Casenote

THE SUPREME COURT’S SUDERS PROBLEM: WRONG QUESTION, WRONG FACTS DETERMINING WHETHER CONSTRUCTIVE DISCHARGE IS A TANGIBLE EMPLOYMENT ACTION

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I. INTRODUCTION

The name Nancy Suders may soon plague plaintiffs and employee rights advocates. In granting certiorari in Suders’s case of alleged sexual harassment and constructive discharge against her supervisor and the Pennsylvania State Police Department, the United States Supreme Court agreed to decide whether a constructive discharge is a “tangible employment action” under its companion opinions in Ellerth v. Burlington Industries, Inc.,¹ and Faragher v. City of Boca Raton,² thereby precluding the employer from raising the affirmative defense to vicarious liability.³ This inquiry is by itself complicated due to the Court’s imprecise language regarding a “tangible employment action.”⁴ Additionally, the Court has yet to address the issue, currently debated among federal courts of a plaintiff’s burden of proof in establishing that her resignation should be treated under

4. See Ellerth, 524 U.S. at 761-63. This casenote will focus exclusively on the Court’s failure to ascribe a clear meaning to the term “tangible employment action” as it regards whether a constructive discharge should be considered a “tangible employment action” for purposes of employer liability under Ellerth and Faragher.
Title VII as the equivalent of a formal termination and thus, a cognizable constructive discharge.\(^5\)

Standing alone, these issues are not insurmountable. Despite the ambiguity of the meaning of the critical phrase “tangible employment action,” the Court’s *Ellerth/Faragher* opinions,\(^6\) which are explicitly motivated by agency principles and Title VII policy considerations, make clear that the “the new keystone to sexual harassment is notice.”\(^7\) While Federal courts take variant approaches to constructive discharge claims, most examine whether the employer had notice of the harassing working conditions and whether the employee bypassed available avenues of redress and instead unreasonably resigned. This dominant approach goes to the crux of the Court’s rationale in *Ellerth/Faragher*. Moreover, current case law indicates that in the context of supervisory harassment,\(^8\) a cognizable constructive discharge often involves a “failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”\(^9\) This casenote argues that if the Supreme Court were to resolve the inquiry of whether a constructive discharge is a tangible employment action in the context of a decision applying this dominant approach it would answer in the affirmative.

The Court, however, has agreed to answer this question on the facts and analysis of the Third Circuit’s *Suders* opinion. This choice is problematic because the Third Circuit’s analysis, by essentially disregarding the dominant approach, lacks the assurance generally present in constructive discharge cases that the plaintiff-employee’s resignation was truly the result of conduct empowered by the employer. In fact, by leaving open significant questions as to whether Suders’s employer was

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5. See *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987) (“When a constructive discharge is found, an employee’s resignation is treated . . . as if the employer had actually discharged the employee”). The Supreme Court addressed the concept of constructive discharge under the National Labor Relations Act (the NLRA) in *Sure-Tan v. N.L.R.B.*, 467 U.S. 883 (1984), where it noted with implicit approval that “[t]he Board, with the approval of lower courts, has long held that an employer violates [Section 8(a)(3) of the NLRA] not only when, for the purpose of discouraging union activity, it directly dismisses an employee, but also when it purposefully creates working conditions so intolerable that the employee has no option but to resign—a so-called ‘constructive discharge’.” Id. at 894.

6. Because the *Ellerth* and *Faragher* decisions, though involving distinct parties and factual circumstances, were issued on the same day and set forth identical holdings this note will often refer to them in conjunction as one opinion.


8. This casenote deals solely with the situation of constructive discharge culminating from supervisory harassment, as opposed to coworker harassment, because this is the question presented to the Court in *Suders*. See *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003).

9. *Ellerth*, 524 U.S. at 761 (explaining that “[a] tangible employment action constitutes a significant change in employment status” and providing these examples in addition to “hiring [and] firing”).
implicated in her resignation, the court of appeals' opinion casts doubt on whether a cognizable constructive discharge has even occurred in Suders's case. As such, it certainly presents the Court a strange basis for determining whether a constructive discharge is a tangible employment action. This dilemma seems certain to be resolved to the detriment of future plaintiffs if the Court treats the Third Circuit's analysis as the standard constructive discharge approach. Given that Suders's case presents the risk of liability being imposed for underlying working conditions that did not involve a clearly "tangible employment action," it seems unlikely that the Court would affirm the Third Circuit to deprive the employer of the affirmative defense.

The Court can certainly solve its "Suders problem" by recognizing that the case before it, while not explicitly presenting the question of the appropriate standard governing constructive discharge claims, clearly illustrates the need for this inquiry's resolution. By seizing Suders as an opportunity to refine the constructive discharge requirements, so they track the dominant approach currently utilized by federal courts, the Court could guarantee that resignations classified as constructive discharges would genuinely be the functional equivalents of formal discharges. Only by addressing this predicate issue can the Court resolve the debate surrounding employer liability for constructive discharge in a manner that will meet its Ellerth/Faragher goals, avoid "results [that] would [be] disparate . . . if not demonstrably contradictory" and "implement [Title VII] sensibly."10

II. EMPLOYER LIABILITY FOR SUPERVISORY HARASSMENT UNDER TITLE VII
A. From Meritor to the Court's Ellerth/Faragher Paradigm: An Emphasis on Agency Principles and Title VII Concerns in Determining Employer Liability

Even before enunciating a standard governing employer liability for supervisory harassment, the Supreme Court recognized the importance of agency law and Title VII considerations in making this inquiry. In its 1996 decision in Meritor Savings Bank, FSB v. Vinson,11 the Court, though acknowledging the presence in lower courts of a "debate over the appropriate standard for employer liability"12 declined the party's "invitation to issue a definitive rule."13 Instead, the Court encouraged other

12. Id. at 72.
13. Id. at 72. The Meritor Court explained that the issue of employer liability had a "rather abstract quality about it" because the record of the case did not indicate "whether . . .
“courts to look to agency principles for guidance in this area,”14 while at the same time cautioning that “such common-law principles may not be transferable in all their particulars to Title VII.”15 Although, in large part avoiding the issue, the Meritor Court did, however, flatly reject the court of appeals conclusion that “employers are always automatically liable for sexual harassment by their supervisors.”16 This one imperative was gleaned from the word “agent” in Title VII’s definition of “employer,” which the Court believed indicated congressional intent to impute agency principles into the analysis and, thereby, limit employer liability.17

Twelve years later, the Court recognized the inadequacy of its advice in this area noting that in the wake of its Meritor decision, “Courts of Appeals ha[d] struggled to derive manageable standards to govern employer liability for hostile work environment perpetrated by supervisory employees”18 and though “following [its] admonition to find guidance in the common law of agency . . . ha[d] adopted different approaches.”19 In Ellerth/Faragher, the Court squarely addressed the issue, holding that vicarious liability was the appropriate standard for supervisory hostile work environment harassment.20 Notably, the Court’s new paradigm conditioned automatic employer liability upon the occurrence of a “tangible employment action.” In cases where “no tangible employment action is taken,” the Court crafted an affirmative defense to liability comprised of “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 preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”21

The Court reached its Ellerth/Faragher holding by picking up its analysis precisely where its discussion in Meritor left off, reaffirming its

[the alleged harasser’s] advances were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment, or whether they were so pervasive and so long continuing . . . that the employer must have become conscious of them.” Id.

14. Id.
15. Id.
16. Id. The Court “conclude[d] that the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.” Id. at 73.
17. Id. at 72.
18. Faragher, 524 U.S. at 785.
19. Id.
20. Specifically, the Court held that “[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.” Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.
21. Id. The employer must prove both of these elements by a preponderance of the evidence. Id.
holding that "agency principles are relevant in assigning employer liability" under Title VII, and that "an employer is not 'automatically' liable for [all] harassment by a supervisor." Examining the Restatement (Second) of Agency, the Court decided that the principle embodied in the "aided in the agency relation" rule, which subjected an employer to liability when an employee is "aided in accomplishing [his tortuous behavior] by the existence of the agency relation," provided the appropriate analysis because supervisors have special "authority conferred as an element of [their] agency relationship with the employer" which "enhanc[es] their capacity to harass." The Court noted, however, that in the context of supervisory workplace harassment, the "rule requires the existence of something more than the employment relation itself" because "there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship." A blanket application of the aided in agency relation principle might thus impose the exact de facto rule of strict liability that Meritor rejected.

The Court believed that the "authority for requiring active or affirmative, as distinct from passive or implicit, misuse of supervisory authority before liability may be imputed" was best satisfied "when a supervisor takes a tangible employment action against a subordinate." Because "only a supervisor or other person acting with the authority of the

22. Faragher, 524 U.S. at 791 ("Meritor's statement of the law is the foundation on which we build today."). In fact, the Court noted that Meritor's precedential force was especially enhanced since "Congress has not altered Meritor's rule even though it has made significant amendments to Title VII in the interim." Ellerth, 524 U.S. at 764.
23. Faragher, 524 U.S. at 804. See also Ellerth, 524 U.S. at 763 ("[W]e are bound by our holding in Meritor that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment.").
25. Id. Restatement section 219 applies only to torts committed outside an employee's "scope of employment." Id. The Restatement defines conduct the employee is "employed to perform," occurring "substantially within the authorized time and space limits," and "actuated, at least in part, by a purpose to serve the [employer]" as within the scope of an employee's employment. Id. at § 228(1). The Court determined that "sexual harassment by a supervisor is not conduct within the scope of employment." Ellerth, 524 U.S. at 756-57. See also Faragher, 524 U.S. at 794-801.
27. Id. at 800.
29. Faragher, 524 U.S. at 802.
30. Id. at 804 ("We are not entitled to recognize [a theory of vicious liability for misuse of supervisory authority] under Title VII unless we can square it with Meritor's holding that an employer is not 'automatically' liable for harassment by a supervisor who creates the requisite degree of discrimination . . .").
32. Ellerth, 524 U.S. at 760.
company can cause" to a "significant change in [a subordinate employee’s] employment status," in such circumstances "there is assurance the injury could not have been inflicted absent the agency relation." "For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer, and the "agency relation standard . . . requirements will always be met." The Court concluded that where a supervisor’s sexual harassment of a subordinate results in a tangible employment action "it would be implausible to interpret agency principles to allow an employer to escape liability," and thus, no affirmative defense is available.

At the same time, the Court acknowledged that application of the agency-relation standard in the context of "supervisor harassment which does not culminate in a tangible employment action" was a more difficult determination due to the Restatement’s "malleable terminology, which can be read to either expand or limit liability." In order to reconcile its imposition of vicarious liability with its "holding in Meritor that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment," the Court "recognize[d] an affirmative defense to liability in some circumstances." Specifically, where a supervisor has created a hostile work environment, but "no tangible employment action is taken," an employer may avoid liability by proving it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

By imposing a standard of conditional vicarious liability subject to an affirmative defense, the Court concluded that it’s framework not only "accommodat[ed] agency principles of vicarious liability for harm caused by misuse of supervisory authority," but also served Title VII’s deterrent purpose by promoting "the creation of antiharassment policies and effective grievance procedures" and saving action by objecting employees. The

33. Id. at 762.
34. Id. at 761.
35. Id. at 761-62.
36. Id. at 762.
37. Id. at 762-63.
38. Id. at 763.
39. Ellerth, 524 U.S. at 763.
40. Id.
41. Id.
42. Faragher, 524 U.S. at 804.
43. Id. at 807; Ellerth, 524 U.S. at 765.
44. Id.
45. Id.
46. Ellerth, 524 U.S. at 764.
Court reasoned that any theory of vicarious employer liability "would be at odds with statutory policy" if it failed to "encourage employees to report harassing conduct before it becomes severe or pervasive" while simultaneously "recogniz[ing] the employer's affirmative obligation to prevent violations and giv[ing] credit . . . to employers who make reasonable efforts to discharge their duty." Accordingly, the Court emphasized that it's *Ellerth/Faragher* holding was not only firmly grounded in stare decisis, but was also consistent with "Congress' intention to promote conciliation rather than litigation in the Title VII context."

**B. Questions Left Open After Ellerth/Faragher: What is a Tangible Employment Action and Does a Constructive Discharge Qualify as a Tangible Employment Action for Employer Liability Purposes?**

Although the Court's new paradigm clarified the limit agency principles and Title VII considerations impose on employer liability for supervisory harassment, the broad and sometimes ambiguous language pervading the *Ellerth/Faragher* opinions has created division among courts regarding how an employer can actually avoid liability. After *Ellerth/Faragher*, the focus of the analysis is certainly on the occurrence of a "tangible employment action." But, while the presence or absence of such an action fundamentally affects an employer's level of legal exposure for supervisory sexual harassment, neither opinion clearly defines its exact parameters. The Court's imprecise description of this pivotal term becomes especially significant and leads to increased complication in the

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47. *Id.* See also *Faragher*, 524 U.S. at 807.
49. *Id.*
51. This is illustrated in recent Federal Court of Appeals cases concerning whether a tangible employment action requires economic harm. *Compare* Holly D. v. Cal. Inst. of Tech., 339 F3d. 1158, 1171-73 (9th Cir. 2003) ("[A] tangible employment action need not cause economic harm to the employee . . . "), and *Jin* v. Metro. Life Ins. Co., 310 F.3d 84 (2d Cir. 2002) (holding that a supervisor's coercing a subordinate employee to perform sexual demands in return for retaining her job and his failure to terminate the submitting employee constituted tangible employment actions, despite the non-existence of any economic harm), *with* Newton v. Cadwell Lab., 156 F.3d 880, 883 (8th Cir. 1998) (finding that in "the absence of a detrimental employment action," the affirmative defense under *Ellerth* and *Faragher* was available to the defendant). While this casenote focuses on the Court's failure to ascribe a precise definition to the term "tangible employment action" solely as it relates to the inquiry of whether a constructive discharge qualifies, numerous commentators have discussed the term's uncertainty in other contexts. See, e.g., Susan Grover, *After Ellerth: The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J.L. REFORM 809 (Summer 2002); Kelly Collins Woodford & Harry A. Rissetto, *Tangible Employment Action: What Did the Supreme Court Really Mean in Faragher and Ellerth?*, 19 LAB. LAW. 63 (2003).
context of the fact sensitive constructive discharge inquiry.

The Court, in Ellerth, explained that a tangible employment action constitutes "a significant change in employment status," giving patent examples of formal discharge and demotion, but failed to indicate whether constructive discharge qualified; nor did it mention the doctrine anywhere else in its opinion. The Court's vagueness is further convoluted by its characterization of a tangible employment action in relation to the admittedly malleable language of the Restatement. In fact, the Court conceded that the agency relation standard is a "developing feature of agency law," and refused to "render a definitive explanation" of its requirements. Nonetheless, the Court simultaneously found that the tangible employment action is the "something more" necessitated by that rule in the employer liability context. If by its own terms the Restatement's agency relation standard is satisfied when a servant is "aided in accomplishing the tort by existence of the agency relation," then what does a "tangible employment action" encompass guarantee that "[w]hatever the exact contours of the aided in the agency relation standard, its requirements will always be met" when a supervisor takes a tangible employment action against a subordinate?

The Court's answer seems to lie in the official nature of a tangible employment action, and its assurance as opposed to mere indication that whatever injury such an action inflicts could not have been imposed by someone acting without the company's authority. So, the Court emphasizes that a tangible employment action is the "means by which the supervisor brings the official power of the enterprise to bear on subordinates" and "requires an official act of the enterprise, a company act." Beyond representing proof that an additional aid existed to assist the supervisor in his misconduct, the concept of tangible employment action is described by the Court in general terms primarily relating to its after-effects, such as: "in most cases inflicts direct economic harm," "in most cases is documented in official company records," or "may be subject to

52. Ellerth, 524 U.S. at 761.
53. Id.
54. The procedural history of Ellerth's case indicates, contrary to the view maintained by some federal courts, that the district court dismissed Ellerth's constructive discharge claim and as such, this claim was never squarely before the Court. See Caridad v. Metro North Commuter R.R., 191 F.3d 283, 294 (2d Cir. 1999).
55. Ellerth, 524 U.S. at 763.
57. Ellerth, 524 U.S. at 762.
58. Id.
59. Id.
60. Id.
61. Id.
review by higher level supervisors.\textsuperscript{62} The Court reasons that a tangible employment action, whatever its essential attributes, promises employer empowerment, and thus, when taken by a supervisor becomes "for Title VII purposes the act of the employer,"\textsuperscript{63} precluding the employer from asserting the affirmative defense.

The placement of constructive discharge in this already murky delineation is debated by the federal courts of appeals which draw on different aspects of the Court's \textit{Ellerth/Faragher} terminology to support contradictory positions with respect to whether a constructive discharge is a tangible employment action.\textsuperscript{64} As the first federal court of appeals to address the issue, the Second Circuit, in \textit{Caridad v. Metro-North Commuter R.R.},\textsuperscript{65} is credited with advancing the position that a constructive discharge "is not a tangible employment action depriving the employer of the availability of the affirmative defense to Title VII liability."\textsuperscript{66} In its brief analysis of the issue, the \textit{Caridad} court emphasized the Supreme Court's intention in \textit{Ellerth/Faragher} to limit employer liability and reasoned that a constructive discharge did not warrant the imposition of strict liability because it can be caused by a coworker and is "not ratified or approved by the employer."\textsuperscript{67}

Since \textit{Caridad}, however, several federal courts have taken the contrary view.\textsuperscript{68} Explicitly rejecting the Second Circuit's reasoning, the

\begin{itemize}
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} Several federal courts of appeals have noted the issue, but expressly declined to rule on it. See, e.g., Reed v. MBNA Mktg. Sys. Inc., 333 F.3d 27, 33 (1st Cir. 2003) (finding "no reason to adopt a blanket rule one way or the other"); Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1282 (11th Cir. 2003) (finding claim of constructive discharge not properly before the court); Kholer v. Inter-Tel Tech., 244 F.3d 1167, 1179 n.8 (9th Cir. 2001) (finding claim of constructive discharge not properly before the court). Others have indicated their position in the debate, without squarely deciding one way or the other. Compare Wyatt v. Hunt Plywood Co., Inc., 97 F.3d 405 (5th Cir. 2002) (suggesting the belief that constructive discharge is a tangible employment action), with Mallinson-Montague v. Pocrnick, 224 F.3d 1224, 1231-32 (10th Cir. 2000) (indicating agreement with the Second Circuit).
\item \textsuperscript{65} 191 F.3d 283 (2d Cir. 1999).
\item \textsuperscript{66} Id. at 294-95.
\item \textsuperscript{68} See, e.g., Jaros v. Lodgenet Entm't Corp., 294 F.3d 960, 966 (8th Cir. 2002); Jackson v. Ark. Dept' of Educ., 272 F.3d 1020, 1026 (8th Cir. 2001); Temores v. SG Cowen, 2003 WL 22455513 (N.D. Ill. Oct. 29, 2003); Vasquez v. Atrium Door & Window Co. of Arizona, Inc., 218 F. Supp. 2d 1139, 1142 (D. Ariz. 2002); Haworth v. Romania
Third Circuit held in *Suders* that because constructive discharge "operates as the functional equivalent of an actual termination," and "has, in most critical respects, the primary attributes of a tangible employment action," \(^{69}\) "when proven, [it] constitutes a tangible employment action within the meaning of *Ellerth* and *Faragher*.\(^{70}\) Even more recently, the Seventh Circuit held in *Robinson v. Sappington*\(^ {71}\) that "in circumstances where official actions by the supervisor makes employment intolerable [forcing the plaintiff to resign] we believe a constructive discharge may be considered a tangible employment action."\(^ {72}\)

### III. THE FEDERAL COURTS' DOMINANT APPROACH TO CONSTRUCTIVE DISCHARGE UNDER TITLE VII CONSTITUTES A TANGIBLE EMPLOYMENT ACTION

Although the Supreme Court has yet to address the issue, courts of appeals universally recognize that a claim of constructive discharge is cognizable under Title VII.\(^ {73}\) The general rule governing constructive discharge claims is that "the trier of fact must be satisfied that the working conditions [are] so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign."\(^ {74}\) Courts

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69. *Suders*, 325 F.3d at 458-60.
70. *Id.* at 461. *See also* *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 149 n.5 (3d Cir. 1999) ("[W]here [the plaintiff] was constructively discharged by her supervisors’ action after their own actionable behavior, the holdings and instruction of *Ellerth* and *Faragher* are clear: the employer . . . is automatically liable and no affirmative defense is available.").
71. 351 F.3d 317 (7th Cir. 2003).
72. *Id.* at 336.
73. Title VII makes it unlawful for employers "to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2000). Because Title VII does not literally prohibit employers from coercing an employee into quitting, but such conduct would certainly violate the statute's intent, courts have developed the constructive discharge doctrine, which allows a plaintiff who voluntarily quits under certain circumstances to be treated as having been fired and thus, preserves her right to equitable remedies. *See Maney v. Brinkley Mun. Waterworks & Sewer Dep't*, 802 F.2d 1073, 1075 (8th Cir. 1986) ("As a general rule, employees are entitled to awards such as backpay and reinstatement only if they were actually or constructively discharged from their employment"); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 887-88 (3d Cir. 1984).
74. Bourque v. Powell Electrical Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980). *See also* Ramos v. Davis & Geck, Inc., 167 F.3d 727, 731 (1st Cir. 1998) ("The question is whether [plaintiff] presented sufficient evidence to allow the jury to credit his claim that a reasonable employee would have felt compelled to resign under the circumstances."); Drake v. Minnesota Mining & Mfg. Co., 134 F.3d 878, 886 (7th Cir. 1998) ("To state a claim for constructive discharge, a plaintiff needs to show that his working conditions were so
agree that the objective reasonableness of the plaintiff's action of resigning is central to this inquiry.75 Certainly underlying the contrary positions taken by federal courts over whether a constructive discharge is a tangible employment action, however, is the "divergence of opinion among the courts as to the findings necessary to apply the [constructive discharge] doctrine."76

At the outset, most federal courts assume that in order for a plaintiff's resignation to be reasonable, the underlying working conditions must, as a matter of law, meet a minimum threshold of severity or pervasiveness of intolerability, surpassing that of a hostile work environment.77 Without defining this requirement, courts often phrase it as one necessitating "aggravated factors,"78 and routinely apply it as a benchmark to reject constructive discharge claims based on situations such as scheduling conflicts,79 negative performance appraisals,80 embarrassment or humiliation incident to an adverse employment decision,81 or single incidents of harassment.82 Even working conditions comprising continuous intolerable that a reasonable person would have been compelled to resign.

75. See, e.g., Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) ("Intolerability of working conditions, as the circuits uniformly recognize, is assessed by the objective standard of whether a 'reasonable person' in the employee's position would have felt compelled to resign.").
77. See, e.g., Sara Kagay, Applying the Ellerth Defense to Constructive Discharge: An Affirmative Answer 85 IOWA L. REV. 1035, 1048 (2000) (stating that most courts require that a plaintiff asserting a constructive discharge claim "meet a higher standard of proof than a plaintiff who seeks merely to prove a hostile working environment"). The Third, Fifth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits have all applied, to varying degrees, the "agravating factors" requirement in Title VII constructive discharge cases.
78. Geisler v. Folsom, 735 F.2d 991, 996 (6th Cir. 1984) ("Proof of discrimination alone is not a sufficient predicate for a finding of constructive discharge; there must be other 'aggravating factors.'"); See also Levendos, 860 F.2d at 1230-31; Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987).
79. See, e.g., Grube v. Lau Indus., Inc., 257 F.3d 723 (7th Cir. 2001); Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000).
82. See, e.g., Tutman v. CBS, Inc., 209 F.3d 1044, 1050 (7th Cir. 2000).
discriminatory treatment or deprivation of promotion opportunities may be found insufficient, in and of themselves, to justify a reasonable employee's resignation. Beyond investigating the intolerability of an employee's working conditions, numerous courts additionally apply various approaches examining the employer's role in the plaintiff's resignation. Many courts employ a requirement resembling the damages theory of mitigation whereby a plaintiff is expected to seek redress before resigning so as to provide the "employer ... sufficient time to remedy the situation." In addition, several federal courts mandate the plaintiff present "proof of the employer's specific intent to force" a resignation.

The emergence of these divergent standards becomes less significant when viewed in the totality of the federal courts of appeals' current constructive discharge jurisprudence. While no formal set of guidelines dictate the courts' application of the "aggravated factors" element, in order to be cognizable, a constructive discharge claim must accompany a hostile work environment allegation plus some predicate act, that as a practical matter, often entails one of the Ellerth Court's examples of a

83. See, e.g., Tidwell v. Meyer's Bakeries Inc., 93 F.3d 490, 497 (8th Cir. 1996) (holding that although the plaintiff provided "evidence that [employer] acted in a racially discriminatory manner" and that work environment was "tinged with discriminatory acts," lost promotion opportunity did not create "the overwhelming compulsion to quit that is necessary for constructive discharge"); Wardwell v. Sch. Bd., 786 F.2d 1554, 1557 (11th Cir. 1986) ("[W]hile a discriminatory refusal to promote would be relevant to the issue of whether [plaintiff] was constructively discharged, such evidence is not always sufficient to support a finding of constructive discharge."); Heagney v. Univ. of Wash., 642 F.2d 1157, 1166 (9th Cir. 1981) ("[O]ther than showing that she was possibly underpaid, [plaintiff] had not introduced evidence showing circumstances from which it could be inferred that [her employer] made her employment conditions difficult or intolerable" to justify resignation.); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65-66 (5th Cir. 1980) (noting that while "by no means discount[ing] the discrimination [plaintiff] may have faced," finding unequal pay did "not constitute such an aggravated situation that a reasonable employee would be forced to resign").

84. Kilgore v. Thompson & Brock Mgmt., Inc., 93 F.3d 752, 754 (11th Cir. 1996) ("None of the plaintiffs returned to work after complaining to the company's corporate management. Summary judgment on the constructive discharge claim was appropriate; the plaintiffs did not allow sufficient time for [their employers] to correct the situation.").

85. Bristow, 770 F.2d at 1255 (holding that since, "[a]t most, [plaintiff] demonstrated that he experienced problems" and a workplace "hardly unbearable for [a reasonable] employee," he did not show that "anyone impose[d] intolerable working conditions with the intent to compel him to resign").

86. See Mark S. Kende, Deconstructing Constructive Discharge: The Misapplication of Constructive Discharge Standards in Employment Discrimination Remedies, 71 NOTRE DAME L. REV. 39, 78 n.57 (1995) (noting that courts "have not been unanimous on what constitutes intolerable conditions"); Cathy Shuck, That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine, 23 BERKELEY J. EMP. & LAB. L. 401, 424 (2002) ("The bottom line is that it is very difficult to tell what 'aggravating circumstances' need to be present for resignation to be a 'reasonable' response to employer discrimination and harassment.").
tangible employment action. And, although courts couch their constructive discharge inquiry in terms of the plaintiff's reasonableness, and articulate differing standards to make this determination, the bottom line result, beyond imposing a considerable burden on the plaintiff, is that a legally cognizable constructive discharge reflects assurance that the employer was implicated in the plaintiff-employee's resignation.

Courts imposing the mitigation requirement and those compelling a plaintiff to prove an employer's intent to force a resignation demand a plaintiff show that the employer had notice of, or even contributed to, the harassing conduct and permitted it to continue, in order to successfully prove constructive discharge. To be sure, the Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have all either explicitly required an employee attempt to redress the harassment before resigning, prove her employer's intent to force resignation, or some combination of the two requirements. These courts form a dominant approach that essentially requires proof of employer notice as an element of the constructive discharge analysis.

As a result of "the pivotal importance notice plays in supervisor sexual harassment cases [after Ellerth/Faragher]," constructive discharge as applied by a majority of courts has the primary characteristics of a tangible employment action. In fact, the evidence considered by this approach necessarily overlaps the evidence highlighted by the Court as relevant in determining whether the employer should ultimately avoid liability. Additionally, and arguably more importantly, the rationale underlying this dominant approach to constructive discharge echoes the Title VII statutory and policy considerations the Court clearly emphasized as the foundation of the Ellerth/Faragher decisions. The consistency of the dominant approach's objectives and practical outcomes with the Court's

87. See, e.g., Buckley v. Hosp. Corp. of Am., 758 F.2d 1252, 1230-31 (11th Cir. 1985) (explaining that since the "hospital offered plaintiff a position as staff nurse," a demotion from her former supervisory position, the "evidence [was] sufficient to create a jury question as to whether a reasonable person would find these working conditions so intolerable that she would be forced to resign"); Satterwhite v. Smith, 744 F.2d 1380, 1382-83 (9th Cir. 1984) (finding that repeated denials of promotion preventing plaintiff from access to training and advancement opportunities provided grounds for constructive discharge); Meyer v. Brown & Root Constr. Co., 661 F.2d 369, 372 (5th Cir. 1981) (holding that an involuntary transfer of a pregnant employee to heavy manual labor that posed substantial risks to her health constituted constructive discharge); Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir. 1981) (holding that a "continuous pattern of discriminatory treatment encompassing deprivation of opportunities for promotion" constituted a sufficiently aggravated situation where a reasonable employee would resign).

88. See, e.g., Jones, 20 F. Supp. 2d at 1384 (involving plaintiffs who "neutralized their constructive discharge claims" by not notifying their employer of their problems with their supervisor).

89. Id.
**Ellerth/Faragher** framework counsels toward the imposition of strict employer liability where the plaintiff establishes a cognizable constructive discharge.

**A. THE FEDERAL COURTS "DOMINANT" APPROACH TO CONSTRUCTIVE DISCHARGE**

1. **Employee Mitigation**

Numerous courts of appeals emphasize the importance of an employee's efforts to alert the employer of a supervisor's harassment and the relevance of an employer's efforts to prevent and correct that harassment in determining whether a plaintiff-employee has carried the burden of proving a constructive discharge. Specifically, these courts maintain that a reasonable employee has an "obligation not to jump to conclusions too fast" or "not to assume the worst," and therefore, must "remain employed while seeking redress," usually through the employer's grievance procedures, before he or she can assert a successful constructive discharge claim. As applied, this prerequisite, embraced in some form by the Fifth, Seventh, Eighth, and Eleventh Circuits, amounts to a quasi-mitigation requirement, where the "standard of reasonableness... require[s] the employee who wants to make a successful claim of constructive discharge to do something before walking off the job." Failure to exhaust this affirmative duty to mitigate is sometimes

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90. Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 310 (5th Cir. 1987) (finding that the plaintiff failed to establish a claim of constructive discharge because she "did not give [her employer] an opportunity to demonstrate that it could curb" her alleged harasser's behavior).

91. Garner v. Wal-Mart Stores, Inc., 807 F.2d 1536, 1539 (11th Cir. 1987) ("[N]ot reasonable for plaintiff to resign after one day's disappointment [without] realistically giv[ing her employer] a chance to work her in... another department or to reassign her to her old... position.").

92. Tutman, 209 F.3d at 1050 (7th Cir. 2000). See also Boze v. Branstetter, 912 F.2d 801, 805 (5th Cir. 1990) ("[A] reasonable employee [who, like plaintiff, was dissatisfied with his performance evaluation and the withdrawal of some of his responsibilities] instead of resigning would first have [either]... completed the internal grievance process, or filed a complaint with the EEOC."); Rosado v. Santiago, 562 F.2d 114, 119 (1st Cir. 1977) ("[E]mployee must use 'honest, earnest and intelligent efforts' to mitigate his losses... ").

93. See, e.g., Shuck, supra note 86, at 426 (describing condition that plaintiffs "not only remain on the job, but take affirmative steps to mitigate the harm as well" as the "requirement of mitigation").

94. Lindale v. Tokheim Corp., 145 F.3d 953, 955 (7th Cir. 1998). See also Campos v. City of Blue Springs, Mo., 289 F.3d 546, 551 (8th Cir. 2002) (holding that a plaintiff "must take affirmative steps short of resigning that a reasonable employee would take to make her conditions of employment more tolerable" before her quit can be considered a constructive discharge).
interpreted as indirectly reflecting on the employee's reasonableness, in
that "passivity in the face of working conditions alleged to be intolerable is
often inconsistent with [that] allegation." Under this reasoning, "failure
to object to egregious conditions, or to seek some form of redress is
compelling evidence that [the plaintiff], [like] any reasonable worker, [did]
not find the conditions intolerable." More often, federal courts view the
absence of mitigation by the plaintiff employee as unreasonable in itself
due to the deprivation it imposes on the employer, explaining that "[i]t is
difficult to find a employee's resignation objectively reasonable and subject
an employer to liability for constructive discharge when the employee quits
without giving her employer a chance to fix the problem." However
articulated, the mitigation requirement mandates that an employee who has
"an avenue of redress within the company and fail[s] to use it" or quits
"without giving the employer a reasonable chance to work out the
problem," can "not prove facts sufficient as a matter of law to constitute
constructive discharge." Federal courts correspondingly find employer response to an
employee's mitigation attempts significant in determining the
reasonableness of that plaintiff's resignation. Where a plaintiff shows that
its employer was aware of the harassment underlying his or her working
conditions and was provided with sufficient time to correct the situation but
nonetheless responded ineffectively, such evidence generally establishes
that the employee was reasonable in feeling compelled to resign.

95. *Lindale*, 145 F.3d at 955.
96. *Wolf v. Northwest Ind. Symphony Soc'y*, 250 F.3d 1136, 1143 (7th Cir. 2001)
(concluding that an employee who "never reported [the] harassment to anyone" and in fact
complimented his boss in his resignation letter was not constructively discharged).
97. *Williams v. Kansas City*, 223 F.3d 749, 754 (8th Cir. 2000) (finding no constructive
discharge where plaintiff "made no attempt to inform her supervisors" of the problem, but
"[r]ather, she abruptly quit"). *See also Tidwell*, 93 F.3d at 497 (holding that the plaintiff's
"decision to forego any effort at communicating his grievance to [his employer] reinforces
the fact that he acted unreasonably when he quit").
98. *Howard v. Burns Bros., Inc.*, 149 F.3d 835, 842 (8th Cir. 1998) (where employee
was "clearly aware of [the grievance] policy" but did not to use it, she "failed to prove that
she was constructively discharged").
that when a plaintiff "was not an employee who felt she had no place to turn when faced
with unlawful discrimination . . . [and] knew that she could report any allegations," failure
to mitigate lead to judgment as a matter of law for employer).
100. *Id. at 1247. See also Gawley v. Ind. Univ.*, 276 F.3d 301, 315 (7th Cir. 2001)
(plaintiff not constructively discharged where she waited seven months before availing
herself of the formal procedures the university established for victims of harassment);
*Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678, 686 (8th Cir. 2001) (finding no
constructive discharge where plaintiff "failed to avail herself of the channels of
communication provided by [employer] to deal with" harassment).
(noticing that "[g]iven the inadequacy" of the employer's response in the face of "frequent
contrary, where an employer has taken prompt remedial action to prevent future harassment this finding "alone is fatal to [a plaintiff's] claim of constructive discharge."102 For instance, the Seventh Circuit in Saxton v. AT&T,103 found the plaintiff's resignation unreasonable where the employer "went out of its way to ensure that [she] was not placed in an uncomfortable or embarrassing position while the company investigated the complaint."104 Her employer took prompt remedial measures by allowing her to work at home and offering her a transfer option. In Buchanan v. Sherrill,105 the Tenth Circuit came to the same result, determining that "no reasonable person could find that plaintiff had no choice but to quit" where "defendant had arranged to transfer plaintiff to another restaurant—thus ending the alleged harassment or discrimination—but she quit her job anyway."106

2. The Employer Intent Requirement

A majority of federal courts of appeals focus their constructive discharge inquiry "on the impact of an employer's actions, whether deliberate or not, upon a 'reasonable' employee."107 However, many circuits scrutinize the employer's motive, holding that in order to prove constructive discharge, the plaintiff must also show that "the discrimination complained of amounted to an intentional course of conduct calculated to force the victim's resignation."108 This emphasis on deliberateness of the complaints" it was reasonable for employee to think that "[i]f she wanted to avoid further harm, she would have to leave work entirely."); Henderson v. Simmons Foods, Inc.,217 F.3d 612, 617 (8th Cir. 2000) (holding that the employer's "half-hearted responses to complaints" and "poorly conducted investigation" established reasonableness of resignation); Morgan v. Ford, 6 F.3d 750, (11th Cir. 1993) (finding the plaintiff's resignation reasonable where she reported harassment to administrators, who took no action and ignored the alleged harassing supervisor's retaliatory conduct).

102. Webb v. Cardiothoracic Surgery Assocs. of N. Tex., P.A., 139 F.3d 532, 539-40 (5th Cir. 1998). See also Dornhecker, 828 F.2d at 310 ("Because [employer's] prompt response was the antithesis of 'inaction,' [plaintiff] was not constructively discharged."); Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 120 n.4 (1st Cir. 1977) (holding that since the employer offered the plaintiff a new position, employee's "refusal to accept the transfer [and instead resign] cannot be considered to be a constructive discharge").

103. 10 F.3d 526 (7th Cir. 1993).
104. Id. at 537.
105. 51 F.3d 227 (10th Cir. 1995).
106. Id. at 229.
107. Levendos, 860 F.2d at 1230-31. The First, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits regularly hold that "no finding of a specific intent on the part of the employer to bring about a discharge is require[d] for the application of the constructive discharge doctrine." Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888 (3d Cir. 1984). See also Finneghan, supra note 76 (stating that this is the majority view).

employer's action finds its origin in constructive discharge cases decided under Section 8(a)(3) of the National Labor Relations Act (the NLRA). 109 The NLRA consistently requires proof that the employer deliberately made an employee's working conditions intolerable and forced the employee to quit because of his union activities. 110 As the earliest court of appeals to incorporate the constructive discharge concept in a Title VII context, the Tenth Circuit, in Muller v. U.S. Steel Corp., 111 explicitly relied on the Board's decisions when recognizing that a constructive discharge claim requires the plaintiff present "extrinsic evidence to establish that an effort had been made to render the job so unattractive and unpleasant . . . [so as to] deliberately . . . force him to quit his job." 112

As enunciated, this minority approach currently advocated by the Second, Fourth, Sixth, and Eighth Circuits 113 "requires proof of the employer's specific intent to force an employee to leave." 114 In practice, however, these courts acknowledge that "[i]ntent may be inferred through circumstantial evidence," 115 or by the plaintiff's showing that the "resignation was a reasonably foreseeable consequence of [his] employers' discriminatory actions." 116 While this is arguably a weak intent standard, as applied by these courts it necessarily entails an inquiry into the employer's elements: deliberateness of the employer's actions, and intolerability of the working conditions.

109. See Kende, supra note 86, at 49 ("The constructive discharge theory was first developed in National Labor Relations Board cases involving discrimination against union members."). See also Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1356 (4th Cir. 1995) ("Because we have concluded that the elements of a constructive discharge formulated under the National Labor Relations Act are equally applicable in the Title VII context, we require a Title VII plaintiff asserting constructive discharge similarly to prove the employer's intent to force the plaintiff to quit.").

110. See, e.g., Crystal Princeton Ref. Co., 222 N.L.R.B. at 1069 (noting that constructive discharge necessitates proof that conditions "imposed upon the employee must cause, and be intended to cause, a change in [the employee's] working conditions so difficult or unpleasant as to force him to resign").

111. 509 F.2d 923, 929 (10th Cir. 1975) (no constructive discharge where plaintiff's "reassignment and the other actions complained of were not designed to coerce his resignation").

112. Id.

113. See Finnegan, supra note 76, at 562-63 (noting that a minority of circuits have "imported the NLRA's intent requirement into constructive discharge under Title VII, requiring the plaintiff to show that the employer intended to force her to quit").

114. Bristow, 770 F.2d at 1255-56.

115. Martin, 48 F.3d at 1356. See also Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989) (holding that a reasonable fact finder could conclude that "[employer] intended to force [plaintiff] to quit" where the "evidence showed that [employer's] remedial action increased the risk of contact between [plaintiff and her harasser]").

116. Hukkanen v. Int'l Union of Operating Eng'rs, Hoisting & Portable Local No. 101, 3 F.3d 281, 285 (8th Cir. 1993) (finding that since alleged harasser "repeatedly propositioned [plaintiff] . . . attempted to force himself on [her] physically" and " threatened to rape her," there was "no doubt that [plaintiff's] resignation was a reasonably foreseeable event").
knowledge of the harassment leading to the plaintiff's resignation "including [whether the employer] fail[ed] to act in the face of known intolerable conditions" or whether the employer urged the plaintiff to reconsider quitting.\textsuperscript{117} In \textit{Bergstron-EK, v. Best Oil Co.,}\textsuperscript{119} a pregnant employee who alleged constant harassment by her supervisor received a reduction in working hours, which was her employer's established "method of getting an undesirable employee to quit."\textsuperscript{120} Despite the employer's "knowledge of other pregnant females who complained of [this supervisor's] discriminatory conduct, no disciplinary action was taken against [him]."\textsuperscript{121} The Eighth Circuit determined that "it was reasonably foreseeable to [plaintiff's employer] that [employees] would quit because of [the supervisor's] discriminatory conduct."\textsuperscript{122} In effect, under the employer intent requirement, a plaintiff must show that her "employer, through action or inaction, render[ed] [her] working conditions so intolerable that [she] essentially [was] forced to terminate her employment."\textsuperscript{123}

\textbf{B. Under the Dominant Approach, Constructive Discharge Accommodates the Court's \textit{Ellerth/Faragher}\ Language, Purposes and Objectives}

Despite the ambiguity surrounding the concept of a "tangible employment action" and the need for further clarification of its precise criteria, the Court's rationale for requiring a tangible employment action, and the policy behind its \textit{Ellerth/Faragher}\ framework generally, is undoubtedly grounded in agency principles and Title VII objectives. The Court makes clear that agency principles impose limits on employer liability unless there "is assurance that [the supervisor's harassment] could not have been inflicted absent the agency relation."\textsuperscript{124} In circumstances

\begin{footnotes}
\item[117] \textit{See} \textit{Martin,} 48 F.3d at 1356 (finding "requisite employer intent" from evidence of assaults and threats of firing and because there was "no evidence that the employer here took any remedial measures").
\item[118] \textit{See, e.g.,} \textit{Craft v. Metromedia, Inc.,} 766 F.2d 1205, 1217 (8th Cir. 1985) ("[N]o evidence that [the employer] took... actions with an intent to force [plaintiff] to quit" where she was "urged" to reconsider resigning.); \textit{EEOC v. Federal Reserve Bank,} 698 F.2d 633, 672 (4th Cir. 1983) (finding no constructive discharge where the evidence showed that plaintiff's "supervisor sought to persuade her not to quit").
\item[119] 153 F.3d 851, 858 (8th Cir. 1998).
\item[120] \textit{Id.}
\item[121] \textit{Id.}
\item[122] \textit{Id.}
\item[123] \textit{Hunt v. State,} 297 F.3d 735, 744 (8th Cir. 2002) (holding that since plaintiffs complaints "were not met with any meaningful support, but were instead answered with... threats of termination, efforts to obstruct their work... and general harassment" a reasonable jury could conclude that they were constructively discharged).
\item[124] \textit{Ellerth,} 514 U.S. at 761-62.
\end{footnotes}
where there is no such assurance, Title VII's deterrent purpose and enforcement policies dictate that both employers and employees have an "affirmative obligation to prevent violations."\(^{125}\) By emphasizing the employee's obligation to seek redress and the employer's duty to avoid harm, the dominant approach to constructive discharge goes to the heart of the Court's *Ellerth/Faragher* motivations and purpose.

1. Under the Dominant Approach, Constructive Discharge Has the Essential "Official Action" Attribute of a Tangible Employment Action

The Court found it "prudent to import the concept [of a tangible employment action] for resolution of the vicarious liability issue"\(^{126}\) in order to accommodate it's *Meritor* holding that "agency principles constrain the imposition of vicarious liability in cases of supervisory harassment."\(^{127}\) The Court explained that a tangible employment action, which "requires an official [or company] act"\(^{128}\) and is "the means by which the supervisor brings the official power of the enterprise to bear on subordinates,"\(^{129}\) is the appropriate predicate for strict liability because it "ensure[s] that employer liability would be imposed . . . only where the employer is implicated in the harm visited upon the employee by his or her supervisor."\(^{130}\) Accordingly, "[w]hat matters [in identifying a tangible employment action] is the Supreme Court's rationale . . . that a supervisor who takes official action against an employee should be treated as acting for the employer."\(^{131}\) As applied by federal courts which require either proof of the employer's intent or of the plaintiff's mitigation efforts, a constructive discharge that results from intolerable working conditions created by a supervisor is effectively a "company act" for *Ellerth/Faragher*

\(^{125}\) *Faragher*, 524 U.S. at 805-06.

\(^{126}\) *Ellerth*, 524 U.S. at 764.

\(^{127}\) *Id.*

\(^{128}\) *Id.*

\(^{129}\) *Id.* The Court's statement that "[t]angible employment actions fall within the special province of the supervisor," *Ellerth*, 524 U.S. at 762, does not mandate that constructive discharge cannot qualify because it can conceivably be caused by a coworker. The *Ellerth/Faragher* framework is explicitly only applicable to supervisory harassment and, thus the concept of a tangible employment action does not even come into play where working conditions were made intolerable by a coworker. *See id.* at 764-65; *Faragher*, 524 U.S. at 807.

\(^{130}\) *Caridad*, 191 F.3d at 294. *See also Ellerth*, 524 U.S. at 761-62 ("When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation.").

\(^{131}\) *Reed*, 333 F.3d at 33. *See also Temores*, 2003 WL 22455513 at *5 ("[T]he question is whether the supervisor's abuse of his authority made the adverse action possible.").
purposes.\textsuperscript{132}

Constructive discharge, as applied by most courts, entails a plaintiff demonstrating that the employer, at the very least, had knowledge of the conduct leading to the employee's resignation. Pursuant to the duty to mitigate, a plaintiff must essentially prove that the employer was informed of the intolerable working conditions and was provided with an opportunity to redress the harm prior to the employee's resignation. Moreover, a cognizable constructive discharge claim under the employer intent standard compels proof that the employer deliberately, through a direct action or informed inaction, created intolerable conditions with the intention of forcing an employee to resign.

As a practical matter, if a plaintiff cannot establish that its employer was at least conscious of his or her intolerable working conditions, the plaintiff will be unable to fulfill either prerequisite and will be unsuccessful in the constructive discharge claim. By its nature, a company act is something the employer has control over and where a constructive discharge is found under the mitigation or employer intent requirements it is necessarily "empowered by the company."\textsuperscript{133} Pursuant to these standards, the constructive discharge that results from intolerable working conditions created by a supervisor bears "the imprimatur of the enterprise."\textsuperscript{134} In the appeal of Ellerth's constructive discharge claim to the Seventh Circuit, Chief Judge Posner intimated that the mitigation standard embodies the same principle underlying the Court's tangible employment action. Judge Posner explained in his concurring opinion that Ellerth's "action in quitting rather than complaining underscores the importance of agency principles that place appropriate pressure on victims of sexual harassment to protect themselves . . . by complaining."\textsuperscript{135}

2. The Dominant Approach to Constructive Discharge Incorporates the Ellerth/Faragher Affirmative Defense

There is no question that the Court crafted the \textit{Ellerth/Faragher} affirmative defense to provide an incentive to employers and employees to avoid the harm prohibited under Title VII. The Court explained that Title VII's "primary objective . . . is not to provide redress but to avoid harm."\textsuperscript{136}

\begin{enumerate}
\item 132. Ellerth, 524 U.S. at 762.
\item 133. Id.
\item 134. Id. One district court recently recognized this point, reasoning that an employer "should be liable for a constructive discharge if the plaintiff can show that her supervisor used the authority vested in him by the employer to create working conditions that a reasonable employee would find to be unbearable." Temores, 2003 WL 22455513 at *6.
\item 135. Ellerth \textit{v.} Burlington Indus., Inc., 123 F.3d 490, 516 (7th Cir. 1997) (Posner, C.J., concurring).
\item 136. Faragher, 524 U.S. at 806.
\end{enumerate}
Such a defense "would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize an employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty." \(^{137}\) Under this statutory policy, the Court further clarified, an employee has a "coordinate duty . . . to use such means as are reasonable under the circumstances to avoid or minimize the damages that result from violations of the statute." \(^{138}\) The dominant approach to a constructive discharge is grounded in these same principles of deterrence and avoidance, and largely incorporates the analysis mandated under the *Ellerth/Faragher* affirmative defense.

Beyond emerging as an aid to assist courts in identifying meritorious constructive discharge claims, the mitigation requirement, is also often justified by federal courts on the identical statutory basis underlying the affirmative defense, that "society and the policies underlying Title VII will be best served if . . . unlawful discrimination is attacked within the context of existing employment relationships." \(^{139}\) Furthermore, the mitigation requirement effectually mirrors the affirmative defense elements by examining the employee's attempt to redress the harm and determine whether the employer promptly responded and pursued reasonable actions to prevent or correct the harassment.\(^{140}\) The analysis entailed by this determination mimics that suggested by *Ellerth/Faragher* in its emphasis on whether the employer has antiharassment policies in place and whether the employee took advantage of the employer's preventative measures.\(^{141}\)

\(^{137}\) Id.

\(^{138}\) Id.

\(^{139}\) *Coffinan*, 141 F.3d at 1247 (quoting *Bourque*, 617 F.2d at 65-66). *See also* Duncan v. Gen. Motors Corp., 300 F.3d 928, 936 (8th Cir. 2002); Jurgens v. EEOC, 903 F.2d 386, 390 (5th Cir. 1990).

\(^{140}\) Several lower courts and commentators have recognized that the constructive discharge doctrine as enunciated by Federal Courts of Appeals "is in keeping with" the affirmative defense. *See, e.g.*, *Scott*, 72 F. Supp. 2d at 595 ("If an employee could convert a hostile work environment claim into a constructive discharge claim simply by resigning without first seeking redress from the employer, then the *Ellerth* defense would ring hollow."); Schoiber v. Emro Mktg. Co., 1999 WL 825275, *6 (N.D. Ill. Sept. 21, 1999) (unpublished opinion) (noting that the constructive discharge "reasonableness approach largely overlaps the second inquiry of the *Ellerth* defense: whether the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise"). *See also* Kagay, *supra* note 77, at 1048 (noting that the mitigation requirement resembles the affirmative defense by "likewise requir[ing] the employee to reasonably give notice and allow the employer an opportunity to prevent or correct" the harassment); Shuck, *supra* note 86, at 444 ("In the case of constructive discharge, the *Ellerth* inquiry duplicates the mitigation requirement.").

\(^{141}\) In fact, the EEOC's guidelines regarding constructive discharge under Title VII emphasize, "an important factor to consider is whether the employer had an effective internal grievance procedure" and that "an employee's failure to utilize effective grievance
Where the mitigation standard is met, the plaintiff will not have failed to "use such means as are reasonable under the circumstances to avoid or minimize the damages" and the employer will not have reasonably responded to the harassment. Accordingly, application of the mitigation requirement results in the exact outcome directed by the Court, that "if the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided." A comparable result arises in jurisdictions requiring a plaintiff to prove "specific intent" on the part of the employer. Under these courts' decisions, where the standard is fulfilled, employers generally either had "recognized practice[s] . . . [used] to force unwanted employees to quit" or possessed knowledge of the harassment and permitted it to continue or failed to respond in a way that was "reasonably calculated to end the intolerable working environment." Additionally, in applying the employer intent requirement, courts recognize that an employer's "reasonably calculated response" may "negate any reasonable inference of intent." Thus, an employee cannot successfully claim constructive discharge if an employer has remedied the harassment and the employee nonetheless resigns. In these jurisdictions, if a plaintiff successfully

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142. *Faragher*, 524 U.S. at 806.
143. *See, e.g., Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 574 (8th Cir. 1997) (finding that a reasonable jury could find constructive discharge where plaintiff attempted to use employer's "open door policy and complained to several members of management on different occasions about the harassment . . . but management generally ignored those complaints"). *See also Shuck*, *supra* note 86, at 444 ("[If] the plaintiff satisfies the mitigation requirement for constructive discharge, then the employee has not failed to avail herself of remedies available in her employment, and the employer's response was not effective.").
144. *Faragher*, 524 U.S. at 806.
146. *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1133 (4th Cir. 1995) (finding that "the investigation [the employer] claims to have undertaken was cursory and failed to end the harassment . . . it fell far short of the types of responses courts have held adequate"). *See also Henderson*, 217 F.3d at 617.
147. *Amirmokri*, 60 F.3d at 1133.
148. *Id.*
149. *See, e.g., Mack v. Otis Elevator Co.*, 326 F.3d 116, 126 (2d Cir. 2003) (holding that plaintiff failed to prove deliberate employer action to force her resignation, where "[i]t [was] uncontested that once [employer's] officials were made aware of [her] complaints, they immediately began an investigation" and offered to transfer her, per her request, but plaintiff "simply refused the transfer and failed to return to work"); *Matvia v. Bald Head Island Mgmt. Inc.*, 259 F.3d 261, 272-73 (4th Cir. 2001) (finding no deliberateness on the part of
claims constructive discharge, an employer will be unable to prove that it “exercised reasonable care to prevent or correct promptly any harassing behavior.”150 Moreover, the employer will be unable to prove that “the plaintiff employee failed to take advantage of any preventive or corrective opportunities”151 and thereby fail to fulfill the affirmative defense.

3. Under the Dominant Approach, a Uniform Rule that Constructive Discharge Qualifies As a Tangible Employment Action Will Lead to the Appropriate Outcome under Ellerth/Faragher

Several recent decisions by federal courts of appeals employing the dominant approach to constructive discharge in claims involving employer liability reveal the overlap of these inquiries. These decisions also demonstrate the conditions under which plaintiff-employees will prevail in claiming constructive discharge are analogous to those that compel imposition of employer liability pursuant to Ellerth/Faragher.152

Take the Seventh Circuit’s recent decision and reasoning in Robinson. Robinson, a judicial clerk, alleged her supervisor, Judge Sappington, sexually harassed her by making overtly sexual comments and inappropriately monitoring her outside activities and personal life. She claimed that her resultant resignation constituted a constructive discharge.153 After finding a “reasonable person would conclude that these actions created an objectively hostile work environment,”154 the court addressed Robinson’s constructive discharge claim. Recognizing that “working conditions for constructive discharge must be even more egregious than the high standard for hostile work environment,”155 the court found that Judge Sapington’s conduct was “hostile and intimidating and... would interfere with the work performance of a reasonable person.”156 Reiterating the Seventh Circuit’s mitigation standard that “an employee is

the employer where “the record is replete with instances of management’s attempts to persuade co-workers to be civil towards [plaintiff]”).

150. Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.
151. Id.
152. See, e.g., Durham Life Ins. Co. v. Evans, 166 F.3d 139, 155 (3d Cir. 1999) (observing the overlap in proof when determining that the plaintiff was constructively discharged for “essentially the same reasons that [the court] conclude[d] that [she] suffered [an] adverse employment action”); Schoiber v. Emro Mktg. Co., 1999 WL 825275, *6 (N.D. Ill. Sept. 21, 1999) (holding that the plaintiff failed to establish a constructive discharge for “much of [the] reasoning [which] applies equally to the court’s finding that [the employer] has established the two elements of the affirmative defense”).
153. Id. at 320-23.
154. Id. at 331.
155. Id. at 334.
156. Id. at 331.
expected to remain employed while seeking redress," the court noted that Robinson took "formal steps to curb Judge Sappington's behavior" by reporting her harassment to the county's circuit court presiding judge, Judge Greanias. Despite attempts to rectify her working conditions, there was "evidence in the record . . . that Judge Sappington had no intention of ceasing his harassment." Furthermore, the Court found that while Judge Greanias offered Robinson a transfer in response to her harassment, he simultaneously acknowledged that this alternative position "would be hell" and "indicated that it was in [her] best interest to resign." The court concluded that Robinson "was entitled to take Judge Greanias at his word" and that it was reasonable for her to credit his suggestion that she resign.

In addition to finding that "the jury could conclude that Ms. Robinson suffered a constructive discharge," the court determined that her transfer "was only possible because Judge Greanias had been empowered by the employer to make economic decisions affecting other employees under his control" and that "Judge Greanias was speaking in his official, supervisory capacity" when suggesting she resign. Accordingly, the court held that because Robinson demonstrated that "official actions by [her supervisors] ma[de] [her] employment intolerable," her "constructive discharge may be considered a tangible employment action." Determining "it would be appropriate to hold the [employer] liable for Ms. Robinson's resulting resignation," the Robinson court "conclude[d] that the Ellerth/Faragher defense is not available in the present case" and "therefore [it did not need to] reach the issue of whether [plaintiff's] transfer . . . standing alone also constituted a tangible employment action."

The Eighth Circuit's decision in Jackson v. Arkansas Department of Education conversely illustrates that where the dominant approach to the constructive discharge standard is not met the employer will most likely be successful in fulfilling the requirements of the affirmative defense. The

157. Id.
158. Id.
159. Id. at 336.
160. Id.
161. Id. at 337.
162. Id.
163. Id.
164. Id.
165. Id. at 336.
166. Id.
167. Id. at 337.
168. Id.
169. Id.
170. 272 F.3d 1020 (8th Cir. 2001).
Jackson court addressed the plaintiff's supervisory hostile work environment and constructive discharge claims and determined that "the [employer] was entitled to the [Ellerth]/Faragher affirmative defense" with regards to the former claim because it "acted promptly and effectively to remedy the past sexual harassment." The court further found that Jackson "unreasonably failed to take advantage of [her employer's] preventative or corrective opportunities through her failure to report the harassment for more than nine months . . . and her refusal to participate" in a meeting with her employer. In applying the Eighth Circuit's mitigation and intent standards, the Jackson court duplicated this analysis using the "constructive discharge terminology" to find that Jackson's "working conditions were not so intolerable that she was forced to resign."

The court explained that because Jackson "did not notify [her employer] until nine months after . . . and because she refused to participate in . . . formal sexual harassment correction procedure," she "did not provide [her employer] with a reasonable opportunity to correct the alleged problem." The Jackson court also found the defending employer "did reasonably correct the problem . . . by changing [the alleged harasser's] schedule . . . and ultimately firing [him]." Concluding its constructive discharge analysis as it had its Ellerth/Faragher application to Jackson's hostile work environment claim, the court held that the employer was "entitled to the affirmative defense."

IV. THE SUDERS PROBLEM

A legally cognizable constructive discharge will generally entail one of the Court's examples of a "tangible employment action." By applying the dominant approach, federal courts essentially compensate for the malleability of the reasonableness standard and the uniqueness of every plaintiff's working conditions by mandating that the employer was made aware of the underlying harassment through some employee action and took an appropriate response to correct the situation. Due to the absence of

171. Id. at 1026.
172. Id.
173. Id.
174. Id.
175. Id. at 1027.
176. Id.
177. Id.
178. Id.
179. See, e.g., supra note 83. The Court also indicated that a "bruised ego," "demotion without change in pay, benefits, duties, or prestige" and an inconvenient job reassignment were insufficient to qualify as tangible employment actions. Ellerth, 524 U.S. at 762. Cognizable constructive discharge claims often embody this characterization as well. See, e.g., supra notes 79-82.
a uniform constructive discharge standard, however, a court is free to deviate from the dominant approach and formulate its own benchmark. It is in this circumstance that the possibility exists for a plaintiff's resignation to be found reasonable, so as to support a constructive discharge, where the resignation was in response to predicate actions that, while certainly actionable harassment, were not assuredly empowered by the employer. The Suders case is an example of such a situation.

Suders's claim primarily involved allegations that would uniformly be characterized as working conditions constituting a hostile work environment. However, Suders also alleged that she was "set... up on a false theft charge," which was the "last straw" leading to her resignation. The events leading up to this incident were set in motion when Suders came to believe that her supervisors "lied to her about the [required computer] test results and that they never sent her test scores to [the department in charge of officer education] because she found her exams in a set of drawers in the women's locker room." Upon realizing that Suders's test results were missing, officers dusted the drawers with a theft detection device that turns the suspected thief's hands blue. When Suders attempted to return the test, a group of officers "treated her as they would an accused suspect." Suders was immediately "handcuffed, photographed, and questioned" and told that she was a "suspect." She was taken into an interrogation room, where Sergeant Easton, her supervisor and alleged harasser, "advised... of her Miranda rights" and "detained [her] for further questioning." She was released only upon "reiterat[ing] [to Easton] her intent to resign." Although she had previously prepared a resignation letter, "[a]rguably, Suders made only one serious attempt... to resolve her problems within the remedial program establish by the PA State Police" and there was also evidence that "[n]o
attempt was made to follow up on Suders’s initial complaint by either her employer’s Equal Employment Opportunity Officer.

When examining whether Suders alleged a cognizable constructive discharge claim, the Third Circuit emphasized that this incident removed "[a]ny shred of doubt" over whether the alleged harassment was sufficiently intolerable that a reasonable person in Suders’s position would have felt compelled to resign. In making this determination, the Suders court essentially disregarded the dominant approach. The court outright "reject[ed] the imposition of an aggravated circumstances requirement often imposed by other Courts of Appeals," and although expressing doubt over whether Suders sufficiently mitigated her harm so as to provide her employer a chance to effectively respond, decided that mitigation "does not amount to a quasi exhaustion requirement." It instead urged that the facts "be considered in light of the totality of the circumstances." Under the dominant approach, a federal court would have examined Suders’s attempt to redress her harm as it related to her constructive discharge claim, but the Suders court evaded this issue by concluding, "false charges of misconduct are tantamount to threats or suggestions of discharge." While there may be instances where a threat of discharge is a sufficient basis for finding an employee’s resignation a constructive discharge, the Third Circuit’s departure from the dominant approach undermines its conclusion that Suders’s claim is such a case. In essence, it begs the question of whether Suders involves a constructive discharge that would be cognizable in any other jurisdiction.

For the same reasons, the

192. Id. at 443.
193. Id. at 446.
194. Id. at 444.
195. The Suders court implied that without the evidence of Suders being set up on false charges of theft, issues of fact remained regarding whether her “one serious attempt... to resolve her problems within [her employer’s remedial program] qualified as adequate mitigation providing her employer a chance to remedy the problems” but held the district court erred in granting summary judgment because it was “plausible that a jury would conclude that Suders” was constructively discharged. Id. at 447.
196. Id. at 445.
197. Id. at 445.
198. Id. at 447. The Suders court explained that, in its view, “[a]ttacking someone with a false charge of theft seems a most effective way of suggesting that an employee will be fired or should leave voluntarily.” Id. at 446.
199. Employing the dominant approach, several federal courts have found cognizable constructive discharge claims where the underlying working conditions involved threats of discharge. See, e.g., Terry v. Ashcroft, 336 F.3d 128, 152 (2d Cir. 2003) (finding that since plaintiff experienced “pervasive, unabated harassment by his supervisors,” including retaliatory conduct for filing a complaint and being told his “days are numbered” there was “sufficient evidence to allow reasonable fact-finder to conclude that a reasonable person in [his] position would have felt compelled to terminate his employment”); EEOC v. Univ. of Chicago Hosps., 276 F.3d 326, 331-32 (7th Cir. 2002) (“When an employer acts in a manner
Suders court's analysis and assessment of the evidence leaves it unclear whether Suders resignation, preceded by a "threat of discharge," was assuredly made possible by her supervisor's official empowerment.

The Supreme Court does not specifically address whether a threat of discharge leading to a resignation should be considered the type of action that is empowered by the employer in either Ellerth or Faragher. The Court's description of a tangible employment action and its treatment of Ellerth's case may evince an intent to preclude mere threats. The question, though, is whether it is clear that a supervisory threat of termination, when part of other evidence found sufficient to prompt an employee reasonably to resign, should be considered a fulfilled threat that necessarily carries the "imprimatur of the enterprise." Judge Posner's concurring decision in Ellerth's case before the Seventh Circuit addresses the issue more directly. He observed that "when the supervisor merely makes threats... but does not carry [them] out... he has not used his delegated authority to commit a company act." But "[t]he difficult borderline case is that of constructive termination precipitated by a threat," where though the resignation may "look to the supervisor's superior like a voluntary quit... there is always some paperwork involved" and "higher-ups in the company will have some ability to monitor constructive discharges."

Suders falls exactly within this thorny category. The Third Circuit avoids dealing with the factual issues pervading Suders claim by concluding that because the "circumstances of the allegedly false charge of theft are quite likely detailed in documents" and "surely [left] a paper trail," Suders resignation was "ratified by the employer." While the Court in Ellerth recognized that a tangible employment action is "in most

so as to have communicated to a reasonable employee that she will be terminated, and the plaintiff employee resigns, the employer's conduct may amount to constructive discharge").

200. In Ellerth, the Court framed the issue before it as "whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats... but does not fulfill the threat." Ellerth, 524 U.S. at 753. In applying its holding to Ellerth's case, the Court's language is open to interpretation. The Court stated that she did "not allege she suffered a tangible employment action" and that, "Burlington should have an opportunity to assert and prove the affirmative defense to liability." Id. at 766. Nonetheless, the Court also noted that "[o]n remand, the District Court will have the opportunity to decide whether it would be appropriate to allow Ellerth to amend her pleading." Id.

201. Ellerth, 123 F.3d at 513 (Posner, C.J., concurring).
202. Id. at 515.
203. Id.
204. Id.
205. Suders, 325 F.3d at 460.
206. Id.
207. Id. at 459.
cases . . . documented in official company records," without application of the dominant approach, it is unclear whether this is sufficient to establish an "official act of the enterprise" in Suders's case.

Simply stated, the Supreme Court's *Suders* problem is that the *Suders* opinion raises numerous significant questions, rendering it an inappropriate vehicle to decide the question actually before the court; whether a constructive discharge is a tangible employment action. The *Robinson* court's analysis exemplifies that a supervisory threat of discharge may be empowered by the employer and thus an appropriate basis for finding constructive discharge. However, the *Suders* court's discussion leaves no such assurance. Accordingly, Title VII's policy and enforcement efforts to provide employers with incentives to avoid harm counsel that the employer should be provided the opportunity to satisfy the affirmative defense.

V. CONCLUSION

Under the dominant approach, a constructive discharge should be, as the Third Circuit suggests, the "functional equivalent of a formal discharge," where the employer is implicated in the plaintiff's "significant change in employment status." In such circumstances, a per se rule that a constructive discharge is a tangible employment action appropriately accommodates the Court's *Ellerth/Faragher* policy concerns and rationale. In most cases, such a holding will result in a uniform proper result. The employer will be held automatically liable for only those resignations that are assuredly the result of conduct by the supervisor, made possible through the "imprimatur of the enterprise" and thus, suitably considered "for Title VII purposes the act of the employer." But, the *Suders* decision makes it impossible to reach this conclusion by leaving significant factual issues regarding whether Suders's resignation, resulting from a "threat of discharge," was a "company act."

The concern, that equating a constructive discharge with other types of tangible employment actions will impose liability on the employer any time a plaintiff resigns is only viable where a federal court departs from the stringent burden the dominant approach places on employees alleging constructive discharge. In other words, the anxiety on the part of employers, courts, and commentators that strict liability will be imposed

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208. Ellerth, 524 U.S. at 762.
209. See Kagay, supra note 77, at 1052 (arguing that if "constructive discharge arises from a hostile work environment, in which a supervisor harasses an employee but makes no significant change in the employee's status . . . [t]hat type of claim . . . should allow the employer an affirmative defense").
210. Suders, 325 F.3d at 446.
211. Ellerth, 524 U.S. at 761.
inappropriately is truly a concern about the requirements of constructive discharge. Consider the Second Circuit’s *Caridad* decision in light of its consistent application of the employer intent requirement in its constructive discharge analysis.\(^{212}\) Under the facts of Caridad’s claim, “[d]espite [her employer’s] sexual harassment policy and the availability of procedures for lodging complaints,”\(^{213}\) she “failed to report [her] harassment”\(^{214}\) and “declined [her employer’s offered] transfer.”\(^{215}\) It seems unlikely that the Second Circuit would have found the employer intent standard met. However, the *Caridad* court skipped over analyzing whether Caridad’s claim involved a true constructive discharge and went straight to the *Ellerth/Faragher* employer liability analysis, emphasizing that “Caridad did not complain of the harassment prior to quitting her job”\(^{216}\) and that “constructive discharge is not ratified or approved by the employer.”\(^{217}\) In actuality, the Second Circuit’s constructive discharge jurisprudence suggests that Caridad failed to state a constructive discharge claim and so the court, while reaching the same outcome, arguably approached the issue backwards.

The *Suders* court analysis, in fact, manifests this tension by finding the working conditions underlying Suders’s resignation to “surpass a threshold of intolerable conditions” so as to be sufficient to establish constructive discharge despite the absence of any “assurance [that] the injury could not have been inflicted absent the agency relation.”\(^{218}\) At its core, the *Suders* court’s analysis and conclusion illustrate that a rule regarding whether constructive discharge is a tangible employment action can only be effective and avoid inconsistency in judgments once the Court enunciates a concise and uniform standard to govern constructive discharge claims. If presented to the Court as involving a cognizable constructive discharge, Suders’s claim appears insufficient to impose automatic employer liability under *Ellerth/Faragher*.

\(^{212}\) See, e.g., Terry, 336 F.3d at 151-52; Chertkova, 92 F.3d at 90; Martin v. Citibank, N.A., 762 F.2d 212, 221 (2d Cir. 1985). See also Shuck, *supra* note 86, at 444 (noting that the “holding in the Second and Fourth Circuits that a constructive discharge does not constitute a tangible employment action are particularly perverse, considering that these circuits follow the specific intent rule”).

\(^{213}\) Caridad, 191 F.3d at 290-93.

\(^{214}\) Id.

\(^{215}\) Id.

\(^{216}\) Id. at 294.

\(^{217}\) Id.

\(^{218}\) Ellerth, 524 U.S. at 753.