affirmative defense).

110. SEXUAL HARASSMENT, *supra* note 7 (calculating that the number of charges filed for the years 2001, 2002, and 2003 are 15,475, 14,396, and 13,566, respectively). This downward trend could exist because fewer people are reporting harassment. *Id.*

Supreme Court not only resolved a split within the Courts of Appeals regarding whether a constructive discharge qualifies as a tangible employment action, but also reinforced the duty of employers to oversee the acts of its supervisors. Hopefully, the reinforcement of employer responsibility will positively impact efforts to eradicate workplace sexual harassment.

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