# *Pennsylvania State Police v. Suders*: The Constructive Discharge Doctrine's Applicability to Title VII Sexual Harassment Cases and the Availability of the *Ellerth/Faragher* Affirmative Defense

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## I. Introduction

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of a number of protected characteristics, including race, color, religion, sex, and national origin.[1] Therefore, it is unlawful for an employer to terminate an employee on the basis of one of these characteristics. The constructive discharge doctrine was created to address situations in which an employer forced the resignation of an employee by creating intolerable working conditions in an effort to avoid the protections of Title VII. Consequently, "[u]nder 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."[2]

The generality of Title VII of the Civil Rights Act of 1964 has made it particularly difficult for the courts to determine the boundaries of the types of claims that can be brought under the Act. The United States Supreme Court did not have occasion to reach any major conclusions on the availability and limitations of constructive discharge claims under Title VII until the 2004 case of *Pennsylvania State Police v. Suders*.[3] This note examines the Court's decision in *Suders* and the evolution of the constructive discharge doctrine, specifically its applicability to Title VII sexual harassment cases. Part II analyzes the origins and purpose of the doctrine. Part III discusses the Court's previous decisions in *Burlington Industries, Inc. v. Ellerth*[4] and *Faragher v. Boca Raton*,[5] which set the framework for *Suders* by establishing the important affirmative defense to Title VII constructive discharge cases that the Court in *Suders* more clearly defined. Part IV considers the Supreme Court's decision in *Suders* in light of *Ellerth* and *Faragher*, and Part V concludes with the practical impact the *Suders* decision will have on future employment practices.

## II. Evolution of the Constructive Discharge Doctrine

### *A. The Creation of the Constructive Discharge Doctrine*

"Constructive discharge" is defined as "[a] termination of employment brought about by making the employee's working conditions so intolerable that the employee feels compelled to

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[1] 42 U.S.C. § 2000e-2(a) (2004) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin … .").

[2] Pennsylvania State Police v. Suders, 124 S.Ct. 2342, 2351 (2004).

[3] 124 S. Ct 2342 (2004).

[4] 524 U.S. 742 (1998).

[5] 524 U.S. 775 (1998).

leave."[6] The concept was originally applied by the National Labor Relations Board (NLRB) in cases brought under the National Labor Relations Act (NLRA).[7] *In re Sterling Corset Co.*[8] was the NLRB's first decision to use the term "constructive discharge."[9] The first cases to use the concept reasoned that anti-discrimination laws were ineffective if employers could merely avoid the consequences of the laws by creating intolerable working conditions.[10] After the concept became firmly established in the labor-law context, the courts recognized the constructive discharge doctrine, applying it to all types of claims brought under Title VII.[11]

### *B. Elements of a Constructive Discharge Claim*

"An employer 'is responsible for a constructive discharge in the same manner that it is responsible for the outright discriminatory discharge of a charging party.'"[12] An objective reasonable employee standard is used by the courts to determine whether an employee has been constructively discharged.[13] Therefore, the trier of fact must conclude that the employee's working conditions were made so intolerable that a reasonable person in the same or similar circumstances as the employee's would have been compelled to quit.[14] This reasonable person standard allows the trier of fact to disregard any subjective sensitivities the particular plaintiff-employee may have and ask whether an ordinary person placed in the same working conditions would have chosen to resign.

Early decisions of the NLRB focused only on illegal conduct of the employer to determine whether there was a constructive discharge.[15] As courts developed the concept, two significant changes were made to the doctrine.[16] The first required intentional discrimination and specific intent by the employer, and the second required that the employee's response to this intentional discrimination be reasonable.[17]

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[6] BLACK'S LAW DICTIONARY 495 (8th ed. 2004).
[7] *See, e.g.* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 888 (1984) (quoting Sure-Tan, Inc., 234 N.L.R.B. 1187, 1191 (1978)) (holding that an unfair labor practice under the NLRA occurred when, in order to hinder involvement in union activities, an employer created such intolerable working conditions that an employee would be compelled to resign).
[8] 9 N.L.R.B. 858 (1938).
[9] Shuck, Cathy, *That's It, I Quit: Returning to First Principles in Construct Discharge Doctrine*, 23 BERKELEY J. EMP. & LAB. L. 401, 406 (2002).
[10] *Id.* at 403.
[11] *See* EEOC v. Univ. of Chicago Hosps., 276 F.3d 326 (7th Cir. 2002) (religious discrimination); Jackson v. Arkansas Dept. of Educ., 272 F.3d 1020 (8th Cir. 2001) (sexual harassment); Faruki v. Parsons S.I.P., Inc., 123 F.3d 315 (5th Cir. 1997) (age discrimination); Paroline v. Unisys Corp., 900 F.2d 27 (4th Cir. 1990) (sexual harassment).
[12] *Suders*, 124 S. Ct. at 2352 (quoting EEOC Compliance Manual 612:0006 (2002)).
[13] Jurgens v. EEOC, 903 F.2d 386, 390 (5th Cir. 1990) (quoting Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980)).
[14] *Id.*
[15] Shuck, *supra* note 9, at 404.
[16] *Id.*
[17] *Id.*.

Some courts have required that the employer discriminated against the employee who brought a constructive discharge claim with the intention of compelling the employee to resign.[18] Others, however, have held that an employer's specific intention to make working conditions so intolerable that the employee would resign was not necessary to satisfy the requirements of a constructive discharge claim.[19] The NLRB currently requires a showing of specific intent to establish constructive discharge.[20]

The courts then seemed to shift their focus from the intention of the employer to concentrate on the reasonableness of the employee's response to the employer's conduct. In analyzing the employee reasonableness standard, "[t]o find that a constructive discharge has occurred, the trier of fact must be satisfied that the working conditions to which the employee was subjected were so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign."[21] This reasonableness standard is a deviation from the NLRB's earlier standards for NLRA cases. The Board originally seemed to apply a subjective standard to the employee when determining whether the decision to quit was reasonable. In *Clover Fork Coal Co. v. NLRB*,[22] the Board determined that a coal loader's resignation was reasonable in response to a discriminatory transfer because he had been a coal worker for twenty-one years and would be able to determine whether his work environment was good or bad.[23]

In cases today, when courts analyze the employee's reasonableness, two factors are taken into account: (1) whether the employer engaged in conduct that would be intolerable to a reasonable person (the objective element), and (2) whether the employee resigned in response to the prohibited conduct.

## III. Title VII Sexual Harassment: *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*

The constructive discharge claim at issue in *Pennsylvania State Police v. Suders* stems from sexual harassment or hostile work environment.[24] The United States Supreme Court first determined that sexual harassment, or "hostile environment," claims were covered by Title VII of the Civil Rights Act of 1964 in the case of *Meritor Savings Bank, FSB v. Vinson*.[25]

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[18] *See, e.g.,* Martin v. Cavalier Hotel Corp., 48 F.3d 1343 (4th Cir. 1995) (holding that the constructively discharged employee met the employer intent requirement by showing that her employer's conduct made it reasonably foreseeable that she would quit).

[19] *Jurgens*, 903 F.2d at 390 (citing *Bourque*, 617 F.2d at 65, n.5 (holding that the employee is not required to prove that the employer had the specific intention that the employee would resign).

[20] Shuck, *supra* note 9, at n. 52.

[21] Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239, 243 (5th Cir. 1993) (citing *Bourque*, 617 F.2d at 65).

[22] 97 F.2d 331 (6th Cir. 1938).

[23] Shuck, *supra* note 9, at 418 (citing *In re* Clover Fork Coal Co., 4 N.L.R.B. 202, 222 (1937)).

[24] Pennsylvania State Police v. Suders, 124 S.Ct. 2342, 2346-47 (2004).

[25] 477 U.S. 57 (1986). *See id.* at 63-66.

### *A. Meritor Savings Bank, FSB v. Vinson*

This 1986 United States Supreme Court case involved a female bank employee who sued the employer bank and her immediate supervisor, claiming that she had been subjected to sexual harassment in violation of Title VII of the Civil Rights Act of 1964.[26] The Court held that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[27] The Court further asserted that Title VII's language was not limited to "economic" or "tangible" discrimination, because "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women in employment.'"[28] Most importantly, the *Vinson* court concluded that:

> such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[29]

As a result, "hostile environment", or non-ecomonic harassment, was rendered a violation of Title VII of the Civil Rights Act of 1964.[30]

### *B. The Court's Categorization of "Hostile Work Environment" in* Ellerth *and* Faragher

The cases of *Burlington Industries, Inc. v. Ellerth*[31] and *Faragher v. City of Boca Raton*[32] were Title VII sexual harassment cases decided by the United States Supreme Court on the same day in 1998. Following the lead of *Vinson*, these cases distinguished "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" the *Ellerth/Faragher* affirmative defense, which will be discussed later.[33] The first category of cases are known as "*quid pro quo*" and the second as "hostile work environment."[34]

While the Supreme Court in *Vinson* determined that hostile environment claims required harassment that was severe or pervasive,[35] *Ellerth* indicated that the distinction between the two categories was not the most important inquiry.[36] The Court acknowledged that the two distinct

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[26] *Id.* at 60.
[27] *Id.* at 64 (second alteration in original).
[28] *Id.* (quoting Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978)).
[29] *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a)(3) (1985)).
[30] *Id.* at 66.
[31] 524 U.S. 742 (1998).
[32] 524 U.S. 775 (1998).
[33] *Suders*, 124 S. Ct. at 2352 (quoting Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998))..
[34] *Ellerth*, 524 U.S. at 751.
[35] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (citing Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
[36] *Ellerth*, 524 U.S. at 753.

terms served an important purpose for the *Vinson* court, and stated that "[t]he principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive."[37]

The Court, in both *Ellerth* and *Faragher*, discussed the history of the courts' use of *quid pro quo* and hostile work environment.[38] Following the decision in *Vinson*, the standard of employer responsibility was based on the type of harassment in which the particular claim fit.[39] Therefore, if the plaintiff could make out a case of *quid pro quo* harassment, the employer was subject to vicarious liability for harassment that occurred at the hand of a supervisor.[40] The Court in *Ellerth*, however, felt as if linking the categorization of the claim as either *quid pro quo* or hostile work environment to the level of employer liability merely encouraged Title VII plaintiffs to bring their claims under the *quid pro quo* heading.[41] As a result, the Court felt that it was more important to analyze the basic question of whether an employer can be held vicariously liable for the harassing behavior of its supervisors.[42]

### *C. Employer Liability for Supervisor's Actions*

*Pennsylvania State Police v. Suders* concerns constructive discharge resulting from hostile work environment harassment that occurred at the hands of a supervisor.[43] This was also the main issue in *Ellerth* and *Faragher*.[44] The Court in *Ellerth* pointed out that Title VII's definition of "employer" included the employer's "agents."[45] Despite this, both *Ellerth* and *Faragher* implied that determining whether to hold the employer liable is much more difficult when the plaintiff has been the victim of harassment that resulted in constructive discharge, as opposed to adverse, tangible actions.[46] Therefore, using agency principles, the *Ellerth* and *Faragher* courts determined that the threshold question when assessing employer liability is whether the agent of the employer (supervisor) "was aided in accomplishing the tort by the existence of the agency relation."[47]

#### 1. Tangible Employment Actions

In an effort to delineate between when an employer is and is not responsible for the harassing conduct of its supervisors, the Court in *Ellerth* and *Faragher* created a requirement that a tangible employment action must occur for the employer to be held vicariously liable.[48] According to the *Ellerth* Court, "[a] tangible employment action constitutes a significant change

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[37] *Id.* at 752.
[38] *Id.* at 752-53; *Faragher*, 524 U.S. at 784-87.
[39] *Ellerth*, 524 U.S. at 752-53.
[40] *Id.* at 753. *See* Newton v. Cadwell Labs., 156 F.3d 880 (8th Cir. 1998); Karibian v. Columbia Univ., 14 F.3d 773 (2d Cir. 1994); Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994).
[41] *Ellerth*, 524 U.S. at 753.
[42] *Id. Accord Suders*, 124 S. Ct. at 2346-47; *Faragher,* 524 U.S. at 780.
[43] *Suders*, 124 S. Ct. at 2352.
[44] *Id.*
[45] *Ellerth*, 524 U.S. at 754 (citing 42 U.S.C. § 2000e(b)).
[46] *See Ellerth*, 524 U.S. at 762-3; *Faragher*, 524 U.S. at 807.
[47] *Faragher*, 524 U.S. at 801, 803; *see also Ellerth*, 524 U.S. at 758.
[48] *Ellerth*, 524 U.S. at 760-61; *Faragher*, 524 U.S. at 804.

in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[49] When such an action has occurred at the hands of the supervisor, it becomes evident that the injury resulting from the harassment would not have been possible without the agency relationship the supervisor has with the employer.[50] The supervisor is using his power to inflict an injury that cannot be inflicted by a co-worker who does not have the power to influence employment decisions.[51] According to the Court, "[t]angible 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."[52] As a result, for the purposes of Title VII claims, a supervisor's tangible employment action vicariously becomes the act of the employer.[53]

Appellate courts were split over whether a constructive discharge is a "tangible employment action" for purposes of employer vicarious liability. The Third, Fifth, and Eighth Circuits held that a constructive discharge qualifies as a tangible employment action.[54] The Second and Eleventh Circuits disagreed.[55] The United States Supreme Court, in *Suders*, answered the call to resolve this dispute between the circuits.

### *D. The Ellerth/Faragher Affirmative Defense to Employer Vicarious Liability*

After establishing that employers could be held vicariously liable for their supervisors' actions in hostile work environment cases, *Ellerth* and *Faragher* set forth an affirmative defense to employer liability.[56] The United States Supreme Court determined that when no tangible employment action was taken, a two-part affirmative defense was available to employers.[57] The two parts of this defense are "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 preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[58] The Supreme Court in *Suders* clarified when this defense can be used and established the burdens of proof that rest on both parties in such a circumstance.

## IV. *Pennsylvania State Police v. Suders*

In the wake of *Ellerth* and *Faragher*, many issues concerning constructive discharge in Title VII hostile environment cases began to arise. The *Suders* Court clarified many of these

[49] *Ellerth*, 524 U.S. at 761.
[50] *Id.* at 761-62.
[51] *Id.* at 762.
[52] *Id.*
[53] *Id.*
[54] *See* Wyatt v. Hunt Plywood Co., 297 F.3d 405 (5th Cir. 2002); Jackson v. Arkansas Dep't of Educ., 272 F.3d 1020 (8th Cir. 2001); Durham Life Ins. Co. v. Evans, 166 F.3d 139 (3d Cir. 1999).
[55] *See* Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272 (11th Cir. 2003); Caridad v. Metro-North Commuter R.R., 191 F.3d 283 (2d Cir. 1999).
[56] *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.
[57] *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.
[58] *Ellerth*, 524 U.S. at 765.

issues for the first time, discussing the use of constructive discharge claims under Title VII hostile environment cases, and the functionality of the *Ellerth/Faragher* affirmative defense.

### *A. Facts of the Case*

In August 1998, Nancy Drew Suders resigned from her position as dispatcher for the Pennsylvania State Police, claiming that she had been sexually harassed by her supervisors.[59] Suders asserted that her decision to quit stemmed from the sexual harassment, but also described a situation in which her supervisors had accused her of theft and handcuffed her.[60]

According to Suders, three of her immediate supervisors had subjected her to such harassing behavior as discussing sex with animals in front of her, conversing about young girls performing oral sex, and imitating a television wrestling move that involved grabbing genitals while shouting out an invitation for oral sex.[61] Following theses actions, Suders went to the police department's Equal Employment Opportunity Officer and mentioned that she "might need some help."[62] Two months later, Suders again approached the EEO Officer about the harassment, at which time she was advised that she should file a complaint but was not instructed how to do so or how to obtain the necessary form to begin the process.[63] Two days later, following the theft accuation, she resigned.[64] Suders then sued the Pennsylvania State Police department, claiming sexual harassment and constructive discharge in violation of Title VII of the Civil Rights Act of 1964.[65]

### *B. Procedural Posture*

The District Court granted summary judgment to the police department.[66] The court held that although Suders' testimony was sufficient to allow the jury to find that her supervisors created a hostile work environment, the Pennsylvania State Police Department was not vicariously liable for the supervisors' conduct because by failing to file a complaint and resigning only two days after first mentioning the harassment, Suders did not give the department the chance to respond to her complaints.[67] Therefore, the District Court essentially applied the *Ellerth/Faragher* affirmative defense.[68]

The Third Circuit reversed, holding that "genuine issues of material fact existed concerning the effectiveness of the [Pennsylvania State Police]'s 'program ... to address sexual harassment claims.'"[69] The appellate court also held that a constructive discharge amounted to a

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[59] Pennsylvania State Police v. Suders, 124 S. Ct. 2342, 2346 (2004).
[60] *Id.* at 2347-48.
[61] *Id.*
[62] *Id.* at 2348.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* at 2347.
[67] *Id.* at 2349.
[68] *See id.*
[69] *Id.* at 2350 (quoting Suders v. Easton, 325 F.3d 432, 443 (3d Cir. 2003)).

tangible employment action for purposes of employer liability.[70] The police department challenged this ruling.[71]

### *C. Analysis – The Majority Opinion*

Justice Ginsburg began the opinion by reaffirming the basic notion that in order to establish a claim of constructive discharge as a result of sexual harassment, the plaintiff must show that the harassing conduct was "sufficiently severe or pervasive to alter the conditions of [their] employment."[72]

#### 1. Hostile Work Environment

The first question the Court set out to answer was which of the two *Ellerth/Faragher* "hostile environment" categories Suders' claim fit within. As aforementioned, these two categories are (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.[73] The *Suders* court stated that the case at hand presented a "worse case" harassment scenario, in which the harassing conduct of the supervisors was so unbearable that Suders resigned.[74]

#### 2. Extenstion of the *Ellerth/Faragher* Affirmative Defense

*Suders* held that "when an official act does not underlie the constructive discharge," the *Ellerth/Faragher* affirmative defense must be extended to the employer.[75] Otherwise, the Court reasoned, the employer may have no reason to know that the resignation is not a typical, day-to-day employee resignation.[76] Without an official act such as a pay cut or demotion, it is less clear to what extent the supervisor's harassment has been aided by the agency relationship with the employer.[77] "That uncertainty, our precedent establishes, justifies affording the employer the chance to establish, through the *Ellerth/Faragher* affirmative defense, that it should not be held vicariously liable."[78]

This portion of the Court's holding overruled the Third Circuit's decision that the *Ellerth/Faragher* affirmative defense would only be available to cases of hostile work environment that did not involve a constructive discharge.[79] The Court said that if the line were drawn in this manner, hostile environment constructive discharge cases would be easier to prove than "ordinary" hostile work environment cases.[80]

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[70] *Id.*
[71] *Id.* at 2347.
[72] *Id.* (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)) (alteration in original).
[73] *See supra* text accompanying note 17.
[74] *Suders*, 124 S. Ct. at 2355.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 2357.
[80] *Id.* at 2355-56.

The Court distinguished the decisions of two Courts of Appeals concerning how the "tangible employment action" criteria should be considered when a plaintiff brings a constructive discharge claim. In *Reed v. MBNA Marketing Systems, Inc.*,[81] the First Circuit held that a supervisor's sexually harassing conduct that led to the resignation of a female employee involved no official action.[82] The appellate court held that unofficial behavior such as this was the prime reason the *Ellerth/Faragher* affirmative defense was created, and therefore the affirmative defense was wholly available to the employer.[83] On the other hand, the Seventh Circuit in the case of *Robinson v. Sappington*[84] held that sexually harassing behavior by a supervisor that resulted in a threat that "her first six months... probably would be 'hell'" involved an official action when the female employee was transferred.[85] In *Suders,* the Court noted that the "courts in *Reed* and *Robinson* properly recognized that *Ellerth* and *Faragher*, which divided the universe of supervisor-harassment claims according to the presence or absence of an official act, mark the path constructive discharge claims based on harassing conduct must follow."[86]

#### 4. Respective Parties' Burdens of Proof

The *Suders* Court concluded that a plaintiff to a hostile work environment case without tangible employment action bears the duty to mitigate the harm caused by the harassment, but the burden is on the defendant to prove that the plaintiff did not uphold this duty.[87] Therefore, the Court agreed with the Third Circuit that the case presented genuine issues of material fact concerning Suders' hostile work environment and constructive discharge claims.[88] However, the Court held that the Third Circuit erred in holding the employer's affirmative defense unavailable in constructive discharge cases.[89] This led the Court to vacate the Third Circuit's judgment and remand the case for further proceedings.[90]

### *C. Justice Thomas's Dissent*

Justice Thomas argued that only a negligent employer should be liable for constructive discharge claims resulting from their supervisors' creation of a hostile work environment.[91] Thomas felt as if the Court created a definition of constructive discharge that no longer resembled an actual discharge, because "as it is currently conceived, a 'constructive' discharge does not require a 'company act[] that can be performed only by the exercise of specific authority granted by the employer,' nor does it require that the act be undertaken with the same purpose as an actual discharge."[92] Justice Thomas concluded that because Nancy Suders did not

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[81] 333 F.3d 27 (1st Cir. 2003).
[82] *Id.* at 33.
[83] *Id.*
[84] 351 F.3d 317 (7th Cir. 2003).
[85] *Id.* at 324, 337.
[86] *Suders*, 124 S. Ct. at 2356.
[87] *Id.* at 2357.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* at 2358 (Thomas, J., dissenting) (quoting Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 767 (1998)).
[92] *Id.* (quoting *Burlington*, 524 U.S. at 768) (alteration in original).

present sufficient evidence of an adverse employment action, nor evidence that her employer should have known of the harassment, the Third Circuit's decision should have been reversed.[93]

## V. Conclusion: Future Impacts of *Pennsylvania State Police v. Suders*

The impact of the United States Supreme Court's decision in *Pennsylvania State Police v. Suders* will most directly impact employers and their employment practices. As a practical matter, employers will now have the peace of mind of knowing that an affirmative defense is available when employees are constructively discharged as a result of supervisors' unofficial harassing behavior. However, this case paves the way for a number of precautions that employers will likely take in the future.

First and foremost, *Suders* makes it extremely important for employers to implement well-defined grievance procedures through which employees can file official complaints concerning harassment. These programs must be readily available to every employee, and the employer is charged with ensuring that each employee is aware of their existence. Employers who take actions such as this and who promptly react and investigate any harassment complaints entered by employees will increase the likelihood of prevailing via the *Ellerth/Faragher* affirmative defense, by demonstrating that the employer does not condone the harassing behavior. Also, employees who fail to take advantage of such complaint procedures will be very unlikely to prevail against their employers under a constructive discharge claim, because it will be clear that the employer was not given the opportunity to remedy the situation.

Employers must also keep in mind the holding in *Suders* that the *Ellerth/Faragher* affirmative defense is not available when the supervisor's harassment culminates in an "official" employment action, such as a cut in pay or a demotion.[94] This creates a situation in which employers must investigate everyday resignations and terminations as possible instances of supervisor harassment. The employers must carefully choose and educate supervisors, and cautiously watch over the supervisors' negative "official acts" against employees.

*Pennsylvania State Police v. Suders* is a historical case in the realm of employment law. It clarifies a number of unanswered issues from the precedent cases of *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*. While allowing the *Ellerth/Faragher* affirmative defense against employer liability in certain cases, *Suders* also creates a number of safety precautions that employers must implement in order to avoid liability. Therefore, this decision effectively results in rewards to employers for implementing programs to prevent and punish for sexual harassment, and allows employees the opportunity to hold employers vicariously liable when supervisors' harassment culminates in an official act, or when the employee takes advantage of the complaint procedure and the employer fails to remedy the harm.

[93] *Id.* at 2359.
[94] *Id.* at 2355.