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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

**SUPREME COURT OF THE UNITED STATES**

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**PENNSYLVANIA STATE POLICE v. SUDERS****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT**

No. 03–95. Argued March 31, 2004—Decided June 14, 2004

In March 1998, the Pennsylvania State Police (PSP) hired plaintiff-respondent Suders to work as a police communications operator for the McConnellsburg barracks, where her male supervisors subjected her to a continuous barrage of sexual harassment. In June 1998, Suders told the PSP’s Equal Employment Opportunity Officer, Virginia Smith-Elliott, that she might need help, but neither woman followed up on the conversation. Two months later, Suders contacted Smith-Elliott again, this time reporting that she was being harassed and was afraid. Smith-Elliott told Suders to file a complaint, but did not tell her how to obtain the necessary form. Two days later, Suders’ supervisors arrested her for theft of her own computer-skills exam papers. Suders had removed the papers after concluding that the supervisors had falsely reported that she had repeatedly failed, when in fact, the exams were never forwarded for grading. Suders then resigned from the force and sued the PSP, alleging, *inter alia*, that she had been subjected to sexual harassment and constructively discharged, in violation of Title VII of the Civil Rights Act of 1964.

The District Court granted the PSP’s motion for summary judgment. Although recognizing that Suders’ testimony would permit a fact trier to conclude that her supervisors had created a hostile work environment, the court nevertheless held that the PSP was not vicariously liable for the supervisors’ conduct. In support of its decision, the District Court referred to *Faragher v. Boca Raton*, 524 U. S. 775, 808. In that case, and in *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742, decided the same day, this Court held that an employer is strictly liable for supervisor harassment that “culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.” 524 U. S., at 765. But when no such tangible

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action is taken, both decisions also hold, the employer may raise an affirmative defense to liability. To prevail on the basis of the defense, the employer must prove that “(a) [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and that (b) the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Ibid.* Suders’ hostile work environment claim was untenable as a matter of law, the District Court stated, because she unreasonably failed to avail herself of the PSP’s internal antiharassment procedures. The court did not address Suders’ constructive discharge claim.

The Third Circuit reversed and remanded the case for trial. The appeals court disagreed with the District Court in two key respects: First, even if the PSP could assert the *Ellerth/Faragher* affirmative defense, genuine issues of material fact existed about the effectiveness of the PSP’s program to address sexual harassment claims; second, Suders had stated a claim of constructive discharge due to hostile work environment. The appeals court ruled that a constructive discharge, if proved, constitutes a tangible employment action that renders an employer strictly liable and precludes recourse to the *Ellerth/Faragher* affirmative defense.

*Held:* To establish “constructive discharge,” a plaintiff alleging sexual harassment must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may assert the *Ellerth/Faragher* affirmative defense to such a claim unless the plaintiff quit in reasonable response to an adverse action officially changing her employment status or situation, *e.g.*, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions. Pp. 9–21.

(a) Under the constructive discharge doctrine, an employee’s reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee’s position would have felt compelled to resign? This doctrine was developed by the National Labor Relations Board (NLRB) in the 1930’s, and was solidly established in the lower federal courts by 1964, when Title VII was enacted. The Court agrees that Title VII encompasses employer liability for a constructive discharge. Pp. 9–11.

(b) This case concerns employer liability for one subset of constructive discharge claims: those resulting from sexual harassment, or “hostile work environment,” attributable to a supervisor. The Court’s starting point is the *Ellerth/Faragher* framework. Those decisions

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delineate two categories of sexual harassment claims: (1) those alleging a “tangible employment action,” for which employers may be held strictly liable; and (2) those asserting no tangible employment action, in which case employers may assert the affirmative defense. *Ellerth*, 524 U. S., at 765. The key issues here are: Into which *Ellerth/Faragher* category hostile-environment constructive discharge claims fall, and what proof burdens the parties bear in such cases. In *Ellerth* and *Faragher*, the Court invoked the principle drawn from agency law that an employer is liable for the acts of its agent when the agent is “aided in accomplishing the tort by the existence of the agency relation.” *Id.*, at 758. When a supervisor engaged in harassing conduct takes a tangible employment action against a subordinate, the Court reasoned, it is beyond question that the supervisor is aided by the agency relation. A tangible employment action, the Court stated, is an “official act of the enterprise” and “fall[s] within the special province of the supervisor.” *Id.*, at 762. In contrast, when supervisor harassment does not culminate in a tangible employment action, *Ellerth* and *Faragher* explained, it is less obvious that the agency relation is the driving force. The Court also recognized that a liability limitation linked to an employer’s effort to install effective grievance procedures and an employee’s effort to report harassing behavior would advance Title VII’s conciliation and deterrence purposes. *Id.*, at 764. Accordingly, the Court held that when no tangible employment action is taken, an employer may defeat vicarious liability for supervisor harassment by establishing the two-part affirmative defense. That defense, the Court observed, accommodates the “avoidable consequences” doctrine Title VII “borrows from tort law,” *ibid.*, by requiring plaintiffs reasonably to stave off avoidable harm. *Ellerth* and *Faragher* clarify, however, that the defending employer bears the burden to prove that the plaintiff-employee unreasonably failed to avoid or reduce harm. *Faragher*, at 807. Pp. 11–15.

(1) The constructive discharge at issue stems from, and can be regarded as an aggravated case of, sexual harassment or hostile work environment. For an atmosphere of harassment or hostility to be actionable, the offending behavior must be sufficiently severe or pervasive to alter the victim’s employment conditions and create an abusive working environment. *Meritor Savings Bank, FSB v. Vinson*, 477 U. S. 57, 67. A hostile-environment constructive discharge claim entails something more: working conditions so intolerable that a reasonable person would have felt compelled to resign. Suders’ claim is of the same genre as the claims analyzed in *Ellerth* and *Faragher*. Essentially, Suders presents a “worse case” harassment scenario, harassment ratcheted up to the breaking point. Like the harassment considered in *Ellerth* and *Faragher*, harassment so intolerable as to

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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 company act, a constructive discharge may or may not involve official action. When it does not, the extent to which the agency relationship aided the supervisor's misconduct is less certain, and that uncertainty justifies affording the employer the chance to establish, through the *Ellerth/Faragher* affirmative defense, that it should not be held vicariously liable. The Third Circuit erred in drawing the line differently. Pp. 15–19.

(2) The Third Circuit qualified its holding that a constructive discharge itself constitutes a tangible employment action under *Ellerth* and *Faragher*: The affirmative defense delineated in those cases, the court noted, might be imported into the anterior issue whether the employee's decision to resign was reasonable under the circumstances. However, the appeals court left open when and how the *Ellerth/Faragher* considerations would be brought home to the fact trier. The Court of Appeals did not address specifically the allocation of pleading and persuasion burdens, but simply relied on “the wisdom and expertise of trial judges to exercise their gatekeeping authority when assessing whether all, some, or none of the evidence relating to employers' antiharassment programs and to employees' exploration of alternative avenues warrants introduction at trial.” 325 F. 3d, at 463. There is no cause for leaving the district courts thus unguided. Following *Ellerth* and *Faragher*, the plaintiff who alleges no tangible employment action has the duty to mitigate harm, but the defendant bears the burden to allege and prove that the plaintiff failed in that regard. Pp. 19–21.

(c) Although the Third Circuit correctly ruled that the case, in its current posture, presents genuine issues of material fact concerning Suders' hostile work environment and constructive discharge claims, that court erred in declaring the affirmative defense described in *Ellerth* and *Faragher* never available in constructive discharge cases. P. 21.

325 F. 3d 432, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion.