No. 03-95

# In the Supreme Court of the United States

PENNSYLVANIA STATE POLICE,
*Petitioner*

*v.*

NANCY DREW SUDERS,
*Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR PETITIONER


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## QUESTION PRESENTED

When a hostile work environment created by a supervisor culminates in a constructive discharge, may the employer assert the affirmative defense recognized in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)?

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The decision of the Court of Appeals is reported at 325 F.3d 432 and is reprinted in the appendix to the petition for certiorari ("Pet. App.") at 1a. The decision of the District Court is not reported, but is reprinted at Pet. App. 62a.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 2003, and the petition for certiorari was filed within 90 days thereafter, on July 14, 2004. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides in relevant part:

**§ 2000e. Definitions.**

For the purposes of this subchapter —

* * * * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees ... and any agent of such a person....

**§ 2000e-2. Unlawful employment practices.**

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

## STATEMENT OF THE CASE

This is an employment discrimination case arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). The employee claims that she was constructively discharged — that is, she was forced to quit her job — because her supervisors subjected her to an atmosphere of sexual harassment which made her working conditions intolerable. The issue is whether, under these circumstances, the employer may assert the affirmative defense recognized by *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998); or whether, as the Court of Appeals held, the affirmative defense is unavailable and the employer is instead automatically liable for the actions of its supervisors.

1. The respondent, Nancy Drew Suders, was a civilian employee of the petitioner, the Pennsylvania State Police. Respondent began work in March of 1998, and was assigned to the State Police station in McConnellsburg, Pennsylvania. Pet. App. 62a-63a. The McConnellsburg station in turn was one of several which formed Troop "G," commanded by a state police captain headquartered in Hollidaysburg. J.A. 37-38.[1] Respondent was assigned

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[1] *See also* PA. STATE POLICE, *1998 Annual Report* 29, available at http://psp.state.pa.us/psp/lib/psp/Annrep98.pdf (visited December 24, 2003). McConnellsburg is located in Fulton County, a rural county on the Maryland border about midway between Philadelphia and Pittsburgh. Hollidaysburg is located in Blair County, near Altoona.

to the McConnellsburg station as one of several police communications operators. J.A. 23, 30, 39.

The station commander at McConnellsburg was Sergeant Eric Easton, assisted by three or four state police corporals. J.A. 22, 29, 38. Sergeant Easton was formally the direct supervisor of respondent and the other communications operators, but they were also supervised on a day-to-day basis by whichever of the corporals was working their shift. J.A. 35-36, 51, 66; Pet. App. 8a-9a.

Respondent claimed[2] that Sergeant Easton and two of these corporals, William Baker and Eric Prendergast, began harassing her on a daily basis shortly after she began working at McConnellsburg. Pet. App. 64. The harassment included repeated attempts to engage her in discussions of bestiality, oral sex and genital piercing; repeated re-enactments — five to ten times a shift, even after respondent asked that it stop — of a "wrestling move" in which Baker would "grab hold of his private parts and yell suck it"; intimidating acts such as hitting office furniture; and various other sexually charged

[2]The District Court resolved this case by granting the petitioner's motion for summary judgment, and we, like the courts below, therefore recite the facts in the light most favorable to respondent.

posturing, leering and remarks.[3] J.A. 23-24, 30, 70-75, 77-81; Pet. App. 64a-66a.

Petitioner had adopted a policy specifically forbidding sexual harassment, J.A. 123-129, including "conduct ... creating an intimidating, hostile or offensive work environment," J.A. 123, and identifying as acts of sexual harassment "suggestive or provocative gestures, e.g., leering, staring, inappropriate gestures, comments, jokes, or stories of a sexual nature." J.A. 124. The policy included detailed procedures for reporting sexual harassment, for processing complaints either formally or informally, and for maintaining confidentiality. J.A. 125-126. It provided that complaints of harassment by an employee's supervisor should be made either to the harasser's immediate supervisor, or to the Affirmative Action Office. J.A. 125. The policy also included prohibitions on retaliation. J.A. 124, 128.

Petitioner's policy against sexual harassment was posted on workplace bulletin boards, available in petitioner's Administrative Regulations (AR) manual, and distributed individually to all employees. J.A. 62-63; Pet.

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[3]While we assume the truth of these assertions, we nevertheless note, in fairness to the accused individuals, that they vigorously dispute them. Respondent's supervisors testified that some of these incidents never happened at all, *see, e.g.*, J.A. 33-35, and that others took place in a context quite different from that suggested by respondent. Sergeant Easton, for example, testified that he referred to bestiality only in the course of explaining to respondent her duty to classify incidents to which the state police responded: he explained to her that a break-in might be classified as a burglary, a theft, or a trespass, depending on circumstances, and that there had been cases in which an intruder had broken into a barn to have sex with an animal, which would receive still another classification. J.A. 43-44.

App. 78a-79a. Respondent was aware of the policy and located it in the AR manual. J.A. 27-28, 32. In addition, as part of her training in June of 1998, respondent attended a class in sexual harassment taught by the State Police's affirmative action officer, Virginia Smith-Elliot. Respondent told Smith-Elliot that she might need some help, but did not supply any details. She obtained Smith-Elliot's telephone number, but did not contact her again until two months later. J.A. 95.

On August 18 — two days before she would resign — respondent telephoned Smith-Elliot and told her that she was being harassed. According to respondent, Smith-Elliot told her to complete a complaint form, located in the AR manual. J.A. 25, 31, 55, 96-97; *see* J.A. 125 (sexual harassment policy, reporting procedures). Respondent asked if Smith-Elliot would send her the form if she was unable to find it. Smith-Elliot said she would see what she could do, but respondent did not contact her again.[4] J.A. 96-97; Pet. App. 67a. The next day, August 19, respondent prepared a letter of resignation. J.A. 102.

The day after that, on August 20, 1998, respondent quit the State Police. Respondent had several times taken a test on her computer skills. Each time, her supervisors told her that she had failed, but she believed that they had lied to her and had not turned in her test results. She went through a drawer in the women's locker room,

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[4]Smith-Elliot testified that respondent complained that she was being discriminated against because of her age and political affiliation, but did not mention any sexual harassment; and that she promised to send a complaint form to respondent. Pet. App. 11a, 67a.

found her test papers and removed them.[5] After the loss of these papers was discovered, officers dusted the drawer with theft detection powder. On August 20, respondent again went through the drawer — to return her test papers, she said — and the powder turned her hands blue. When Corporal Baker confronted her, respondent told him that she was resigning. She claims that she was not allowed to leave the barracks, but was detained and questioned, and her hands were photographed.[6] She submitted the letter of resignation which she had been carrying with her, and eventually was permitted to leave.[7] J.A. 27, 32, 46-48, 98-104; Pet. App. 11a-12a, 68a-69a.

2. Respondent filed this action in the District Court pursuant to Title VII,[8] claiming that she had been "forced

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[5]Respondent contended that the drawer was not assigned to anyone in particular, while others said that the drawer was assigned to another employee and contained her personal belongings. Pet. App. 11a-12a, 68a.

[6]The opinion of the Court of Appeals twice refers to respondent having been handcuffed, *see* Pet. App. 12a, 27a, but did not identify any source for this assertion. It does not appear in the District Court's opinion, in the complaint, or in any of the evidentiary materials, including respondent's own deposition, submitted on summary judgment.

[7]Sergeant Easton testified that, after respondent was questioned about the blue on her hands, she was told to take the rest of the evening off. Pet. App. 68a.

[8]In addition to her claim of sex discrimination under Title VII, respondent also raised claims of age and political affiliation discrimination, and sought relief under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and the Pennsylvania Human Relations Act, Pa. Cons. Stat., tit. 43, § (continued...)

to endure an insulting and humiliating work environment and ... forced to suffer a termination of employment." Pet. App. 69a (quoting complaint). After discovery, the petitioner moved for summary judgment, which the District Court granted.

The District Court, viewing the facts in the light most favorable to respondent, held that genuine issues of material fact remained on the issue of whether respondent had been subjected to a hostile work environment. Pet. App. 74a-77a. Nevertheless, the District Court granted judgment to the petitioner, on the ground that even if a hostile environment existed, petitioner had established an affirmative defense to vicarious liability for its supervisors' actions. The District Court relied on *Faragher v. City of Boca Raton, supra,* which recognized an affirmative defense against claims of "an actionable hostile environment created by a supervisor ... [w]hen no tangible employment action is taken."

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

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[8](...continued)
951 *e t seq.* She sued, in addition to petitioner, Sergeant Easton, Corporals Baker and Prendergast, and Ms. Smith-Elliot. Pet. App. 69a. The District Court resolved all of these claims against respondent. *See* Pet. App. 70a-74a, 80a-81a. Respondent appealed, however, only as to the Title VII sex discrimination claim against the State Police. Pet. App. 15a-16a.

Pet. App. 77a, *quoting Faragher*, 524 U.S. at 807-08. *See also Burlington Industries, Inc. v. Ellerth*, 524 U.S. at 765 (same).

The District Court held that petitioner had in place both an anti-harassment policy and a corrective mechanism, that respondent was aware of both, but that she had not attempted to take advantage of them until two days before she resigned; thus, "the [petitioner] was never given the opportunity to respond to any complaints of sexual harassment." Pet. App. 80a. The District Court therefore concluded that respondent had "failed to avail herself of [petitioner's] internal procedures for reporting any harassment," and granted petitioner's motion for summary judgment. *Ibid.* The District Court did not separately address respondent's claim that her resignation as the result of the hostile environment was in reality a constructive discharge.

3. The Court of Appeals reversed the District Court's judgment. The Court of Appeals found two "fundamental[] flaws," Pet. App. 20a, in the District Court's analysis. First, the Court of Appeals held that it was "unclear whether the PA State Police exercised reasonable care to prevent or correct the sexual harassment that Suders claimed she suffered," and that these material disputes of fact precluded summary judgment on the petitioner's affirmative defense to the hostile environment claim. *Ibid.*

Second, "and more importantly," the District Court had failed to consider respondent's claim of constructive discharge. *Ibid.* The Court of Appeals first held that, on the record presented for summary judgment, a jury might find that respondent had in fact been constructively discharged. Pet. App. 26a-28a. The Court of Appeals then considered whether petitioner should be permitted to assert the *Ellerth/Faragher* affirmative defense to this claim.

> *Ellerth* and *Faragher* hold that an employer is strictly liable to a victimized employee for the harassment or discrimination of its supervisors if the harassment or discrimination resulted in a tangible employment action. In that case, an employer is precluded from invoking the affirmative defense. If, however, the harassment or discrimination did not amount to a tangible employment action, the employer is entitled to assert the affirmative defense.

App. 28a. The Court of Appeals thus turned to what it called the "critical issue in this case: whether a constructive discharge, when proved, constitutes a tangible employment action." Pet. App. 28a-29a. After an extensive discussion, *see* Pet. App. 28a-57a, the Court of Appeals concluded that it does.

The Court of Appeals first "recognize[d] a division among the Courts of Appeals as to this issue." Pet. App. 39a. Both the Second and the Sixth Circuits had held that a "constructive discharge does not constitute a 'tangible employment action' as that term is used in *Ellerth* and *Faragher*." *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000), *quoted at* Pet. App. 39a. *Accord Turner v. Dowbrands Inc.*, 2000 WL 924599 (6th Cir. 2000)(unpublished), *cited at* Pet. App. 40a-41a. The Eighth Circuit, on the other hand, had held that a constructive discharge does constitute a "tangible employment action." Pet. App. 41a-42a, *citing Jaros v. LodgeNet Entertainment Corp.*, 294 F.3d 960, 966 (8th Cir. 2002) and *Jackson v. Arkansas Dep't of Ed.*, 272 F.3d 1020, 1026 (8th Cir. 2001), *cert. denied*, 536 U.S. 908 (2002). The Court of Appeals noted that district courts which had addressed the issue were likewise divided. Pet. App. 42a (collecting cases). Finally, both the Seventh and the Ninth Circuits had recognized, but not decided, this issue. Pet. App. 42a-43a, *citing Kohler v. Inter-Tel*

*Technologies*, 244 F.3d 1167, 1179 n. 8 (9th Cir. 2001) and *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662, 666-67 (7th Cir. 2001).

In a lengthy discussion, *see* Pet. App. 45a-53a, the Court of Appeals rejected the reasoning of *Caridad* and similar cases as unpersuasive. The Court of Appeals proceeded to its own analysis, and concluded that a constructive discharge does constitute a "tangible employment action" within the meaning of *Ellerth* and *Faragher*. Where a constructive discharge has occurred, then, the employer may not assert the *Ellerth/Faragher* affirmative defense; and if the existence of a constructive discharge is in dispute at the summary judgment stage, the employer may not seek summary judgment on the basis of the affirmative defense. Pet. App. 57a.

In reaching its conclusion, the Court of Appeals relied primarily on the idea, established in circuit precedent, that a constructive discharge is the "functional equivalent of an actual termination." Pet. App. 50a, *citing Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1075 (3d Cir.1996). A constructive discharge, like a formal termination, constitutes a "significant change in employment status," and inflicts "direct economic harm" on the employee, Pet. App. 50a; and these, in the Court of Appeals' view, are the "primary attributes" of a "tangible employment action." Pet. App. 54a. The Court of Appeals also thought that imposing strict liability on employers for constructive discharges would "encourage employers to be watchful of sexual harassment ... and to remedy complaints at the earliest possible moment," Pet. App. 56a; while the contrary holding could have the "perverse effect of discouraging an employer from actively pursuing remedial measures and of possibly encouraging intensified harassment." Pet. App. 55a.

The Court of Appeals conceded that the elements of a constructive discharge overlap with the elements of the *Ellerth/Faragher* affirmative defense. Pet. App. 58a. Establishing a constructive discharge entails an enquiry into whether the employee's decision to resign was reasonable, and therefore

> it may be relevant to a claim of constructive discharge whether an employer had an effective remedial scheme in place, whether an employer attempted to investigate, or otherwise to address, plaintiff's complaints, and whether plaintiff took advantage of alternatives offered by antiharassment programs. These are, of course, the same considerations relevant to the affirmative defense in *Ellerth* and *Faragher*.

*Ibid.* Thus, there is a "substantial risk" that evidence amounting to the affirmative defense might come in through the "back door," even in cases where, under the Court of Appeals' approach, the affirmative defense is not available. Pet. App. 58a-59a. Nevertheless, the Court of Appeals discounted this risk, confident that the "wisdom and expertise of trial judges," Pet. App. 60a, would enable them to deal with these "thorny evidentiary issues." Pet. App. 58a.

## SUMMARY OF ARGUMENT

1. a. The text of Title VII expresses Congress' intention that the courts should look to principles of agency law to determine the scope of employers' liability for acts of sexual harassment committed by supervisors. The Court, applying these agency principles in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), has held that an employer is subject to automatic vicarious liability for "tangible employment actions" such as firings, demotions or changes in benefits. Tangible employment actions are

those which fall within the "special province of the supervisor ... as a distinct class of agent," and effect a change in employment status which only a supervisor can cause. It is therefore beyond question that, in taking such actions, a supervisor is aided by the agency relationship, and under principles of agency law, it is appropriate that the employer be held vicariously liable for such actions.

The agency status of a supervisor's actions is less clear, however, where the supervisor creates a hostile work environment but does not take any tangible employment action. A hostile environment is not the kind of injury which can only be inflicted by a supervisor, but can also be inflicted by co-workers, and it lacks the indicia of official action which typically mark tangible employment actions. In such cases, therefore, the rule of vicarious liability is relaxed by subjecting it to an affirmative defense which allows the employer to avoid liability by showing that it made reasonable efforts to prevent and remedy the harm, and that the employee failed to make reasonable efforts to avoid it.

b. A claim of constructive discharge adds nothing to this agency analysis and should therefore not affect the availability of the affirmative defense one way or the other. The fact that an employee feels compelled to quit his or her job in response to intolerable sexual harassment does not change the nature, for purposes of agency law, of the supervisor's underlying conduct which resulted in the resignation. If the supervisor merely created a hostile environment but did not take any tangible employment action, then the employee's resignation should not deprive the employer of the affirmative defense which would otherwise be available. By the same token, if the affirmative defense would not otherwise have been available — that is, if the employee's resignation resulted from conduct which was itself a

tangible employment action — then the employee's resignation should not serve to resurrect that defense.

c. In reaching a contrary result, the Court of Appeals failed properly to apply the agency principles which underlie Title VII and which are central to the Court's analysis in *Ellerth* and *Faragher*. The approach of the Court of Appeals leads to the absurd result that the same actions of a supervisor are viewed as either aided by the agency relationship or not, depending entirely on whether the employee responds to them by resigning.

2. In this case, respondent claims that she suffered a hostile work environment, but has never claimed that her supervisors took any tangible employment action to which her resignation was a response. There has never been any question that, but for her claim of constructive discharge, petitioner could properly interpose the affirmative defense to her hostile environment claim, and the same should be true as to her constructive discharge claim.

## ARGUMENT

### I. When a Hostile Work Environment Created by a Supervisor Results in the Constructive Discharge of an Employee, the Employer Should Be Allowed to Assert the Affirmative Defense Recognized by *Ellerth* and *Faragher*.

#### A. Under the agency principles which underlie Title VII, claims that a supervisor created a hostile work environment, without more, are subject to an affirmative defense by the employer.

It has long been settled that Title VII's prohibition against sex discrimination is not limited to acts of

"tangible" or "economic" discrimination, *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986), but also encompasses so-called "hostile environment" discrimination: acts of sexual harassment "sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'" *Id.*, at 67 (brackets omitted); *cf.* 42 U.S.C. § 2000e-2(a)(1) (forbidding sex discrimination in "terms, conditions or privileges of employment"). *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998). Nevertheless, the Court has rejected the idea that Congress intended for employers to be "always automatically liable" for sexual harassment committed by their employees, even when those employees are supervisors. *Meritor*, 477 U.S. at 72. Rather, the text of Title VII — which defines "employer" to include any "agent" of an employer — "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Ibid.* Congress, the Court concluded in *Meritor*, "wanted the courts to look to agency principles for guidance in this area." *Ibid.* The Court cited generally to the Restatement (Second) of Agency §§ 219-237 (1958) ("Restatement"), while noting that "common-law principles may not be transferable in all their particulars to Title VII." *Ibid.*

The Court returned to the question of employer liability for supervisors' actions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), decided the same day, both of which involved claims of hostile environments created by sexual harassment from

supervisors.[9] The Court repeated that the rules on employer liability should be informed by the "traditional principles of the law of agency" which underlie Title VII, *Faragher*, 524 U.S. at 791, and again cited the Restatement as an "appropriate starting point." *Id.* at 803 n.3; *Ellerth*, 524 U.S. at 755 (Restatement is "useful beginning point"). The Court noted that, under the Restatement, employers are liable for the torts of employees acting within the scope of their employment, but also noted "[t]he general rule ... that sexual harassment by a supervisor is not conduct within the scope of employment." *Ellerth*, 524 U.S. at 757; *see Faragher*, 524 U.S. at 793-801.[10] The Court found more relevant the idea that an employer is liable for an employee's intentional tort when the employee was "'aided in accomplishing the tort by the existence of the agency relationship.'" *Ellerth*, 524 U.S. at 759, *quoting* Restatement § 291(2)(d); *Faragher*, 524 U.S. at 801 (same).[11]

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[9]The Court has never squarely addressed the standards for employer liability for harassment by co-workers. The Court has noted, however, that the lower courts have "uniformly" required a showing of employer negligence. *Faragher*, 542 U.S. at 799 (collecting cases).

[10]In this case as well, the Court of Appeals rejected scope-of-employment as a basis for vicarious liability. Pet. App. 31a-32a n.10.

[11]Section 219(2) of the Restatement provides that:

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment unless:
>
> * * * *
>
> (d) the servant purported to act or to speak on behalf of
>
> (continued...)

The Court then identified a category of cases where, "beyond question," the supervisor is aided by the existence of the agency relation: "when a supervisor takes a tangible employment action against the subordinate." *Ellerth*, 524 U.S. at 760. A "tangible employment action"[12] is one which effects "a significant change in employment status," such as hiring, firing, promotion, a significant change in job responsibilities or a significant change in benefits, *id.*, at 761, and it typically inflicts "direct economic harm." *Id.*, at 762.

More importantly, for purposes of agency law a tangible employment action is different in kind from, say, a physical assault or simple offensive conduct, which can be inflicted by anyone. A tangible employment action, by contrast, is the sort of injury which "*only* a supervisor, or other person acting with the authority of the [employer], can cause." *Ibid* (emphasis added). "Tangible employment actions fall within the special province of the supervisor ... empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control." "Tangible employment actions are the means by which the supervisor brings the *official* power of the enterprise to bear on subordinates." *Ibid* (emphasis added).[13] Thus, there is "assurance the injury

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[11](...continued)
the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relationship.

[12]The Court "imported" the concept of a "tangible employment action" from numerous lower court cases involving claims of discrimination. *Id.*, at 761.

[13]The Court noted as well other indicia of a tangible employment action: "The decision in most cases is documented (continued...)

could not have been inflicted absent the agency relation," *id.*, at 761-762, and agency principles therefore support subjecting the employer to vicarious liability for such injuries.

Where supervisor harassment does not involve a tangible employment action, however, the application of agency principles is "less obvious." *Id.*, at 763. On one hand, "there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship," if only because "an employee cannot check a supervisor's conduct in the same way that she might deal with abuse from a co-worker." *Faragher*, 524 U.S. at 802-803. *Ellerth*, 524 U.S. at 763 ("[A] supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor is always aided by the agency relation.") On the other hand, acts of harassment by a supervisor might be the same as those which a co-worker might commit, *ibid*, and they might likewise lack the indicia of "official" action which mark tangible employment actions.

The Court resolved this tension by rejecting a rule of strict or automatic vicarious liability. An employer is subject to vicarious liability for a hostile environment created by a supervisor. That liability, however, is subject to an affirmative defense, which has two parts: 1) "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and 2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities

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[13](...continued)
in official [employer] records, and may be subject to review by higher level supervisors. ... The supervisor often must obtain the imprimatur of the enterprise and use its internal processes." *Ibid.*

provided by the employer or to avoid harm otherwise." This resolution honored *Meritor's* holding that Congress did not intend for employers to be "always automatically liable" for their employee's actions, accommodated the agency principles which underlie Title VII, and furthered Title VII's policies of encouraging conciliation, deterrence, forethought by employers and saving action by employees. *Faragher*, 524 U.S. at 764-765; *Ellerth*, 524 U.S. at 807-808.

It is clear, then, that agency principles support the imposition of automatic vicarious liability for a supervisor's tangible employment action, because only a supervisor can inflict such injuries; that is, in such cases there is "assurance the injury could not have been inflicted absent the agency relation." *Ellerth*, 524 U.S. at 761-762. And it is equally clear that no such assurance exists where a supervisor creates a hostile work environment but does no more; in that case, agency principles require that the rule of vicarious liability be relaxed by allowing the *Faragher/Ellerth* affirmative defense. We now turn to the proper application of these principles where a supervisor's harassment culminates, not in any action by the supervisor, but in a resignation by the employee, that is, in a constructive discharge.

### B. An employee's resignation in reaction to a hostile work environment does not change the nature of the supervisor's actions for purposes of agency law.

The concept of constructive discharge first appeared in cases arising under the National Labor Relations Act, 29 U.S.C. §§ 151-169, alleging unfair labor practices motivated by anti-union animus, *see generally* Roslyn C. Lieb, *Constructive Discharge under Section 8(a)(3) of the National Labor Relations Act: A Study in Undue Concern over Motives*, 7 Indus. Rel. L.J. 143 (1985); *Sure-Tan, Inc.*

*v. NLRB*, 467 U.S. 883, 894 (1984); and it has come to be applied in a variety of employment contexts, including Title VII and other federal anti-discrimination statutes. *See, e.g., Calcote v. Texas Educational Foundation*, 578 F.2d 95 (5th Cir. 1978) (Title VII racial discrimination); *Bristow v. Daily Press, Inc.*, 770 F.2d 1251 (4th Cir. 1985) (Age Discrimination in Employment Act); Steven D. Underwood, *Comment, Constructive Discharge and the Employer's State of Mind: A Practical Standard*, 1 U. Pa. J. Lab. & Emp. L. 343, 343-344 & n.4 (1998)(collecting cases). While the specific elements of a constructive discharge vary considerably from one court to the next, the factor common to all is that "the working conditions be sufficiently intolerable that a reasonable person objectively would have felt compelled to resign." Practicing Law Institute, *The Employment-at-Will Doctrine: Have Its Exceptions Swallowed the Rule?*, 650 PLI/Lit 577, 742 (2001). *See* Pet. App. 25a (plaintiff alleging constructive discharge must prove "harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign").

The question in this case is whether such a resignation should have any effect on the availability of the *Ellerth/Faragher* affirmative defense. We submit that it should not, because an employee's resignation adds nothing to the agency analysis on which the affirmative defense depends.

The purpose of the analysis in *Ellerth* and *Faragher*, and of the affirmative defense to which it gave rise, is to provide a principled basis for limiting employer liability for the actions of supervisors, and thus to effectuate the agency principles on which Title VII is based. Under those principles, an employer's vicarious liability for a supervisor's actions is automatic only where, "beyond question," there is assurance that the supervisor was aided in his or her actions by the existence of the agency

relation.[14] *Ellerth*, 524 U.S. at 760. That assurance is present when a supervisor takes a tangible employment action, for such actions — firings, demotions, transfers and so forth — cannot be taken absent the agency relationship. *Id.*, at 761-762. Where a supervisor merely creates a hostile work environment, however, that assurance is not present, *id.*, at 763, and it does not suddenly appear just because the employee resigns.

Whether a supervisor's actions are aided by the agency relation depends on what it is that the supervisor does, not on what the employee does. It would be absurd to hold that, if an employee resigns in response to supervisor harassment, then the supervisor's actions were aided by the agency relationship, but that if the employee decides to remain, then the same actions were *not* aided by the agency relationship. The issue under agency principles is the nature of the *supervisor's* actions, and the employee's resignation, whether reasonable or not, simply provides no information on the aided-by-the-agency-relation question.

In fact, it is clear that harassment which leads an employee to resign is not the kind of injury which "only a supervisor ... can cause," or which falls within the "special province of the supervisor ... as a distinct class of agent." *Ellerth*, 524 U.S. at 762. To the contrary, such harassment, like any other offensive behavior, can be inflicted by an employee's co-workers as well as by his or her supervisor. *Caridad v. Metro-North Commuter R.R.*,

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[14]Or where some other agency standard has been satisfied. In *Faragher*, the Court noted that vicarious liability is automatic where the harasser is "within that class of officials who may be treated as the organization's proxy." 524 U.S. at 789-790, *citing Harris*, 510 U.S. at 19 (harasser was employer's president) and other cases.

191 F.3d 283, 294 (2d Cir. 1999); *see Oncale*, 523 U.S. at 77 (employee forced to quit after repeated assaults and threats of rape from co-workers); *Ellerth*, 524 U.S. at 762 ("A co-worker can break a co-worker's arm as easily as a supervisor...."). In addition, the supervisor's actions in creating the hostile environment will continue to lack the indicia of official action which mark tangible employment actions — documentation in official records, review by superiors, and so on, *see ibid* — whether or not the employee feels compelled to resign. *See Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27, 33 (1st Cir. 2003) ("all of [the supervisor's] conduct was exceedingly unofficial and involved no direct exercise of company authority. ... [It] is exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed.")

While it is true, as the Court of Appeals pointed out, Pet. App. 54a, that an employee's resignation effects a significant change in employment status, this cannot be dispositive for two reasons: first, because this change comes about as the result of the employee's own decision, rather than from the direct action of the supervisor, *cf. Ellerth*, 524 U.S. at 762 (tangible employment action typically inflicts "*direct* economic harm"); and second, because the same thing would be true if the resignation was in response to harassment from co-workers.

Finally, preserving the affirmative defense in cases where a hostile environment culminates in a constructive discharge will also further the statutory goals of encouraging employers to maintain anti-harassment policies and internal grievance mechanisms, encouraging conciliation rather than litigation, and encouraging employees to report problems sooner rather than later. *See Faragher*, 524 U.S. at 764-765; *Ellerth*, 524 U.S. at 807-808. Allowing employees to cut off the affirmative defense by resigning, on the other hand, will provide

them with an incentive to do just that, as well as providing an incentive to justify such resignations by hoarding and exaggerating their grievances rather than attempting to resolve them. For all these reasons, a claim of constructive discharge should not eliminate an employer's *Ellerth/Faragher* affirmative defense where it would otherwise exist.

By the same token, where the affirmative defense would *not* otherwise exist, it should not be allowed to reappear merely because the employee has been provoked into resigning. One Court of Appeals has suggested, and another has held, that where a constructive discharge results, not merely from a hostile environment, but from something which is itself a tangible employment action, the affirmative defense should not be available. In *Reed v. MBNA Marketing Systems, Inc., supra*, the First Circuit suggested that the affirmative defense might be precluded in cases where "*official* job actions ... make employment intolerable." 333 F.3d at 33 (emphasis in original).

The Seventh Circuit confronted such a situation in *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003). In *Robinson*, a higher-level supervisor transferred an employee away from the immediate supervisor who had been harassing her, but into an "equally cruel working situation" which the higher-level supervisor knew would make the employee's life "hell," and in response the employee resigned. *Id.*, at 320-325, 337. The Seventh Circuit held that

> Ms. Robinson's constructive discharge may be considered a tangible employment action for purposes of the *Ellerth/Faragher* affirmative defense. This was not simply a situation in which a supervisor was inflicting harassment on a subordinate. In this case, Judge Greanias, in his capacity as presiding judge,

> took the official action of transferring Ms. Robinson to Judge Francis.... The transfer was only possible because Judge Greanias "ha[d] been empowered by the [employer] ... to make economic decisions affecting other employees under his or her control."

*Id.*, at 337. Accordingly, the Seventh Circuit held that the affirmative defense was not available.

While this case does not present a similar situation, we submit that the analysis of *Reed* and *Robinson* is sound, and is entirely consistent with the analysis we have presented here. Whether a harassed employee resigns has nothing to do with whether the underlying conduct of the supervisor was or was not aided by the agency relationship, and therefore should not affect the availability of the affirmative defense one way or the other.

### C. The contrary reasoning of the Court of Appeals fails to follow the agency principles which underlie Title VII.

In holding otherwise, the Court of Appeals paid little or no attention to the agency principles which were the centerpiece of the Court's analysis in *Ellerth* and *Faragher*. Thus, the Court of Appeals found it unpersuasive that a constructive discharge "may not bear the imprimatur of the enterprise," Pet. App. 49a-50a (internal quotation marks omitted), and found it irrelevant that a constructive discharge could be caused by harassment from co-workers as well as from a supervisor.[15] Pet. App. 48a. Rather, the Court of Appeals

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[15]The Court of Appeals made the odd suggestion, without citing any authority for it, that this Court had recognized that (continued...)

focused almost entirely on the harm caused by a constructive discharge, as seen from the perspective of the employee: what mattered, in the Court of Appeals' view, was that a constructive discharge "constitutes precisely the same sort of significant change in employment status and inflicts the same sort of economic harm as any other firing." Pet. App. 50a, *quoting Cherry v. Menard, Inc.*, 101 F.Supp. 2d 1160 (N.D. Iowa 2000) (internal quotation marks omitted).

But under the analysis of *Ellerth* and *Faragher*, what matters is not the nature of the harm experienced by the employee, but whether the supervisor was aided by the agency relationship in inflicting it; and this in turn is informed largely by whether it is the sort of harm which "only a supervisor ... can cause," or which falls within the "special province of the supervisor ... as a distinct class of agent." *Ellerth*, 524 U.S. at 762. The Court of Appeals' approach is thus at odds with that of *Ellerth* and *Faragher*. Moreover, as we discussed above, the Court of Appeals' approach has the decidedly odd result that the same actions by a supervisor may or may not give rise to the affirmative defense, depending entirely on whether the employee does or does not resign and claim a constructive discharge. Whatever else may be said about this result, it surely has no roots in principles of agency law.

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[15](...continued)
"many tangible employment actions may be perpetrated by either supervisors or co-workers," and listed "obscene gestures, lewd comments, sexual propositions, [and] stealing ... clients" as examples. Pet. App. 48a. But surely none of these qualifies as a tangible employment action. Moreover, the Court of Appeals' observation cannot be reconciled with this Court's statement that tangible employment actions are those which "fall within the special province of the supervisor ... as a distinct class of agent." *Ellerth*, 524 U.S. at 762.

This approach also results in prolonged uncertainty about the legal rights and obligations of both employers and employees. As this case illustrates, the existence of a constructive discharge will often turn on disputed issues of fact which cannot be resolved until trial. *See* Pet. App. 26a-28a. Under the Court of Appeals' approach, if respondent proves her constructive discharge claim to the satisfaction of the jury, petitioner will not be allowed to invoke the affirmative defense. But if she does not, she will still be left with a hostile environment claim, to which the affirmative defense *will* apply. The Court of Appeals does not explain how the District Court and the jury are to proceed, nor how the parties are to develop rational trial or settlement strategies, in light of this uncertainty.

Finally, the Court of Appeals thought that allowing the affirmative defense in cases like this one would provide a perverse incentive for employers to turn a "blind eye" to sexual harassment, or even to "tacitly approve of increased harassment," in order to get an employee to quit. Pet. App. 55a-56a. The logic of this suggestion, however, is hard to follow, since an employer which followed this course of action would change its litigating position only for the worse. First, such an employer would gain nothing in terms of the affirmative defense: as we explained above, an employee's resignation is irrelevant to the availability of the affirmative defense, which is available, or not, based entirely on the underlying conduct of the supervisor. Certainly, an employer would never be entitled to assert it, as the Court of Appeals seemed to suggest, *because* an employee resigned. Second, such an employer would increase its exposure to damages, by adding a claim for lost wages to whatever damages were caused by the underlying hostile environment. An employer which faces a constructive discharge claim is therefore never better off, but only worse off, than it would otherwise be, and

the perverse incentive which the Court of Appeals feared simply does not exist. Rather, the approach we have suggested leaves intact the structure of incentives which the Court identified in *Ellerth*, 524 U.S. at 764, and *Faragher*, 524 U.S. at 806-807, for employees to report and for employers to remedy sexual harassment sooner rather than later.

## II. Respondent's Resignation Resulted from a Hostile Work Environment Rather than from a Tangible Employment Action.

As we explained above, the availability of the affirmative defense should depend not on the fact of a constructive discharge, but on the nature of the underlying conduct which provoked it. Where the constructive discharge results from a tangible employment action (such as an abusive transfer or demotion) — that is, where the affirmative defense would not otherwise be available — it should remain unavailable. But where the constructive discharge results from a hostile work environment which has not culminated in a tangible employment action — that is, where the affirmative defense would otherwise be available — it should remain available.

That is the case here. It is clear that, but for respondent's claim of constructive discharge, respondent could properly interpose the affirmative defense. There has never been any suggestion that the hostile environment which respondent allegedly suffered culminated in any tangible employment actions, or that petitioner is not entitled to assert the affirmative defense as to petitioner's hostile environment claim. To the contrary, the District Court held that respondent was entitled, not merely to assert the affirmative defense, but to summary judgment on it, Pet. App. 77a-80a; and while the Court of Appeals held that disputed issues of fact

required that the affirmative defense be submitted to a jury, Pet. App. 20a, neither the Court of Appeals nor respondent suggested that petitioner was not entitled to assert it. Petitioner should therefore be permitted to interpose the affirmative defense as to respondent's constructive discharge claim as well.

## CONCLUSION

The Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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