

## COMMENT

### ***PENNSYLVANIA STATE POLICE V. SUDERS: TURNING A BLIND EYE TO THE REALITY OF SEXUAL HARASSMENT***

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#### I. INTRODUCTION

After allegedly enduring months of obscene gestures, lewd comments, and humiliation at the hands of her supervisors, Nancy Drew Suders quit her job as a police communications operator without officially informing the police department of the harassment.<sup>1</sup> Suders then sued the department for sexual harassment in violation of Title VII, arguing that her decision to quit represented a constructive discharge. In *Suders v. Easton* (“*Suders I*”), the Third Circuit held that a constructive discharge due to sexual harassment by a supervisor is a “tangible employment action,” thereby denying the police department an affirmative defense to vicarious liability that is available when the harassment does not result in a tangible employment action.<sup>2</sup> In *Pennsylvania State Police v. Suders* (“*Suders II*”), the Supreme Court overruled the Third Circuit, holding that a constructive discharge does not constitute a tangible employment action, making the defense available to the police department.<sup>3</sup> The Third Circuit’s elimination of the defense in constructive discharge cases would more effectively remedy sexual harassment and better reflect the reality of the power dynamics of the workplace.

#### II. BACKGROUND

A plaintiff may have a claim for constructive discharge when she resigns from her employment as a result of sexual harassment if “a reasonable employee would have concluded that the conditions were such as to

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<sup>1</sup> *Suders v. Easton*, 325 F.3d 432, 436–38 (3d Cir. 2003).

<sup>2</sup> *Id.* at 445.

<sup>3</sup> *Pa. State Police v. Suders*, 124 S. Ct. 2342 (2004). The Court noted, however, that the defense would not be available where “the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.” *Id.* at 2347.

make remaining in the job unbearable.”<sup>4</sup> Plaintiffs who successfully claim constructive discharge can recover backpay and other equitable remedies, whereas those who prevail on sexual harassment claims without constructive discharge can only recover limited compensatory and punitive damages.<sup>5</sup>

In *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton*, in which the plaintiffs did not assert a claim for constructive discharge though they did resign from their jobs, the Supreme Court divided hostile work environment sexual harassment claims into two categories to determine employer vicarious liability.<sup>6</sup> If the harassment “culminates in a tangible employment action,” such as hiring or firing, then the employer is vicariously liable.<sup>7</sup> If the harassment does not lead to a tangible employment action, however, the employer may assert a defense to liability, which consists of showing: “(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.”<sup>8</sup> The Supreme Court did not include constructive discharge in its description of a “tangible employment action,” which the Court describes 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.”<sup>9</sup>

### III. THE FACTS OF *PENNSYLVANIA STATE POLICE v. SUDERS*

In *Suders I*, Nancy Suders charged that three male supervisors at the police department sexually harassed her by subjecting her to obscene gestures and sexually explicit comments.<sup>10</sup> Although her supervisors claimed that she had repeatedly failed a required computer skills test,<sup>11</sup> Suders found her exams in a drawer in the women’s locker room, indicating that her supervisors had not sent her test scores to the appropriate department.<sup>12</sup> Once Suders’s supervisors learned that her tests were missing, they ac-

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<sup>4</sup> *Lindale v. Tokheim Corp.*, 145 F.3d 953 (7th Cir. 1998) (describing the application of constructive discharge doctrine to Title VII cases). The test varies somewhat among the circuits, though all include the same basic reasonableness standard of *Lindale*.

<sup>5</sup> Cathy Shuck, *That’s It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKELEY J. EMP. & LAB. L. 401, 403 (2002) (discussing the history of the concept of constructive discharge, which developed out of cases under the National Labor Relations Act).

<sup>6</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

<sup>7</sup> *Faragher*, 524 U.S. at 808.

<sup>8</sup> *Id.* at 807.

<sup>9</sup> *Ellerth*, 524 U.S. at 761.

<sup>10</sup> *Suders v. Easton*, 325 F.3d 432, 436–37 (3d Cir. 2003).

<sup>11</sup> *Id.* at 439.

<sup>12</sup> *Id.*

cused her of theft, and handcuffed, photographed, and questioned her.<sup>13</sup> Suders briefly explored the option of reporting the harassment by contacting the Equal Employment Opportunity (“EEO”) Office of the Pennsylvania State Police (the “State Police”).<sup>14</sup> After finding her initial contact with the EEO officer “unhelpful,” Suders did not officially report the harassment and resigned shortly thereafter.<sup>15</sup>

Suders sued the three supervisors and the State Police, alleging claims under the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, and the Pennsylvania Human Relations Act.<sup>16</sup> The district court granted the defendants’ motion for summary judgment on all claims.<sup>17</sup> The court found that Suders had produced enough evidence to raise a genuine issue of fact on her Title VII claims of hostile work environment and constructive discharge.<sup>18</sup> However, the court determined that, as a matter of law, she had unreasonably failed to take advantage of available grievance procedures, and thus there was no genuine issue of fact as to the State Police’s use of the *Ellerth/Faragher* affirmative defense to vicarious liability.<sup>19</sup> As a result, the court did not address the constructive discharge claim.

#### IV. THE THIRD CIRCUIT: *SUDERS V. EASTON*

After reviewing the Supreme Court’s rationale in *Ellerth* and *Faragher*, the Third Circuit on appeal reversed the district court’s judgment on Suders’s Title VII claim, holding “that the District Court erred in failing to address Suders’ [sic] claim of constructive discharge.”<sup>20</sup> The court ruled that the State Police could not assert the *Ellerth/Faragher* defense because a constructive discharge constitutes a tangible employment action, to which the affirmative defense is never applicable.<sup>21</sup>

The Third Circuit noted that in *Ellerth* and *Faragher* the Supreme Court intended to further the purposes of Title VII, particularly the encouragement of “antiharassment policies and effective grievance procedures,” as well as the promotion of “conciliation rather than litigation.”<sup>22</sup> The court stated that its decision furthered these policies because “holding that a constructive discharge constitutes a tangible employment action . . . effectively encourage[s] employers to be watchful of sexual harassment in their workplaces and to remedy complaints at the earliest pos-

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 438.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 439.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 440.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 462.

<sup>21</sup> *Id.*

<sup>22</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

sible moment,” while the “stringent test for proving constructive discharge” requires employees’ decision to quit to be a reasonable response, thereby encouraging them to seek out any available complaint procedures.<sup>23</sup>

The Third Circuit precluded the defense in constructive discharge cases by expanding the category of tangible employment actions to include constructive discharge. The court saw the definition of a tangible employment action as a “flexible concept” that included “subtle discrimination not easily categorized as a formal discharge or demotion.”<sup>24</sup> Focusing on the *effect* of constructive discharge—economic harm—the court concluded that constructive discharge is the “functional equivalent of an actual termination,” which makes it “the act of the employer.”<sup>25</sup> The court further reasoned that allowing the *Ellerth/Faragher* defense in constructive discharge cases “could have the perverse effect of discouraging an employer from actively pursuing remedial measures and of possibly encouraging intensified harassment,” thereby frustrating the policy rationale of Title VII.<sup>26</sup>

The Third Circuit determined that the appropriate test for constructive discharge in violation of Title VII has two components: (1) a showing that the plaintiff-employee “suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign,” and (2) “the employee’s reaction to the workplace situation—that is, his or her decision to resign—was reasonable given the totality of circumstances.”<sup>27</sup> The court indicated that whether the plaintiff-employee had utilized grievance procedures prior to resigning would be relevant to the second element; however, failing to explore preventative or remedial procedures would not necessarily bar the plaintiff’s constructive discharge claim. The court believed that this rule would encourage employers to “remedy complaints at the earliest possible moment,” while still encouraging employees to avail themselves of remedial procedures.<sup>28</sup> Applying this rule to the facts of the case, the Third Circuit held that Suders had raised genuine issues of material fact regarding her constructive discharge claim, and reversed and remanded the case.<sup>29</sup>

#### V. THE SUPREME COURT: *PENNSYLVANIA STATE POLICE V. SUDERS*

In an opinion written by Justice Ginsburg, the Supreme Court decided (8-1) to retain the *Ellerth/Faragher* affirmative defense in constructive

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<sup>23</sup> *Suders*, 325 F.3d at 458, 461.

<sup>24</sup> *Id.* at 456.

<sup>25</sup> *Id.* at 446, 458.

<sup>26</sup> *Id.* at 461.

<sup>27</sup> *Id.* at 445.

<sup>28</sup> *Id.* at 461.

<sup>29</sup> *Id.* at 446.

discharge cases.<sup>30</sup> The Court declared constructive discharge to be distinct from tangible employment actions, stating that “when an official act does not underlie the constructive discharge,” as is the case when the supervisor did not directly alter the employee’s status, then it is “less obvious” that “the agency relation is the driving force” of the harassment.<sup>31</sup> The employer is only subject to vicarious liability if the “agency relation is the driving force.”<sup>32</sup> The Court was concerned about holding an employer liable for the actions of supervisors without “an official act of the enterprise” because the Court worried that the employer would then have no warning that a hostile work environment precipitated the employee’s resignation.<sup>33</sup>

The Supreme Court disagreed with the Third Circuit’s elimination of the *Ellerth/Faragher* affirmative defense in constructive discharge cases. In particular, the Court felt that designating constructive discharge a tangible employment action would have the anomalous result of making “the graver claim of hostile-environment constructive discharge,” for which the affirmative defense would be retained, “easier to prove than its lesser included component, hostile work environment,” leading to jury confusion.<sup>34</sup> The Court agreed for other reasons that Suders’s case presented genuine issues of material fact concerning her Title VII claims.<sup>35</sup>

The Court held that to establish a claim for constructive discharge, a plaintiff must show that “working conditions bec[a]me so intolerable that a reasonable person in the employee’s position would have felt compelled to resign.”<sup>36</sup> The employer can then invoke an affirmative defense against such claims.<sup>37</sup> This defense, slightly reworded from its form in *Ellerth* and *Faragher*, states that an employer may defend against constructive discharge claims by showing that “(1) the employer had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and [that] (2) the plaintiff unreasonably failed to make use of such a preventative or remedial apparatus.”<sup>38</sup>

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<sup>30</sup> Pa. State Police v. Suders, 124 S. Ct. 2342, 2352 (2004). The only dissenter, Justice Thomas, disagreed with both the majority and with the Third Circuit. Justice Thomas believes that constructive discharge is distinct from actual discharge and would hold employers vicariously liable only if a supervisor takes a tangible employment action against an employee or if the employer were negligent. *Id.* at 2358–59 (Thomas, J., dissenting).

<sup>31</sup> *Id.* at 2353–55.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 2353.

<sup>34</sup> *Id.* at 2356.

<sup>35</sup> *Id.* at 2357.

<sup>36</sup> *Id.* at 2351.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 2347.

## V. ANALYSIS

A. *Problematic Aspects of the Ellerth/Faragher Defense*

In *Suders II*, the Supreme Court protected employers at the expense of Title VII's objective of protecting employees from discrimination in the workplace. In comparison to the defense articulated in *Ellerth* and *Faragher*, the Third Circuit's "totality of the circumstances" test better addresses sexual harassment by encouraging employers to implement more preventative policies and procedures, while also being sensitive to the realities that employees face in the workplace. By affirming the *Ellerth/Faragher* defense in *Suders II*, the Supreme Court failed to resolve many of the defense's problems, such as its overall ambiguity, its failure to encourage effective policies and procedures that would more likely prevent sexual harassment, and its grounding in an unrealistic image of power dynamics in the workplace.

First, the affirmative defense created in *Ellerth* and *Faragher* provides little guidance for employers and employees.<sup>39</sup> Employers have a duty to take "reasonable care to prevent and correct promptly any sexually harassing behavior," but the Supreme Court refrained from defining what actions would constitute "reasonable care."<sup>40</sup> The Court indicated that "an anti-harassment policy with complaint procedure" is one factor to consider, but even this basic remedial measure is "not necessary in every instance as a matter of law."<sup>41</sup> The employee's duty is similarly ambiguous because the employee, in addition to utilizing "any preventative or corrective opportunities," must also "avoid harm otherwise," but no examples of appropriate avoidance are given in the opinion.<sup>42</sup>

The courts of appeals have interpreted the first element of the *Ellerth/Faragher* defense as imposing two duties on employers: (1) the duty to exercise reasonable care to *prevent* sexual harassment; and (2) the duty to exercise reasonable care to *correct* sexual harassment.<sup>43</sup> Employers must meet both of these components to establish the first subpart of the affirmative defense.<sup>44</sup> The duty on employers under the first subpart is narrow and can be satisfied merely by the existence and distribution of an anti-

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<sup>39</sup> See, e.g., David Sherwyn et al., *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, 1268 (2001).

<sup>40</sup> *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1296-97 (11th Cir. 2000); *Montero v. Agco Corp.*, 192 F.3d 856, 862-63 (9th Cir. 1999); Michael Taylor, *Let's Talk About Sex: A Clarification of Employer Liability for Supervisor Sexual Harassment Under Title VII*, 27 OHIO N.U. L. REV. 607, 615 (2001).

<sup>44</sup> See Taylor, *supra* note 43, at 615-40 (providing an overview of the application of the affirmative defense in the circuit courts).

harassment policy.<sup>45</sup> To satisfy the second subpart of the first element, employers usually must show the existence of internal grievance procedures and the reasonable attempts they took to resolve the harassment after becoming aware of it.<sup>46</sup>

Circuit courts have interpreted the second element of the *Ellerth/Faragher* defense as imposing two duties on employees: (1) to take advantage of the procedures the employer has put in place; and (2) to avoid harm otherwise.<sup>47</sup> In most circuits, an employer must only prove that an employee failed to meet either of these duties to assert the affirmative defense successfully.<sup>48</sup> When considering the first subpart of the second element, whether the employee “unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer,” courts generally find that any failure to utilize internal grievance procedures, regardless of the reasons for the failure, is “unreasonable.”<sup>49</sup> For example, delays in reporting a harassing experience and reporting the harassment to the wrong official have both been found to be “unreasonable.”<sup>50</sup>

Second, the first subpart of the defense, which considers what policies and procedures employers have implemented to prevent sexual harassment, permits employers to accept sexual harassment that fails to lead to tangible employment actions.<sup>51</sup> Under the *Ellerth/Faragher* defense, which easily finds employees “unreasonable,” the employer is liable only if a tangible employment action occurred or if the employer failed to have an antiharassment policy and a minimal reporting system. The defense thus irrationally incentivizes employers to put in place a nominal reporting system and to train supervisors only to avoid allowing their harassment to culminate in tangible employment actions.

Furthermore, the defense fails to encourage employers to implement the policies most effective at decreasing sexual harassment. To further the objectives of Title VII, courts should craft rules that, while fair and not

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<sup>45</sup> *Montero*, 192 F.3d at 862 (concluding that the existence of an antiharassment policy and the corporation’s attempt to make employees aware of the policy satisfied the first subpart of the employer’s duty under the *Ellerth/Faragher* affirmative defense); Taylor, *supra* note 43, at 644; *see also* Joanna Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3, 42–50 (2003) (finding that most courts require an antiharassment policy with these elements: “(i) a description of prohibited conduct; (ii) a list of individuals to whom complaints should be made, with a bypass procedure to ensure that no victim will have to complain to her harasser; and (iii) a grievance procedure calculated to bring out complaints”).

<sup>46</sup> Grossman, *supra* note 45, at 15–16.

<sup>47</sup> Taylor, *supra* note 43, at 616.

<sup>48</sup> *Id.* (noting that unlike the other circuit courts, the Fifth Circuit requires employers to show that employees failed both subparts of the second element of the affirmative defense to block liability).

<sup>49</sup> *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998).

<sup>50</sup> Sherwyn et al., *supra* note 39, at 1297–98 (describing several cases in which courts have found delays in reporting harassment unreasonable).

<sup>51</sup> *Suders v. Easton*, 325 F.3d 432, 461 (3d Cir. 2003) (pointing out this “perverse effect” of the *Ellerth/Faragher* defense).

overly burdensome, use employer liability to create incentives for employers to implement measures that would truly decrease harassment in the workplace. Since courts have required employers to implement no more than a basic antiharassment policy and reporting procedure, employers have little reason to enact further measures that focus on prevention, like antiharassment training.<sup>52</sup> Although an antiharassment policy serves as a deterrent, employees and supervisors are often unaware of the policies buried in handbooks that they have failed to read.<sup>53</sup>

A more direct approach would be for employers to adopt policies and procedures like antiharassment training that aim to prevent all forms of harassment. Although the link between antiharassment training and a quantifiable decrease in sexual harassment remains to be proven, sociological research suggests that antiharassment training may be particularly effective at decreasing sexual harassment.<sup>54</sup> This research indicates that antiharassment training contributes to changes in attitudes and behavior that decrease workplace sexual harassment.<sup>55</sup> While the law should not necessarily demand antiharassment training as a part of an employer's "reasonable care," the law should not discourage employers from implementing it either. To avoid setting the bar for employers too high, circuit courts have interpreted the *Ellerth/Faragher* defense in a way that sets it too low by permitting employers to accept subtle forms of sexual harassment with token policies and reporting procedures while remaining protected from employees' constructive discharge claims. The Third Circuit, specifically aware of the "perverse effects" of the defense, appropriately addressed these concerns with its decision in *Suders I*.<sup>56</sup>

Finally, the second element of the *Ellerth/Faragher* defense, which lower courts apply harshly against employees, fails to reflect the realities of the workplace, particularly the power dynamics between employees and their supervisors and the way victims typically respond to sexual harassment.<sup>57</sup> The significant difference in levels of workplace power between supervisors and their subordinates may cause employees to delay reporting harassment or to fail to use grievance procedures altogether be-

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<sup>52</sup> See *Shaw v. AutoZone*, 180 F.3d 806, 812 (7th Cir. 1999) (holding that a corporation's antiharassment trainings as part of its efforts to prevent sexual harassment in addition to its promulgation of an antiharassment policy was "more than enough" to satisfy the *Ellerth/Faragher* affirmative defense).

<sup>53</sup> See *id.* at 811 (noting that plaintiff employee claimed that she had not read the handbook containing the antiharassment policy, though she signed a form acknowledging that she had read it).

<sup>54</sup> Grossman, *supra* note 45, at 42–50 (providing an overview of research on the efficacy of antiharassment training); see also Heather Antecol & Deborah Cobb-Clark, *Does Sexual Harassment Training Change Attitudes? A View From the Federal Level*, 84 Soc. Sci. Q. 826, 838–41 (2003).

<sup>55</sup> Grossman, *supra* note 45, at 42–50; Antecol & Cobb-Clark, *supra* note 54, at 838–41.

<sup>56</sup> See *Suders*, 325 F.3d at 461.

<sup>57</sup> *Brown v. Perry*, 184 F.3d 388 (4th Cir. 1999).

cause of fear of retaliation.<sup>58</sup> The Supreme Court attempted to address these concerns in *Ellerth* and *Faragher* by denying the affirmative defense if the employee suffers a tangible employment action as retaliation. Nevertheless, the defense still fails to reflect the way employees cope with sexual harassment. The fear of retaliation may still cause employees to delay reporting harassment, thereby failing to meet the duty imposed by the second element of the defense. Moreover, as psychological studies indicate, it is common for employees to hope that ignoring the harassment, and thus failing or delaying to report it, will alleviate the hostile environment.<sup>59</sup>

The second subpart of the employee's duty to utilize preventative measures—the duty “to avoid harm otherwise”—is also harsh on employees, but most circuit courts have refrained from applying it because the majority of cases have been decided based on the first subpart of this element.<sup>60</sup> An example from the Fourth Circuit, however, illustrates how stringently courts impose the second subpart on employees. In *Brown v. Perry*,<sup>61</sup> the Court determined that the plaintiff “unreasonably failed . . . to avoid harm otherwise” even though she took advantage of her employer's internal grievance procedures, because she “unnecessarily put herself in a situation that permitted” the harassment.<sup>62</sup> Such an interpretation amounts to blaming the victim. Rather than questioning the employer's efforts to prevent or remedy the harassment as a defense to vicarious liability should, this interpretation revives the issue of whether the conduct was in some sense invited. As the Fourth Circuit applied the defense in *Brown*, the burden of proof is placed heavily on the plaintiff because an employer can free itself from liability by merely showing any instance that could be interpreted as insufficient avoidance.

### B. *The Third Circuit's Solution*

The Third Circuit's elimination of the *Ellerth/Faragher* defense in constructive discharge cases and its “totality of the circumstances” test in *Suders I* adequately address many of the problems with the *Ellerth/Faragher* defense. In particular, the Third Circuit's test is more likely to prevent sexual harassment, a major purpose of Title VII, and it better reflects the realities employees face in the workplace. Because the Third Circuit's

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<sup>58</sup> See Rebecca A. Thacker, *A Descriptive Study of Situational and Individual Influences upon Individuals' Responses to Sexual Harassment*, 49 HUMAN RELATIONS 1105 (1996).

<sup>59</sup> See S. Arzu Watsi & Lilia M. Cortina, *Coping in Context: Sociocultural Determinants of Response to Sexual Harassment*, 83 JOURNAL OF PERSONALITY & SOCIAL PSYCHOLOGY 394, 396 (2002) (citing several studies indicating that “a common strategy for many targets is to avoid the perpetrator or the harassing context if possible”).

<sup>60</sup> Taylor, *supra* note 43, at 616.

<sup>61</sup> *Brown*, 184 F.3d at 397.

<sup>62</sup> *Id.* (finding that the plaintiff had failed to “avoid harm” because the plaintiff, after a social gathering, remained alone in a hotel room with a supervisor who had previously harassed her).

test would not automatically bar harassed employees from recovering if they failed to utilize the available complaint procedures, employers, who are better situated to accomplish structural changes in the workplace and are the most efficient cost-spreaders, would be encouraged to implement the most effective and efficient antiharassment policies.<sup>63</sup> Employers, rather than implementing the minimal policies and procedures defined by the courts as necessary, would be more likely to enact measures that they believe would best decrease overall harassment. To avoid liability, they would likely provide their employees and supervisors with antiharassment training to inform workers about what constitutes prohibited behavior, how to recognize it, and how to access preventative and remedial procedures in the workplace.

Additionally, the Third Circuit's test would better address the realities faced by victims of workplace sexual harassment, making it more likely to prevent harassment and subsequent litigation. The Third Circuit recognized the power dynamic inherent in interactions between supervisors and their employees, stating that supervisors are in a position of power over their employees, and that supervisors are aided in their harassment by the "agency relation" to the employer.<sup>64</sup> The court also acknowledged this power dynamic by not automatically barring from recovery an employee who waits a few days, weeks, or months to report harassment, as the *Ellerth/Faragher* defense does. As a result, the Third Circuit's elimination of the defense and its test for constructive discharge is fairer to employees, many of whom instinctively cope with sexual harassment by waiting to see if the situation improves over time.

The Third Circuit worried that its test could leave a "back door" open for the *Ellerth/Faragher* defense if courts weighed heavily an employee's failure to use reporting procedures when considering the question of whether the employee's decision to resign was "reasonable under the circumstances" because the courts could view this reasonableness primarily in terms of the employer's antiharassment policies and grievance procedures, as the *Ellerth/Faragher* defense would.<sup>65</sup> Nonetheless, ensuring that a failure to utilize grievance procedures is not an automatic bar to constructive discharge claims better responds to how employees actually react to sexual harassment by supervisors. Under the Third Circuit's formulation, employees would still have an incentive to utilize procedures "promot[ing] conciliation rather than litigation" because a court applying

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<sup>63</sup> See David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 92-93 (1996) (arguing that the usual policy justifications for respondeat superior are applicable to workplace harassment).

<sup>64</sup> *Suders v. Easton*, 325 F.3d 432, 450 (3d Cir. 2003).

<sup>65</sup> *Id.* at 462.

the Third Circuit's test would consider whether a plaintiff utilized internal procedures that could have obviated the need for litigation.<sup>66</sup>

### C. Problems with the Supreme Court's Analysis

The criticisms the Supreme Court offered for rejecting the Third Circuit's test do not outweigh the myriad problems identified above with the *Ellerth/Faragher* defense and the definition of tangible employment action. The Supreme Court asserted that eliminating the affirmative defense for constructive discharge claims would "anomalously . . . make the graver claim of hostile-environment constructive discharge easier to prove than its lesser included component, hostile work environment," a problem that would be "more than a little confusing" to jurors.<sup>67</sup> Any potential complications, however, must be balanced against the degree to which the policy reasons for the denial of the affirmative defense in cases involving tangible employment actions extend to constructive discharge cases.<sup>68</sup>

The Supreme Court determined that the affirmative defense should not be allowed in cases involving tangible employment actions because in such cases it is nearly certain that the supervisor's position aided the harassment, making liability for the employer appropriate.<sup>69</sup> When a supervisor harasses an employee to the point of constructive discharge, though, it is just as clear that the harassment was aided by the harasser's position. The only distinction between a tangible employment action and a constructive discharge is whether the employee's change in status results directly from the harassment or is compelled by the harassment; in both instances, the Supreme Court's test for denying the affirmative defense—that the "agency relation is the driving force" for the harassment—is met. Employers should be held vicariously liable for all such actions clearly resulting from the abuse of their power.

While clarifying the rule in some ways, the Supreme Court may have introduced more ambiguity in other ways by re-wording the affirmative defense. To successfully assert the affirmative defense described in *Suders II*, an employer must show that it: (1) "had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) the plaintiff unreasonably failed to make use of such a preventative or remedial apparatus."<sup>70</sup> This new construction better indicates the duties of employers and employees than the wording in *Ellerth* and *Faragher*; however, it does not require preventative measures, suggesting that the Supreme Court has officially narrowed an employer's

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<sup>66</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

<sup>67</sup> *Pa. State Police v. Suders*, 124 S. Ct. 2342, 2356 (2004).

<sup>68</sup> *Suders*, 325 F.3d at 463 (leaving these complications to be resolved by trial judges depending on the factual circumstances).

<sup>69</sup> *Ellerth*, 524 U.S. at 762–63.

<sup>70</sup> *Pa. State Police*, 124 S. Ct. at 2347.

duty of “reasonable care” to exclude antiharassment training and other preventative and remedial measures. While this modification comports with lower courts’ interpretation of the first element of the *Ellerth/Faragher* defense, it fails to address the importance of antiharassment training in decreasing sexual harassment in the workplace. In addition, there is some ambiguity in the new wording because the Court requires antiharassment policies and reporting procedures to be “accessible” and “effective” without defining what types of policies and procedures would suffice.

As for the second element, the Court’s new formulation appears to narrow the duty on employees by eliminating the catch-all duty on employees to “avoid harm otherwise.” This omission may prevent future outcomes like *Brown v. Perry*.<sup>71</sup> Nonetheless, the Supreme Court has still failed to elucidate the meaning of “unreasonably” failing to use preventative or remedial apparatus. As a result, lower courts will likely continue to apply the defense harshly against employees by calling short delays or errors in reporting harassment “unreasonable,” thereby ignoring the realities of workplace power dynamics that cause employees to cope with the problem through avoiding confrontation.

## V. CONCLUSION

In *Suders II*, the Supreme Court chose to view constructive discharge as distinct from tangible employment actions, ignoring the similar resulting economic harm and the fact that supervisors are *always* aided by the agency relationship when they harass subordinates, regardless of whether harassed employees are fired or quit. Thus, the Court decided that the *Ellerth/Faragher* affirmative defense to vicarious liability, a defense that has been applied leniently to employers and harshly against employees, should remain available to employers when an employee has been constructively discharged due to the actions of a supervisor. The defense as defined by the Supreme Court encourages employers to implement token preventative and remedial measures and punishes employees without regard to how they typically respond to sexual harassment by their supervisors. The Supreme Court thus chose to protect employers at the expense of fairness to victims of workplace sexual harassment.

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<sup>71</sup> 184 F.3d 388, 397 (4th Cir. 1999).