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ELIMINATING THE INTENT REQUIREMENT IN CONSTRUCTIVE DISCHARGE CASES: PENNSYLVANIA STATE POLICE V. SUDERS

INTRODUCTION

In Pennsylvania State Police v. Suders,¹ the United States Supreme Court recognized for the first time that employers may be held liable under Title VII of the Civil Rights Act of 1964² for constructive discharge.³ The Court also held that constructive discharge may be considered a tangible employment action,⁴ and, in certain circumstances, an employer may raise an affirmative defense against a claim of constructive discharge.⁵ In so doing, the Court resolved a split among circuit courts as to whether constructive discharge constitutes a tangible employment action.⁶ Although Suders offered much-needed clarity on the issue of constructive discharge,⁷ the Court did not expressly address the issue of whether

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³. Employees are constructively discharged when they are not actually or formally terminated by their employers but are forced to quit because of intolerable working conditions. See, e.g., Phillips v. Taco Bell Corp., 156 F.3d 884, 890 (8th Cir. 1998).
⁴. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998); accord Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998); see also CHARLES V. DALE, SEXUAL HARASSMENT AND VIOLENCE AGAINST WOMEN: DEVELOPMENTS IN FEDERAL LAW 6 (2004) (noting that tangible employment action "refers to any job detriment or benefit that results in significant change in employment status").
⁵. See Suders, 542 U.S. at 140-41.
⁶. See id. at 139-40.
⁷. One question left unanswered after Suders is what exactly constitutes an "official act" by an employer. See id. at 148. The Court did give some guidance, see infra note 55, but the scope of actions that may constitute an "official act" is not entirely clear.
a former employee alleging constructive discharge must prove that
the employer acted intentionally. 8

Part I of this Note examines the facts behind Suders and outlines
the Court's holdings. Part II postulates that, although the Court did
not expressly address whether an employee claiming constructive
discharge must prove that the employer acted with intent, the
Court's ruling in Suders may have implicitly eliminated such a
requirement. Part III examines the potential impact of Suders and
suggests that, together with the Court's other holdings in the
case—in particular its definition of constructive discharge and the
damages it made available in constructive discharge cases—
eliminating the intent requirement may create an incentive for
some employees who are subjected to harassment at work to resign
and seek recourse through the courts. Finally, this Note concludes
that, to the degree that Suders creates such an incentive for
employees to quit without first proceeding through the proper
complaint channels, Suders does not advance specific purposes of
Title VII.

I. PENNSYLVANIA STATE POLICE V. SUDERS

A. Factual Background

Nancy Drew Suders began working for the Pennsylvania State
Police (PSP) in March 1998 as a police communications operator. 9
According to Suders, she was subjected to offensive sexual com-
ments and gestures during most of her tenure at the PSP. 10 Suders
claimed that the inappropriate conduct came primarily from three
male supervisors. 11 Specifically, Suders claimed that the station
commander brought "up [the subject of] people having sex with

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10. Id.
11. Id.
animals," talked about oral sex with another male supervisor in Suders's presence, and commented to Suders about his wife's breasts. Suders also alleged that another male supervisor made obscene gestures, apparently imitating a television wrestling move, "as many as five to ten times per night throughout her five-month tenure." Suders claimed that on one occasion she told the supervisor that she thought his conduct was inappropriate, and he responded by jumping onto a chair and repeating the move. According to Suders, a third male supervisor "verbally harassed her day after day" by calling her a liar and telling her that "the village idiot could do her job."

In June 1998, after one of her male supervisors accused her of taking a missing file home with her, Suders contacted the PSP's Equal Employment Opportunity Officer (EEO Officer). Suders told the EEO Officer that "she might need some help" but did not provide further details. The EEO Officer gave her phone number to Suders but never followed up on the conversation.

According to Suders, the harassment "continued unabated" until it "reached a breaking point" in August 1998. Suders contacted the EEO Officer again and stated that she was being harassed and that she was afraid. Suders claimed that the EEO Officer was "insensitive and unhelpful" and that the EEO Officer told Suders to file a formal complaint, but did not tell her how to obtain a complaint form.

12. *Id.* (alteration in original) (quoting the district court opinion).
13. *Id.* at 437. Suders also claimed that the station commander made disparaging comments about her age. *Id.* at 436.
14. *Id.* at 437.
15. *Id.*
16. *Id.*
17. *Id.* (internal quotation marks omitted). Suders also alleged that this male supervisor indicated that "she would be the last political appointee who had a job ... at the substation." *Id.* (internal quotation marks omitted).
18. *Id.* at 438.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* According to the EEO Officer, Suders stated that she was being discriminated against because of her age and political affiliation but made no complaints of sexual harassment. *Id.*
23. *Id.*
Two days after her conversation with the EEO Officer, Suders resigned from her position at the PSP. Suders's resignation was prompted by allegations that she stole PSP property. Suders had been required to take a computer skills test several times during her tenure at the PSP. Her supervisors told her that she had failed each time. When Suders discovered her test papers in a set of drawers in the women's locker room, she concluded that her supervisors had lied to her and had never actually forwarded her exams to the appropriate department for grading, so she took the tests. When Suders later attempted to return the tests to the drawers, her supervisors confronted her. Suders was handcuffed and interrogated. Feeling "abused, threatened and held against her will," she tendered her resignation.

B. The Lower Courts

Suders filed suit against the PSP in federal district court under Title VII, alleging that she was subjected to a sexually hostile work environment and that she was constructively discharged. The district court found that Suders had presented sufficient evidence to establish an actionable hostile work environment claim; the district court also found, however, that the PSP could not be held vicariously liable under the affirmative defense articulated by the

24. Id. at 438-39.
25. Id.
26. Id. at 439.
27. Id.
28. Id.
29. Id. When her supervisors realized that the tests were missing, they dusted the drawers with a theft-detection powder that turns hands blue when touched. When the supervisors saw that Suders's hands were blue, they confronted her. Id.
30. Id.
31. Id. (quoting the district court opinion). Suders tried to tender her resignation at least twice before she was ultimately allowed to leave. Id.
32. Id. at 435, 439. In addition to the Title VII claims, Suders also alleged that she had been discriminated against because of her age and political affiliation and brought claims against the PSP under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2000), and the Pennsylvania Human Relations Act, 43 P.A. CONS. STAT. ANN. §§ 951-963 (1991). Suders, 325 F.3d at 439. Suders also named her three male supervisors and the EEO Officer as individual defendants. Id. This Note, however, only addresses Suders's claims under Title VII against the PSP.
33. See Suders, 325 F.3d at 440.
United States Supreme Court in Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton.\textsuperscript{34} As a result, the district court granted summary judgment in favor of the PSP.\textsuperscript{35} The district court did not address Suders's constructive discharge claim.\textsuperscript{36}

On appeal, the Court of Appeals for the Third Circuit reversed and remanded the case.\textsuperscript{37} The court's decision was based on its conclusions that constructive discharge constituted a tangible employment action and that the \textit{Ellerth/Faragher} affirmative defense was unavailable to employers in constructive discharge actions.\textsuperscript{38}

C. The United States Supreme Court

The Supreme Court granted certiorari\textsuperscript{39} "to resolve the disagreement among the Circuits on the question [of] whether a constructive discharge brought about by supervisor harassment ranks as a tangible employment action and, therefore, precludes assertion of the affirmative defense articulated in \textit{Ellerth} and \textit{Faragher}."\textsuperscript{40} In an opinion authored by Justice Ginsburg, the Court ruled for the first

\begin{thebibliography}{99}
\bibitem{34} Id.; see also Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). The affirmative defense set forth in \textit{Ellerth} and \textit{Faragher} is known as the "Ellerth/Faragher affirmative defense." For more detail about the defense and its elements, see infra Part I.C.1; see also 1 Merrick T. Rossein, \textsc{Employment Discrimination Law and Litigation} §§ 5.2, 5.5-9, 5.16-38 (2005) (discussing employer liability for sexual harassment after \textit{Ellerth} and \textit{Faragher} and how federal courts are applying the defense); Dianne Avery, \textit{Overview of the Law of Sexual Harassment and Related Claims, in Litigating the Sexual Harassment Case} 1, 13-22 (Matthew B. Schiff & Linda C. Kramer eds., 2d ed. 1999) (discussing employer liability for sexual harassment after \textit{Ellerth} and \textit{Faragher}).
\bibitem{35} Suders, 325 F.3d at 440 (discussing the district court opinion). The district court held that, under the \textit{Ellerth/Faragher} affirmative defense, the PSP could not be held vicariously liable for the conduct of Suders's three supervisors or for the conduct of its EEO Officer because Suders "unreasonably failed to avail herself of the [PSP's] internal procedures for reporting any harassment." \textit{Id.} (quoting the district court opinion).
\bibitem{36} Id.
\bibitem{37} Id. at 463.
\bibitem{38} Id. at 462. The \textit{Ellerth/Faragher} affirmative defense is only available to employers in instances in which no tangible employment action has been taken. \textit{See} \textit{Ellerth}, 524 U.S. at 765; accord \textit{Faragher}, 524 U.S. at 807; see also infra Part II.C.2.
\end{thebibliography}
time that constructive discharge is actionable under Title VII. The Court held that constructive discharge could be, but was not always, a tangible employment action and that the Ellerth/Faragher affirmative defense was available to employers in certain constructive discharge cases. As a result, the Court vacated the Third Circuit's judgment and remanded the case.

1. Building on Precedent: Ellerth and Faragher

The Court's opinion in Suders was built on its holdings in Ellerth and Faragher. In both Ellerth and Faragher, the Court "delineate[d] two categories of hostile work environment claims: (1) harassment that 'culminates in a tangible employment action,' for which employers are strictly liable, and (2) harassment that takes place in the absence of a tangible employment action, to which employers may assert an affirmative defense." The Ellerth Court reasoned that, in making tangible employment decisions, a supervisor uses her authority "to make economic decisions affecting other employees under ... her control." In such instances, the supervisor acts as the employer's agent and, therefore, the employer is liable for the supervisor's conduct. On the other hand, in situations in which the hostile work environment does not involve a tangible employment action, it is possible that the supervisor does not use her status to perpetrate the harassing conduct; instead, the

41. Id. at 132, 142-43. Lower courts and the Equal Employment Opportunity Commission (EEOC), however, have long recognized constructive discharge under Title VII. See id. at 142-43. Although Suders was the first decision in which the Supreme Court recognized constructive discharge as a cause of action under Title VII, the Court previously held, in Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 894 (1984), that constructive discharge was actionable in the labor law context.

42. Suders, 542 U.S. at 140-41.

43. Id. at 141.

44. The Court decided the two cases on the same day. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 775 (1998).

45. Suders, 542 U.S. at 143 (citations omitted). "For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

46. Ellerth, 542 U.S. at 762.

47. See id. at 763.
supervisor's acts may be similar to those of a coworker. In those situations, the Court reasoned that the supervisor may not always act as the employer's agent and, therefore, the employer should not be held strictly liable for the supervisor's conduct and may raise an affirmative defense to liability. To assert the Ellerth/Faragher affirmative defense, an employer must prove: "(a) that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

In making this distinction in liability, the Court focused on the premise that "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms" and that "Congress's intention [was] to promote conciliation rather than litigation in the Title VII context." The Court also considered the EEOC's policy of encouraging employers to develop employee complaint programs. "To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would ... serve Title VII's deterrent purpose."

2. The Majority Opinion in Suders

In Suders, the Court held that in order to establish constructive discharge, an employee must show "that the abusive working environment became so intolerable that her resignation qualified as a fitting response." As it did with hostile work environment claims in Ellerth and Faragher, the Court delineated two categories of constructive discharge claims—those that are precipitated by "an

48. Id.
49. Id. at 763-65.
50. Id. at 765; accord Faragher, 524 U.S. at 778.
51. Ellerth, 524 U.S. at 764.
52. Id.
53. Id.
official act of the company\textsuperscript{55} and those that are not.\textsuperscript{56} In cases in which the constructive discharge claim is based on an official act of the employer, a tangible employment action has occurred and the employer may not assert the Ellerth/Faragher affirmative defense.\textsuperscript{57} On the other hand, when an employer's official act does not underlie a claim of constructive discharge, a tangible employment action has not occurred and the defense is available to the employer.\textsuperscript{58} The Court reasoned that

official directions and declarations are the acts most likely to be brought home to the employer, the measures over which the employer can exercise greatest control. Absent "an official act of the enterprise," as the last straw, the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force. And as Ellerth and Faragher further point out, an official act reflected in company records—a demotion or a reduction in compensation, for example—shows "beyond question" that the supervisor has used his managerial or controlling position to the employee's disadvantage. Absent such an official act, the extent to which the supervisor's misconduct has been aided by the agency relation ... is less certain. 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.\textsuperscript{59}

Nancy Drew Suders based her constructive discharge claim on an alleged hostile work environment. That type of claim is "one subset

\textsuperscript{55} An official act is "the means by which the supervisor brings the official power of the enterprise to bear on subordinates." Id. at 144 (quoting Ellerth, 524 U.S. at 762).

\textsuperscript{56} Id. at 148-49.

\textsuperscript{57} Id. at 148-52.

\textsuperscript{58} Id. For an argument that the Court unnecessarily complicated matters by finding that constructive discharge may be, but is not always, a tangible employment action, see generally James M. Weiss, Note, If He Makes You Quit, We're Not Liable: How Pennsylvania State Police v. Suders Unnecessarily Complicates Title VII Lawsuits, 82 WASH. U. L.Q. 1621 (2004).

\textsuperscript{59} Suders, 542 U.S. at 148-49 (citations omitted). In Suders, the Court again pointed out its attempt to further Congress's purpose "to promote conciliation rather than litigation of Title VII controversies" and indicated that, by tying employer liability to the employer's implementation of preventive and corrective measures, it furthered "Title VII's deterrent purpose by encouraging employees to report harassing conduct before it becomes severe or pervasive." Id. at 145 (alteration in original) (internal quotation marks omitted).
of Title VII constructive discharge claims."\textsuperscript{60} A hostile work environment claim requires an employee to show that "the offending behavior ... [was] sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."\textsuperscript{61} The Court indicated that an employee bringing a cause of action for constructive discharge based on a hostile work environment must make a further showing: (1) that there was a hostile work environment and (2) that the "working conditions [became] so intolerable that a reasonable person would have felt compelled to resign."\textsuperscript{62} In essence, such a claim "presents a 'worse case' harassment scenario, harassment ratcheted up to the breaking point."\textsuperscript{63}

[H]arassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts. Unlike an actual termination, which is always effected through an official act of the company, a constructive discharge need not be. A constructive discharge involves both an employee's decision to leave and precipitating conduct: The former involves no official action; the latter, like a harassment claim without any constructive discharge assertion, may or may not involve official action.\textsuperscript{64}

Employees who prove that they were constructively discharged under Title VII, whether it is the type of constructive discharge claim Suders brought or not, may receive the same type of damages available in cases involving actual discriminatory discharge,

\begin{itemize}
\item \textsuperscript{60} Id. at 143. The other type of constructive discharge claim "center[s] on a discrete discriminatory act, such as a demotion." Martha Chamallas, \textit{Title VII's Midlife Crisis: The Case of Constructive Discharge}, 77 S. CAL. L. REV. 307, 317-18 (2004). These are the two different categories of constructive discharge claims that the Supreme Court identified in \textit{Suders}.\textsuperscript{61}
\item \textit{Suders}, 542 U.S. at 146-47 (internal quotation marks omitted) (quoting \textit{Meritor Sav. Bank, FSB v. Vinson}, 477 U.S. 57, 67 (1986)). An employee, in order to state a prima facie case of hostile work environment based on sexual harassment by a supervisor, must prove that "(1) she is a member of a protected group; (2) she was subjected to unwanted conduct based on sex; (3) the conduct was objectively severe or pervasive [enough] to alter the conditions of the plaintiff's employment and create an abusive work environment; and (4) she subjectively perceived the conduct to be abusive." ROSSEIN, supra note 34, § 5:11.\textsuperscript{62}
\item \textit{Suders}, 542 U.S. at 147.\textsuperscript{63}
\item Id. at 147-48.\textsuperscript{64}
\item Id. at 148.
\end{itemize}
including backpay, frontpay, and compensatory and punitive damages.\textsuperscript{65}

3. Justice Thomas’s Dissent

Justice Thomas was the lone dissenter in \textit{Suders}. Thomas noted that, under the majority’s definition of constructive discharge—which he designated as “hostile work environment plus”\textsuperscript{66}—it is possible for an employee to bring a constructive discharge claim even though there has been no adverse employment action.\textsuperscript{67} In this way, constructive discharge “does not in the least resemble actual discharge,” and yet the majority “attach[ed] the same legal consequences to a constructive discharge as to an actual discharge.”\textsuperscript{68} Thomas argued that it would make sense to treat a constructive discharge like an actual discharge “[i]f, in order to establish a constructive discharge, an employee must prove that his employer subjected him to an adverse employment action with the specific intent of forcing the employee to quit.”\textsuperscript{69} Thomas believed, however, that this was not required under the majority’s definition of constructive discharge.\textsuperscript{70} Under the majority’s definition, Thomas argued that an employer should be held liable for a supervisor’s conduct only if the employer negligently allowed the conduct to occur.\textsuperscript{71}

\begin{itemize}
  \item \textsuperscript{65} \textit{Id.} at 147 n.8. For further discussion of the damages available for constructive discharge claims, see infra notes 169-73 and accompanying text.
  \item \textsuperscript{66} \textit{Suders}, 542 U.S. at 154 (Thomas, J., dissenting) (internal quotation marks omitted).
  \item \textsuperscript{67} \textit{Id.}
  \item \textsuperscript{68} \textit{Id.} at 153.
  \item \textsuperscript{69} \textit{Id.}
  \item \textsuperscript{70} \textit{Id.} at 154.
  \item \textsuperscript{71} \textit{Id.} Thomas would have reversed the court of appeals’s judgment because \textit{Suders} did not prove that she had been subjected to an adverse employment action nor did she establish that the PSP knew or should have known about the harassment. \textit{Id.}
\end{itemize}
II. The Employer Intent Requirement May Have Been Eliminated

A. The Origins of Constructive Discharge: Constructive Discharge Under the National Labor Relations Act

The concept of constructive discharge first appeared in the labor law context.\(^{72}\) The National Labor Relations Act (NLRA) prohibits employers from engaging in unfair labor practices.\(^{73}\) Under §158(a)(3) of the NLRA, it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."\(^{74}\) The National Labor Relations Board (NLRB), the federal administrative agency created to hear and decide unfair labor practice charges under the NLRA,\(^{75}\) has recognized constructive discharge since the 1930s.\(^{76}\) The NLRB developed the concept of constructive discharge to deter employers from terminating employees simply because the employees supported a union.\(^{77}\) In *Crystal Princeton Refining Co.*,\(^{78}\) "the leading [NLRB] case on constructive discharge,"\(^{79}\) the NLRB set forth the elements of a constructive discharge claim: "First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities."\(^{80}\)

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72. Id. at 141 (majority opinion); see also Cathy Shuck, Comment, That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine, 23 BERKELEY J. EMP. & LAB. L. 401, 403 (2002).
74. Id. § 158(a)(3).
75. Id. § 153.
76. See Suders, 542 U.S. at 141; see also Shuck, supra note 72, at 406. For a discussion of the NLRB's treatment of constructive discharge claims, see generally Roslyn Corenzwit Lieb, Constructive Discharge Under Section 8(a)(3) of the National Labor Relations Act: A Study of Undue Concern over Motives, 7 INDUS. REL. L.J. 143 (1985).
77. See Chamallas, supra note 60, at 357.
78. 222 N.L.R.B. 1068 (1976).
The NLRB initially took the position that an employee must prove that the employer took action with the specific intent to compel the employee to resign. In Muller v. United States Steel Corp., the Court of Appeals for the Tenth Circuit reviewed cases brought under the NLRA to determine the appropriate standard for establishing a constructive discharge claim. The Tenth Circuit concluded that in each of the cases in which constructive discharge was found, there was sufficient evidence to find that the employer had specifically intended to compel the employee's resignation. On the other hand, the court did not find constructive discharge under the NLRA when there was no evidence of "the existence of a scheme to get rid of the employee."

More recently, however, the NLRB has held that proof of the employer's specific intent is not necessary. In Yellow Enterprise Systems, Inc., the NLRB indicated that the first prong of the test delineated in Crystal Princeton "is not limited to whether the employer specifically intended to cause the employee to quit, but includes whether, under the circumstances, the employer reasonably should have foreseen that its actions would have that result."

82. 509 F.2d 923 (10th Cir. 1975).
83. Id. at 929 (citing J.P. Steven & Co., Inc. v. NLRB, 461 F.2d 490 (4th Cir. 1972); NLRB v. Century Broad. Corp., 419 F.2d 771 (8th Cir. 1969); NLRB v. Tenn. Packers, Inc., 339 F.2d 203 (6th Cir. 1964)).
84. Id. (citing Steel Indus., Inc. v. NLRB, 325 F.2d 173 (7th Cir. 1963)). In Muller, the Tenth Circuit also took the view that an employee must show that the employer deliberately intended the employee's resignation. Id. The Tenth Circuit subsequently rejected that standard and now uses the "reasonable employee" standard. See infra notes 98, 100-03 and accompanying text.
86. See supra notes 78-80 and accompanying text.
87. Yellow Enter. Sys., 2004 WL 1875729, at *5 (quoting Am. Licorice Co., 299 N.L.R.B. 145, 148 (1990); see also Midwest Television, Inc., No. 21-CA-32858 (N.L.R.B. Div. of Judges May 4, 2001), 2001 WL 1598718 (finding that the employer constructively discharged the employee where, even though the employer may not have had the specific intent to force the employee to resign, the employer could have anticipated that the employee would have done so in response to the employer's actions).
B. Two Different Standards Used by Circuit Courts

Circuit courts reluctantly acknowledged the concept of a constructive discharge. It was not until 1944 that a circuit court first used the term "constructive discharge." The notion eventually caught on, and by the time Title VII was enacted in 1964, "[t]he constructive discharge doctrine was firmly established in the [lower] federal courts." 89

Two main standards have emerged in the circuit courts for determining whether an employee was constructively discharged. 90 Most circuit courts employ a "reasonable employee standard" approach to constructive discharge. Others use a standard that focuses on the intent of the employer—the so-called "employer intent standard." 92

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88. Shuck, supra note 72, at 407 (citing NLRB v. Waples-Platter Co., 140 F.2d 228 (5th Cir. 1944)).
89. Id. at 410.
90. For a general discussion of the two standards, see Chamallas, supra note 60, at 316-17; Shari M. Goldsmith, The Supreme Court's Suders Problem: Wrong Question, Wrong Facts Determining Whether Constructive Discharge Is a Tangible Employment Action, 6 U. Pa. J. LAB. & EMP. L. 817, 832-34 (2004); Sarah H. Perry, Comment, Enough Is Enough: Per Se Constructive Discharge for Victims of Sexually Hostile Work Environments Under Title VII, 70 WASH. L. REV. 541, 548-51 (1995); Shuck, supra note 72, at 413-17. See generally Martin W. O'Toole, Note, Choosing a Standard for Constructive Discharge in Title VII Litigation, 71 CORNELL L. REV. 587 (1986) (examining both standards to determine which is most appropriate for use under Title VII). At least one author has argued that there are five different standards currently in use. See Underwood, supra note 81, at 344.
91. O'Toole, supra note 90, at 598. This standard is also referred to as the "reasonable person standard." See, e.g., Levendos v. Stern Entm't, Inc., 860 F.2d 1227, 1230 (3d Cir. 1988).
92. O'Toole, supra note 90, at 596. This standard is also referred to as the "subjective-intent standard." See, e.g., Derr v. Gulf Oil Corp., 796 F.2d 340, 343 (10th Cir. 1986).
1. The Majority Approach: The "Reasonable Employee Standard"

The First, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits all use the objective, "reasonable employee standard" for constructive discharge claims brought under Title VII. The objective standard considers whether a reasonable person in the employee's position would have felt compelled to resign as a result of the working conditions and focuses "on the impact of the employer's actions, whether deliberate or not, upon a 'reasonable' employee." To state a cause of action under Title VII using this standard, an employee need only establish two factors: (1) that there was harassing conduct so intolerable that a reasonable person would have felt compelled to resign and (2) that the employee's action in resigning was reasonable under the circumstances. In the courts that use the objective standard, "no finding of a specific intent on the part of the employer to bring about a discharge is required for the application of the constructive discharge doctrine." In fact, these courts generally believe that "such a requirement would be inconsistent with the purpose of the constructive discharge doctrine to protect employees from conditions so

93. See, e.g., Ramos v. Davis & Geck, Inc., 167 F.3d 727, 731-32 (1st Cir. 1999); Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 561 (1st Cir. 1986); Rosado v. Santiago, 562 F.2d 114, 119 (1st Cir. 1977).
96. See, e.g., Tutman v. WBBM-TV, Inc./CBS, Inc., 209 F.3d 1044, 1050 (7th Cir. 2000); Simpson v. Borg-Warnier Auto., Inc., 196 F.3d 873, 877 (7th Cir. 1999).
97. See, e.g., Brooks v. City of San Mateo, 229 F.3d 917, 930 (9th Cir. 2000); Nolan v. Cleland, 866 F.2d 806, 813 (9th Cir. 1982).
98. See, e.g., Thomas v. Denny's, Inc., 111 F.3d 1506, 1514 (10th Cir. 1997); Derr v. Gulf Oil Corp., 796 F.2d 340, 343-44 (10th Cir. 1986).
unreasonably harsh that a reasonable person would feel compelled to leave the job."^{103}

2. The Minority Approach: The "Employer Intent Standard"

In the Second,^{104} Fourth,^{105} Sixth,^{106} Eighth,^{107} and D.C.^{108} Circuits, an employee claiming constructive discharge under Title VII must prove that the "employer ... intentionally create[d] an intolerable work atmosphere that force[d the] employee to quit involuntarily."^{109} The "employer intent standard" used by these courts requires a showing of "deliberate action on the part of the employer."^{110} Initially, courts using the "employer intent standard" required specific intent on the part of the employer: "To constitute a constructive discharge, the employer's actions must have been taken with the intention of forcing the employee to quit."^{111} More recently, however, many of these courts have relaxed this stringent requirement.^{112} These courts now permit an employee to show employer intent by submitting "evidence that [the] employee's resignation was the reasonably foreseeable consequence of the

104. See, e.g., Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 73 (2d Cir. 2000).
105. See, e.g., Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 272 (4th Cir. 2001); Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 244 (4th Cir. 1997); Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1350 (4th Cir. 1995).
109. Whidbee, 223 F.3d at 73.
110. Id. at 74. The courts' focus on the deliberateness of the employer's action resembles the NLRB's approach in early NLRA actions. See Goldsmith, supra note 90, at 832-33.
112. See Goldsmith, supra note 90, at 833-34; Shuck, supra note 72, at 415-16. See generally Stacey Elizabeth Tjon Aasland, Case Comment, The Constructive Discharge Doctrine and Its Applicability to Sexual Harassment Cases: Does It Matter What the Employer Intended Anymore?, 71 N.D. L. REV. 1067, 1079 (1995) (discussing Hukkanen v. Int'l Union of Operating Eng'r's Local No. 101, 3 F.3d 281 (8th Cir. 1993), in which the Eighth Circuit departed from its former requirement that the employee show specific intent on the part of the employer).
employer's conduct."\textsuperscript{113} Proof that "the employer's actions were deliberate and not merely negligent[,] or ineffective[,]" however, is still required.\textsuperscript{114} This requirement differentiates the "employer intent standard" from the "reasonable employee standard." Under the "reasonable employee standard," a court may find that the employee was constructively discharged when the employer's conduct was deliberate and when the employer acted negligently.\textsuperscript{115}

C. Suders May Have Eliminated the Requirement of "Employer Intent"

Acknowledging the split among the federal courts of appeal as to the elements of constructive discharge claims, the Third Circuit explicitly rejected imposing a requirement on Nancy Drew Suders to prove that the PSP intended to force her to resign:

We hold that no finding of a specific intent on the part of the employer to bring about a discharge is required for the application of the constructive discharge doctrine. The court need merely find that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign.\textsuperscript{116}

Although the Supreme Court did not take the opportunity in Suders to expressly address the issue of employer intent, a New York district court found that the Suders decision did not overrule the "requirement that an employee alleging a constructive discharge claim demonstrate deliberate action on the part of the employer."\textsuperscript{117}


\textsuperscript{114} Petrosino v. Bell Atl., 385 F.3d 210, 230 (2d Cir. 2004) (alterations in original) (internal quotation marks omitted) (quoting Whidbee, 223 F.3d at 74); see also Amirmokri v. Balt. Gas & Elec. Co., 60 F.3d 1126, 1132 (4th Cir. 1995) ("To prove constructive discharge, [a plaintiff] must show that the [employer] deliberately made his working conditions 'intolerable' in an effort to induce him to quit.").

\textsuperscript{115} See Goldsmith, supra note 90, at 832-33.


In *EEOC v. Grief Brothers Corp.*, the EEOC filed suit against Greif, Inc., alleging the employer subjected its former employee, Michael Sabo, to same-sex sexual harassment and constructively discharged Sabo in violation of Title VII. The EEOC alleged that within his first two weeks of working at the employer's plant, Sabo was "harassed, emasculated, humiliated and ridiculed" by three coworkers and Sabo's coworkers' "offensive verbal and physical conduct, include[ed] conduct that caused Sabo concern for his physical safety." According to the EEOC, the harassment continued even after Sabo complained to management. After an incident in which his coworkers allegedly sped up an assembly line to make his work more difficult, Sabo could not "take [it] anymore" and walked out of the plant.

The EEOC filed suit and argued that the Supreme Court had eliminated any requirement that an employee alleging constructive discharge demonstrate that the employer acted with deliberateness. The EEOC's argument was based on the Court's finding in *Suders* that "harassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts. Unlike an actual termination, which is always effected through an official act of the company, a constructive discharge need not be." The *Grief Brothers* court, however, disagreed:

This Court does not agree with the EEOC's interpretation of this passage. This statement by the Court is simply a recognition that constructive discharge does not ordinarily involve an official, overt adverse employment action by the employer—an unremarkable proposition. This Court does not read *Suders* as eliminating the requirement that an employer's disregard to the hostile environment be deliberate, and neither have other courts in this circuit.

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118. The employer's name was "Greif"; it was misspelled in the complaint. See id. at n.1.
119. Id. at *1.
120. Id. at *2.
121. Id. at *3.
122. Id.
123. Id. at *15 n.11.
125. Id. (citation omitted). Nevertheless, the court found that the EEOC had put forth sufficient evidence to create an issue of fact as to whether the employer's conduct in failing
Although the *Grief Brothers* court rejected reading *Suders* as eliminating the need for an employee alleging constructive discharge to demonstrate deliberate action on the part of the employer, Justice Thomas thought that the *Suders* majority opinion did just that.\(^{126}\) This Note suggests that Justice Thomas may have been correct.

Three aspects of the majority opinion in *Suders* seem to indicate that the Court has rejected the requirement of deliberate action by the employer in a constructive discharge claim. First, in defining constructive discharge, the Court adopted the language of those courts that have specifically rejected a showing of employer intent in constructive discharge claims and, in so doing, rejected the definition used by the courts that require an employee to establish employer intent. Second, the Court designated two types of constructive discharge claims—in one type, employer liability can be premised on the employer’s negligence rather than on deliberate actions. Finally, by describing one type of constructive discharge as an extreme form of sexual harassment, it follows that an employer should not escape liability for constructive discharge merely because the employer lacked the requisite intent when that same employer could be found liable for sexual harassment without having acted intentionally. Thus, for employees in the circuits that previously required a showing of deliberate action on the part of the employer, it appears that *Suders* may have opened a door allowing a constructive discharge claim to be based on employer negligence.

1. *The Language Used by the Supreme Court*

The first indication that the Court appears to have endorsed the “objective employee standard” and rejected the “employer intent standard” is the Court’s definition of “constructive discharge.” The Court’s language in *Suders* is very similar to the language used by courts who embrace the “objective employee standard.” In *Suders*,

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the Court held that a constructive discharge claim arising from an allegedly hostile work environment requires the employee to "show that the abusive working environment became so intolerable that [the employee's] resignation qualified as a fitting response." Similarly, the Third Circuit below recognized constructive discharge when "acts of discrimination in violation of Title VII ... make working conditions so intolerable that a reasonable employee would be forced to resign." The Fifth Circuit has employed comparable verbiage: "To demonstrate constructive discharge, a plaintiff must prove that working conditions were so intolerable that a reasonable person in the plaintiff's position would feel compelled to resign.

Compare that language to the language of courts that use the "employer intent standard." The Grief Brothers court stated that "[a] constructive discharge occurs when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." The Fourth Circuit also uses the word "deliberate" in its definition of constructive discharge: "A constructive discharge occurs when an employer creates intolerable working conditions in a deliberate effort to force the employee to resign." Likewise, in the Eighth Circuit, "[c]onstructive discharge occurs when an employer deliberately renders the employee's working conditions intolerable, thereby forcing her to quit." Finally, the Sixth Circuit requires a plaintiff to show that "the employer ... deliberately create[d] intolerable working conditions."

127. Suders, 542 U.S. at 134 (majority opinion).
130. Grief Bros., 2004 WL 2202641, at *15 (emphasis added) (quoting Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1188 (2d Cir. 1987)).
133. Logan v. Denny's, Inc., 259 F.3d 558, 568 (6th Cir. 2001) (omission and alteration in original) (emphasis added) (quoting Moore v. KUKA Welding Sys. & Robot Corp., 171 F.3d 1073, 1080 (6th Cir. 1999)).
Every circuit that applies the "employer intent standard" patently includes the word "deliberate" in the definition of constructive discharge and, yet, the word is noticeably missing from the Supreme Court’s definition in \textit{Suders}.\textsuperscript{134} Instead, the Court chose to use language similar to language used in courts that apply the "objective employee standard."\textsuperscript{135}

\textbf{2. Constructive Discharge Claims Categorized into Two Types}

The second indication that \textit{Suders} may have eliminated the need to show employer intent is the Court’s reliance on agency principles in delineating two types of constructive discharge claims.

In \textit{Meritor Savings Bank, FSB v. Vinson},\textsuperscript{136} the Court stated its belief that it was Congress’s intent to limit employer liability for acts of its employees under Title VII.\textsuperscript{137} Based on this belief and basic agency principles, the \textit{Vinson} Court held that employers are not always liable for their supervisors' acts of sexual harassment.\textsuperscript{138}

The Court returned to agency principles in \textit{Ellerth} and \textit{Faragher}. Under the Restatement (Second) of Agency, an employer is liable for the torts of its employees that were committed "in the scope of their employment."\textsuperscript{139} The \textit{Ellerth} Court, however, found that harassment is generally not within the scope of a supervisor's employment.\textsuperscript{140} Section 219(2) of the Restatement provides:

\begin{quote}
(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
(a) the master intended the conduct or consequences, or
(b) the master was negligent or reckless, or
(c) the conduct violated a non-delegable duty of the master, or
(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority,
\end{quote}

\textsuperscript{134} See supra notes 130-33 and accompanying text.
\textsuperscript{135} Moreover, the Court did not suggest that the Third Circuit's analysis on this point was incorrect. See generally Pa. State Police v. Suders, 542 U.S. 129 (2004).
\textsuperscript{136} 477 U.S. 57 (1986).
\textsuperscript{137} \textit{Id.} at 72.
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{RESTATEMENT (SECOND) OF AGENCY} § 219(1) (1958).
\textsuperscript{140} See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 757 (1998).
or he was aided in accomplishing the tort by the existence of the agency relation.\textsuperscript{141}

The Court held that under subsection (b), the employer is liable for the harassing conduct of a supervisor when "it knew or should have known about the conduct and failed to stop it."\textsuperscript{142}

Turning to the language of subsection (d), the Court held that when the supervisor's act consisted of a tangible employment action, there could be no doubt that the supervisor's conduct was "aided in the agency relation."\textsuperscript{143} In such instances, the employer is vicariously liable for the conduct of the supervisor.\textsuperscript{144} On the other hand, an employer is not always liable for a supervisor's acts that do not result in a tangible employment action.\textsuperscript{145} The Court acknowledged that, although it could be argued that the power and authority that accompany supervisor status always make a supervisor's conduct aided in the agency relationship, "there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where the supervisor's status makes little difference."\textsuperscript{146} Therefore, the Court reasoned, in order to promote the policies of Title VII, the employer may assert the \textit{Ellerth/Faragher} affirmative defense when there was no tangible employment action taken.\textsuperscript{147}

Using the same agency principles, the \textit{Suders} Court designated two types of constructive discharge claims—those predicated on the employer's official act and those in which an official act of the employer is not the basis of the constructive discharge. In the first type, the employer is vicariously liable. In the second, liability is not automatically imposed on the employer.\textsuperscript{148} In situations in which there was no official act of the employer, liability will attach to the employer only if the employer cannot establish the elements of the \textit{Ellerth/Faragher} affirmative defense. In other words, liability will attach when the employer was \textit{negligent} in failing to "exercis[e]
reasonable care to prevent and correct promptly any sexually harassing behavior." Thus, a court could find that the employee was constructively discharged based on a finding that the employer acted with negligence. This is directly contrary to a requirement that an employee alleging constructive discharge show that the employer deliberately acted in an effort to get the employee to resign.

3. Constructive Discharge as "Sexual Harassment Plus"

A third indication that the Court may have eliminated the employer intent requirement is the Court's description of the type of constructive discharge predicated on sexual harassment as "worse case" scenario sexual harassment. An employer is liable for "ordinary" sexual harassment by a supervisor when the employer "knew or should have known about the conduct and failed to stop it." In other words, the employer will be liable for a supervisor's harassing conduct when the employer acted negligently. If the Court allows an employer's liability to be based on its negligent conduct in "ordinary" sexual harassment, then, absent specific instruction to the contrary, it is unlikely that the Court would impose a higher standard for an employee to meet when the conduct has become so egregious that it rises to the level of "worse case" scenario sexual harassment.

III. THE POTENTIAL IMPACT OF SUDERS

Without a requirement to prove employer intent in constructive discharge claims—when considered in light of the Sunders Court's definition of constructive discharge and the damages it made available under constructive discharge claims—some employees

149. *Id.* at 145-46 (quoting *Ellerth*, 524 U.S. at 765).
150. *See supra* notes 134-35 and accompanying text.
152. *Ellerth*, 524 U.S. at 759. The lower courts have "uniformly" imposed liability on employers for coworker harassment using this same negligence standard. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 799; *see also Primer on Equal Employment Opportunity 51* (Nancy J. Sedmak & Chrissie Vidas eds., 6th ed. 1994) ("An employer is liable for sexual harassment committed by co-workers if it knew, or should have known, of the conduct unless it can show that it took 'immediate and appropriate corrective action.'").
may be motivated to quit their jobs without first making their employers aware of the harassment.\textsuperscript{153} The Court has previously indicated that the “primary objective” of Title VII was “not to provide redress but to avoid harm”\textsuperscript{154} and has cited with approval EEOC policies that were “designed to encourage victims of harassment to come forward.”\textsuperscript{155} “Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms .... [And] to promote conciliation rather than litigation ....”\textsuperscript{156} Suders, however, may serve as an impetus for employees to file constructive discharge claims.

The most common type of constructive discharge claims brought under Title VII are claims based on hostile work environments and are not based on official acts by supervisors.\textsuperscript{157} Prior to Suders, it was not uncommon for an employee to bring both a hostile work environment claim and a constructive discharge claim together.\textsuperscript{158} Now, assuming that there is not a separate requirement to establish the employer’s intent, it is even easier to do so. Employees can just “piggyback” constructive discharge claims onto hostile work environment claims. If an employee has sufficient evidence to survive the employer’s motion for summary judgment on the hostile work environment claim, she can expect that her constructive discharge claim will probably survive summary judgment as well. The difference between the harassment necessary to give rise to a hostile work environment claim and that necessary for a constructive discharge claim is “only a matter of degree.”\textsuperscript{159} Factfinders in hostile work environment constructive discharge claims “are thus called on to make fine calibrations of the magnitude of the harassment faced by the plaintiff”\textsuperscript{160} and, therefore, summary judgment

\begin{itemize}
  \item 153. Even if Suders did not eliminate the requirement to prove employer intent, this may still be true in those circuits that currently use the reasonable employee standard in constructive discharge cases as a result of the Court’s specific holdings in Suders.
  \item 154. Faragher, 524 U.S. at 806; accord Suders, 542 U.S. at 145; Ellerth, 524 U.S. at 764.
  \item 155. Faragher, 524 U.S. at 806.
  \item 156. Ellerth, 524 U.S. at 764.
  \item 158. See Perry, supra note 90, at 546.
  \item 159. 2 Cox, supra note 126, § 18.04.
  \item 160. Chamallas, supra note 60, at 316.
\end{itemize}
may often be inappropriate. Moreover, due to the fact-intensive nature of the Ellerth/Faragher defense (which focuses on the reasonableness of the parties’ actions), summary judgment disposition may be even less appropriate.\textsuperscript{161}

The majority of employment discrimination cases are settled out of court.\textsuperscript{162} Although “[a]ll litigation is expensive[,] ... employment discrimination litigation is particularly so” and the legal fees and costs of litigation are enough to make many employers settle out of court “simply to avoid these costs.”\textsuperscript{163} In addition, although employees traditionally have had low success rates at trial,\textsuperscript{164} employee win rates in employment discrimination cases brought in federal court are on the rise.\textsuperscript{165} When this fact is considered in light of the unpredictability of jury decisions, employers have an even greater reason to want to avoid the courtroom.\textsuperscript{166}

\textsuperscript{161} See Jill L. Rosenberg & Tracy L. Scheidtmann, Sexual Harassment, in EMPLOYMENT LAW YEARBOOK ch. 12, § 12:8 (Timothy J. Long ed., 2005); see also Phillips v. Taco Bell Corp., 156 F.3d 884, 889 (8th Cir. 1998) (holding that the trier of fact should decide the sufficiency of the employer’s antiharassment policy). But see Chamallas, supra note 60, at 354 (noting that “recent empirical studies indicate that employers are having considerable success in establishing the defense, often at the summary judgment stage”).

\textsuperscript{162} See 2 JOHN F. BUCKLEY IV & MICHAEL R. LINDSAY, DEFENSE OF EQUAL EMPLOYMENT CLAIMS § 13:5 (2d ed. 2005); Kevin M. Clermont & Stewart J. Schwab, How Employment Discrimination Plaintiffs Fare in Federal Court, 1 J. EMPIRICAL LEGAL STUD. 429, 440 (2004) (stating that almost seventy percent of employment litigation settles). In 1998, only about one-third of the employment discrimination cases filed in federal courts actually went to trial and since then the percentage of employment discrimination cases that have proceeded to trial has decreased even further. Laurie Leader & Melissa Burger, Let’s Get a Vision: Drafting Effective Arbitration Agreements in Employment and Effecting Other Safeguards To Insure Equal Access to Justice, 8 EMP. RTS. & EMP. POL’Y J. 87, 88 (2004).

\textsuperscript{163} 2 BUCKLEY & LINDSAY, supra note 162, § 13:5. An employer can expect to spend between $100,000 and $250,000 to defend an employment lawsuit through trial. See Shari Caudron, Angry Employees Bite Back in Court, 75 PERSONNEL J. 32, 36 (1996); see also Leader & Burger, supra note 162, at 90.


\textsuperscript{165} See Clermont & Schwab, supra note 162, at 441-42.

\textsuperscript{166} Gregory Todd Jones, Note, Testing for Structural Change in Legal Doctrine: An Empirical Look at the Plaintiff’s Decision To Litigate Employment Disputes a Decade After the Civil Rights Act of 1991, 18 GA. ST. U. L. REV. 997, 1008-09, 1024-26, 1028 (2002); see also Marc R. Engel, Constructive Discharges Resulting from Sexual Harassment: The Supreme Court Finally Weighs In, EMP. L. STRATEGIST, Aug. 29, 2004 (“[W]hen viewed in the context of increasing jury awards, ... the stakes have never been higher for employers when it comes to harassment claims.”).
After *Suders*, employers defending hostile work environment constructive discharge claims have greater incentive to attempt a settlement than they did before.\(^{167}\) Knowing that there is a good chance that their cases will never make it to trial, employees may see financial benefit in bringing constructive discharge claims rather than allowing their employers an opportunity to correct the harassment.\(^{168}\) And, if the case happens to make it to trial, there is significantly more at stake in terms of damages available to an employee who brings a constructive discharge claim and a hostile work environment claim than there is to an employee who brings only a hostile work environment claim. An employee who has been subjected to a hostile work environment is entitled to receive backpay and frontpay; a court, however, is not likely to award backpay or frontpay unless the employee is able to prove that she was also constructively discharged.\(^{169}\) “Victims of hostile environments who cannot prove constructive discharge are thus limited to those compensatory and punitive damages traceable to the abuse on the job.”\(^{170}\) The possibility of being awarded backpay and frontpay is significant because the amount of compensatory and punitive

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167. See *supra* notes 158-66 and accompanying text.

168. Of course, these employees face the significant risk of quitting their jobs and not prevailing in subsequent litigation.

169. Chamallas, *supra* note 60, at 315; see also Sara Kagay, Note, *Applying the Ellerth Defense to Constructive Discharge: An Affirmative Answer*, 85 IOWA L. REV. 1035, 1047 (2000); Shuck, *supra* note 72, at 403 n.7. Backpay compensates a plaintiff for earnings the plaintiff would have received had there been no discriminatory conduct. Frontpay is compensation for loss of future earnings and may be awarded to a successful plaintiff in lieu of reinstatement.

170. Chamallas, *supra* note 60, at 315. Compensatory damages may be awarded for “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” 42 U.S.C. § 1981a(b)(3) (2000). Punitive damages are available to an employee who demonstrates that the employer discriminated “with malice or with reckless indifference.” *Id.* § 1981a(b)(1). The factors courts consider in determining punitive damages include:

1. The severity of the misconduct;
2. The amount needed to prevent repetition in light of defendant’s financial condition or to deter others from similar discriminatory conduct in the future;
3. The nature, extent, and severity of the harm caused by the misconduct;
4. The existence and frequency of post-discriminatory conduct;
5. Whether the employer has lied or attempted to conceal discriminatory conduct; and
6. Whether the employer has made threats or engaged in retaliatory conduct.

damages an employee can recover under Title VII is capped. Backpay and frontpay, however, are not subject to these caps and thus "[t]he significance of recovering on the constructive discharge claim ... remains particularly important for hostile environment claimants who have not suffered other economic loss in the form of discriminatory demotions, unequal pay, or lost promotions." Employees, therefore, have the potential of receiving a significantly greater amount in damages if they resign and file a constructive discharge claim than they do if they stay employed and file a claim for hostile work environment. And, unsurprisingly, the greater the amount of damages available, the more likely it is that employees will sue their employers.

CONCLUSION

There has been an “explosion” in the number of Title VII cases filed in federal court.

The number of employment suits in federal court increased by 430% between 1971 and 1991. The four following years witnessed another jump of 128%. In the last thirty years, the amount of employment litigation has grown at a rate almost ten times greater than the rate of increase in other types of civil litigation.

172. Chamallas, supra note 60, at 321. It should be noted, however, that under Title VII, a plaintiff has a duty to mitigate damages, and that recovery of backpay has always been limited to amounts that the plaintiff did not, or reasonably could not, recoup through securing comparable employment after quitting her job. Thus, even the plaintiff who proves constructive discharge is not entitled to sit tight and wait to be vindicated through a judgment awarding reinstatement and backpay. Instead, Title VII explicitly requires backpay awards to be reduced by "interim earnings or amounts earnable with reasonable diligence."
174. Id. at 265.
Employment discrimination cases now constitute nearly 10% of all federal civil cases.\textsuperscript{176}

Rather than deterring employment litigation, \textit{Suders} may, in fact, spawn more claims. By examining the Court's objective definition of constructive discharge, its delineation of two categories of constructive discharge, and its designation of one of those categories as an extreme form of harassment, it appears that the Court may have abolished any requirement for employees alleging constructive discharge to show that their former employer deliberately acted in an effort to make them resign. The elimination of a need to show employer intent, together with the \textit{Suders} Court's implication that the difference between the level of harassment necessary to prove harassment and that necessary to prove constructive discharge is just a matter of degree, and its holding that an employee who successfully proves constructive discharge may recover the same damages as an employee who proves actual discriminatory discharge may make it easier and more appealing for potential plaintiffs to bring constructive discharge claims.

This Note does not intend to suggest that constructive discharge should not be an actionable claim. Certainly in some situations an employee truly has no other option but to remove herself from the harassing environment. In other situations, however, where the harassment has not risen to such levels, there may be some individuals who would opt not to give the employer an opportunity to remedy the situation and would instead resign, choosing to take their chances in court. "An employee[, however,] has an obligation not to assume the worst and not to jump to conclusions too quickly."\textsuperscript{177} This Note merely asserts that insofar as it creates an incentive for employee to "jump ship" prematurely, \textit{Suders} operates contrary to what the Supreme Court has found to be the "design" of Title VII.

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\textsuperscript{176} Clermont & Schwab, \textit{supra} note 162, at 429, 432.
\textsuperscript{177} Phillips v. Taco Bell Corp., 156 F.3d 884, 889 (8th Cir. 1998) (quoting Summit v. S-B Power Tool, 121 F.3d 416, 421 (8th Cir. 1997)).

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