IN THE

Supreme Court of the United States

No. 03-95

PENNSYLVANIA STATE POLICE,
Petitioner,
v.

NANCY DREW SUDERS,
Respondent.

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

BRIEF AMICUS CURIAE OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No persons or entities other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

human resource management. Founded in 1948, SHRM's mission is to serve the needs of human resource professionals by providing the most essential and comprehensive resources available. Through its activities, SHRM's goal is to help human resource professionals become competent and effective in managing what SHRM recognizes to be the backbone of all organizations—employees. SHRM is committed to advancing the human resources profession to ensure that human resources is recognized as an essential partner in developing and executing organizational strategy. To that end, SHRM provides education and information services, conferences and seminars, government and media representation, on-line services and publication to more than 175,000 professional and student members worldwide.

As the leading association of the human resources profession, SHRM and its members are vitally concerned with the orderly development of the law defining the meaning of non-discrimination and equal employment opportunity. More specifically, SHRM and its members are concerned with the nature and scope of an employer's obligation to provide a workplace free from unlawful harassment and discrimination. SHRM affirmatively supports and encourages compliance with the fundamental principles of equal employment opportunity and strives to provide its members with the knowledge and most current information to achieve this end.

In this case, SHRM is interested in protecting its members by promoting rules that encourage employers to initiate and maintain, and employees to use, internal procedures that address complaints of unlawful harassment and discrimination. SHRM provides its members with written guidance and information on landmark court decisions that address workplace harassment and discrimination. Indeed, SHRM's *amicus* brief filed in *Faragher* encouraged the Court to recognize a safe harbor for employers who implement and maintain strong anti-harassment policies when employees have not taken advantage of the internal complaint procedures; and the Court effectively adopted this concept of a safe harbor through the creation of the *Faragher/Ellerth* affirmative defense.

In addition, SHRM hosts conferences throughout the United States that include seminars and guest speakers addressing the current topics affecting the human resources profession, with topics including recent legal developments that involve employers and their obligations to comply with the law. At its conferences in 2003 alone, SHRM presented several programs aimed at assisting employers in preventing unlawful workplace harassment and discrimination, including "The Investigations Seminar", "Decoding Recent Legal Developments Into Plain English", "The Employee Handbook: Every Word Counts", "The Drive To Work—Understanding and Eliminating Sexual Harassment In the Workplace", "Writing Effective HR Policies and Procedures", and "Survivor IV: Avoiding Organizational and Personal Liability for Wrongful Discharge". SHRM provides this information and these programs to teach and motivate human resource professionals to develop and maintain anti-harassment and anti-discrimination policies and procedures that encourage and facilitate employees to report unlawful harassment and discrimination in the workplace. SHRM's ultimate goal is to provide human resource professionals with the means by which they can do their part in eradicating unlawful workplace harassment and discrimination.

From this vantage point, SHRM posits that the Third Circuit's holding in *Suders v. Easton*, 325 F.3d 432 (3d Cir.

2003), that constructive discharge is a tangible employment action, which precludes an employer from asserting the affirmative defense created by the Court in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (the "*Faragher/Ellerth* affirmative defense"), denigrates the spirit and purpose of federal and state anti-harassment and anti-discrimination laws. In particular, SHRM believes that the Third Circuit's decision controverts this Court's pronouncements, and provides employees with a legally-sanctioned end-run around the judicially approved internal human resources mechanisms designed to prevent and correct unlawful workplace harassment and discrimination. Accordingly, SHRM respectfully submits this brief in the furtherance of its mission to promote management policies that aim to eradicate unlawful workplace harassment and discrimination through efficient internal resolution channels.

INTRODUCTION

This Court's pronouncements in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), reiterated and refined in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), establish that "Title VII place[s] some limit on employer responsibility for the creation of a discriminatory environment by a supervisor"; and, further, that "an employer is not 'automatically' liable for harassment by a supervisor who creates the requisite degree of discrimination." *Faragher,* 524 U.S. at 792, 804 (citing *Meritor*, 477 U.S. at 72). Based on the parameters of employer liability first set forth in *Meritor*, this Court has determined that "an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim." *Faragher*, 524 U.S. at 780.

This Court crafted the *Faragher/Ellerth* affirmative defense in recognition of the fact that "[a]lthough Title VII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination,' *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), ***its 'primary objective,'*** like that of any statute meant to influence primary conduct, ***is not to provide redress but to avoid harm***." *Faragher*, 524 U.S. at 805-06 (emphasis added).

Additionally, this Court has noted that the EEOC has well-established regulations that advise employers to take all measures to prevent and correct promptly unlawful workplace harassment. *Faragher*, 524 U.S. at 806 (citing 29 C.F.R. § 1604.11(f) (1997)).[2] Thus, the statutory policy behind Title VII, in conjunction with the EEOC's enforcement efforts, require that courts "recognize the employer's affirmative obligation to prevent violations and give credit . . . to employers who make reasonable efforts to discharge their duty." *Faragher*, 524 U.S. at 806. As such, an imposition of strict vicarious liability on an employer based on the misuse of power by a supervisor is contrary to the statutory policy of Title VII if it fails to provide employers with the incentive to implement and maintain effective anti-harassment policies and procedures. *Faragher*, 524 U.S. at 806.

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[2] Significantly, in the aftermath of *Faragher* and *Ellerth*, the EEOC issued a Notice entitled "Enforcement Guidance: Various Employer Liability for Unlawful Harassment by Supervisors." No. 915.002 (June 18, 1999) (acknowledging that the Supreme Court, in *Ellerth* and *Faragher*, found that "employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment").

The unequivocal mandate from this Court for employers to implement preventative and corrective measures addressing workplace harassment and discrimination has been accepted and respected by corporate America. Following the instructions from this Court in *Meritor, Faragher*, and *Ellerth*, in conjunction with encouragement, training and counseling from SHRM, human resource professionals see that the employment policies adopted by their employers both deter unlawful harassment and discrimination in the workplace, as well as provide legal protection from employee claims seeking judicial relief before invoking the employer's internal grievance system.

In this case, the Third Circuit's decision that constructive discharge is a tangible employment action runs afoul of the pronouncements of this Court and would ultimately eviscerate the employer's *Faragher/Ellerth* affirmative defense. The Third Circuit's holding necessarily precludes an employer's ability to assert the *Faragher/Ellerth* affirmative defense in the context of a constructive discharge and subjects the employer to strict liability for a supervisor's alleged sexual harassment upon the employee's resignation of employment. Indeed, finding constructive discharge to be a tangible employment action instantly transforms Title VII from a shield against discrimination into a sword against which an employer is rendered defenseless—a concept this Court has repeatedly rejected. *See Faragher*, 524 U.S. at 805-06; *Ellerth*, 524 U.S. at 764-65.

Indeed, of more concern, the Third Circuit's holding both encourages employees to resign their employment to achieve an advantage in litigating their allegations of unlawful workplace harassment, and simultaneously discourages them from invoking and utilizing their employers' internal grievance system before seeking judicial redress. Thus, the Third Circuit's decision permits employees to craft employment claims against which an employer is left defenseless before the employee has even filed an internal complaint that would have given the employer the opportunity to prevent and correct the situation from escalating to a constructive discharge. As such, the Third Circuit's holding greatly diminishes, if not entirely eliminates, the incentive this Court offered to employers to disseminate and enforce strong anti-harassment policies. Also, that holding eliminates the employee's duty to exhaust internal procedures, and ultimately opens the judicial floodgates to employment litigation – something that this Court sought to avoid in *Faragher* and *Ellerth*. *See Faragher*, 524 U.S. at 805-06; *Ellerth*, 524 U.S. at 764-65.

This Court has repeatedly recognized that Congress devised Title VII to encourage employers to create anti-harassment policies and effective internal grievance mechanisms in an effort "to promote conciliation rather than litigation in the Title VII context." *Ellerth*, 524 U.S. at 764 (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984); 29 C.F.R. § 1604.11(f)(1997)). As such, employer liability for harassment in the workplace must depend on an employer's efforts to create employment policies and procedures that aim to prevent and correct promptly unlawful workplace harassment. *Ellerth*, 524 U.S. at 764.

Hinging the availability of the *Faragher/Ellerth* affirmative defense on the employer's own conduct – and official, independent ratification of supervisor harassment – by requiring a "tangible employment decision" of the employer before imposing vicarious liability on the employer respects the "holding in *Meritor* that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment." *Ellerth*, 524 U.S. at 763. Conversely, construing constructive discharge, **an**

employment decision made by the employee, as an employer's "tangible employment decision" under the rubric of *Faragher* and *Ellerth* destroys the defense to employer liability this Court recognized must exist.

If the Third Circuit's holding is adopted, an unfortunate message will be sent to employees that they need not report harassment and discrimination, but instead may terminate their employment and seek judicial relief in the first instance, making federal judges the "Senior Vice President of Human Resources" for the American workplace—precisely the result federal courts have sought to avoid. *See, e.g., Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (citations omitted) (federal courts "do not sit as a super-personnel department that re-examines an entity's business decisions"); *Keyes v. Secr. of Navy*, 853 F.2d 1016, 1024-25 (1st Cir. 1988) ("It is chancy business, indeed, for a court – on so interstitial a matter – to set itself up as a super-personnel evaluator . . ."). Indeed, by quitting instead of using the employer's internal grievance mechanisms, employees gain a tactical advantage in court by depriving their employer of an important defense. Moreover, if an employer's policies and internal grievance mechanisms offer an employer no incentive to avoid liability for decisions it did not make, will employers be as inclined to heed the mandate of this Court and the encouragement of SHRM to adopt and maintain them?

Here, SHRM seeks to persuade this Court that the Third Circuit's holding that constructive discharge constitutes a tangible employment action runs contrary to the pronouncements of this Court in *Meritor*, *Faragher* and *Ellerth* and ultimately impedes the goal of eradicating unlawful harassment and discrimination in the workplace through the cooperation of employers and employees rather than through premature judicial intervention.

SUMMARY OF ARGUMENT

The Third Circuit has held that an employee's constructive discharge constitutes a tangible employment action, which renders an employer strictly liable for the harassment of its supervisors. In so holding, the Third Circuit expressly rejected any rule that would require an employee alleging constructive discharge to show an official company act to prove a tangible employment action. The Third Circuit has reasoned that when an employee demonstrates that the work environment was so intolerable that the employee had no choice but to resign, the constructive discharge becomes the act of the employer, and thus qualifies as a tangible employment action.

Yet, it is counter-intuitive that an employee who suffers from threshold unlawful harassment will lose if he/she fails to complain, but an employee who suffers a substantially more egregious hostile work environment will be rewarded for not complaining, even though he/she had far more about which to complain. Indeed, the Third Circuit's holding sends the message to employees that they are better off not complaining initially because if the environment deteriorates, they can quit and prevail in court. As we explain below, among the reasons to reject the Third Circuit's holdings are:

First, the Third Circuit's reasoning contravenes this Court's holdings in *Meritor*, *Faragher* and *Ellerth*, which each recognize that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment.

Second, the Third Circuit's holding ignores this Court's efforts to promote the statutory policy behind Title VII, as well as the EEOC's enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit to employers who make reasonable efforts to discharge their duty. On the one hand, SHRM recognizes that the availability of the *Faragher/Ellerth* affirmative defense will not avoid liability in extreme cases where, even though the employer has actually discharged its affirmative obligation to implement and maintain anti-harassment policies and complaint procedures, the harassment was so egregious that the use of those policies would have been futile or could not have avoided imminent harm to the employee. In these extreme cases, the *Faragher/Ellerth* affirmative defense will still require the employer to prove that the employee's failure to utilize its policies was unreasonable. On the other hand, the wholesale deprivation of the *Faragher/Ellerth* affirmative defense for a decision that the employer did not make may serve to diminish the impetus to be vigilant in preventing and eradicating harassment and discrimination.

Third, the Third Circuit's holding glosses over this Court's decision in *Ellerth*, which defines "tangible employment decision" as an official act of the employer, usually documented in official records and subject to review by higher level supervisors, which bears the imprimatur of the employer. *See Ellerth*, 524 U.S. at 762. Instead, the Third Circuit supplants the requisite independent, official act of the employer with the independent, unreviewable act of the employee to impose strict vicarious liability on the employer for the unlawful, unreported, unauthorized acts of a rogue supervisor.

Finally, the Third Circuit's holding confers on employees an unbridled control over their workplace harassment and discrimination claims and confers on them a significant strategic advantage in the litigation of their Title VII lawsuits.

Accordingly, SHRM respectfully requests that the Court reject the Third Circuit's holding, and instead find that a constructive discharge does not constitute a tangible employment action for purposes of precluding an employer from asserting the affirmative defense created by the Court in *Faragher* and *Ellerth*.

ARGUMENT

Point I

Construing Constructive Discharge As A Tangible Employment Action Is Inconsistent with *Meritor* And Its Progeny.

This Court first set out the parameters of an employer's vicarious liability for the unlawful harassment by a supervisor in *Meritor*, which involved a claim of discrimination by a supervisor's sexual harassment of a subordinate over an extended period. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). In *Meritor*, while the Court held that a hostile work environment is actionable under Title VII, the Court determined that agency principles are relevant in assigning employer liability. *Meritor*, 477 U.S. at 70-72. The Court rejected the imposition of strict liability for a hostile environment created by a supervisor, finding that "some limitation was intended." *Meritor*, 477 U.S. at 70-72. Ultimately, the Court held that Title VII does not make employers "always automatically liable for sexual harassment by their supervisors." *Meritor*, 477 U.S. at 70-72.

In *Ellerth*, this Court concluded that because "Congress has directed federal courts to interpret Tile VII based on agency principles . . . a uniform and predictable standard must be established as a matter of federal law." *Ellerth*, 524 U.S. at 754. In so doing, the Court "rel[ied] 'on the general common law of agency . . . to give meaning to [Title VII's terms 'employer' and 'agents'].'" *Ellerth*, 524 U.S. at 754-55 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989)). In devising this standard, the Court first looked to Section 219(1) of the Restatement: "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." *Ellerth*, 524 U.S. at 755-56 (quoting Restatement, Section 219(1)). The Court noted, however, that "[t]he harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer." *Ellerth*, 524 U.S. at 757. Thus, according to the Court, "[t]he general rule is that [unlawful] harassment by a supervisor is not conduct within the scope of employment." *Ellerth*, 524 U.S. at 757. Nonetheless, the Court opined that "although a supervisor's [unlawful] harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable . . .where its own negligence is a cause of the harassment." *Ellerth*, 524 U.S. at 759. Thus, "[n]egligence sets a minimum standard for employer liability under Title VII." *Ellerth*, 524 U.S. at 759.

Further, to find an employer vicariously liable for the unlawful harassment of a subordinate employee by a supervisor, the supervisor must have taken a tangible employment action against the subordinate. *Ellerth*, 524 U.S. at 760. Because the Court already established that "sexual harassment by a supervisor is not conduct within the scope of employment", *Ellerth*, 524 U.S. at 757, the "tangible employment action" contemplated by the Court must be an independent, official act of the employer other than the supervisor's unlawful harassment. In the constructive discharge scenario, however, the Third Circuit concluded that the supervisor's unlawful harassment is the employer's employment action that causes the harm to the employee:

> ***By focusing on the actions of a supervisor and on the type of injury to a plaintiff***, it becomes clear that when a supervisor creates a hostile work environment so severe that an employee has no alternative but to resign, the official power of the enterprise is brought to bear on the constructive discharge.

Suders v. Easton, 325 F.3d 432, 459 (3d Cir. 2003) (emphasis added). Indeed, the Third Circuit went so far as to expressly "reject any rule requiring a plaintiff-employee alleging a constructive discharge to show an official company act in order to prove a tangible employment action." *Suders*, 325 F.3d at 459. However, in so holding, the Third Circuit entirely ignored the consistent pronouncements of this Court in *Meritor*, *Faragher* and *Ellerth* that mandate the utilization of agency principles to attribute actions of supervisors to employers for Title VII liability purposes. Under this mandate, a constructive discharge, as in the case of unlawful harassment itself, cannot qualify as a tangible employment action under the rubric of *Faragher* and *Ellerth* and violates the principles first established in *Meritor*.

Because Congress has relied on this Court's holding in *Meritor* when it amended Title VII in 1991, and due to the principles of *stare decisis*, this Court has declined to depart from its holding in *Meritor* concerning the limits of employer liability. *Faragher*, 524 U.S. at 804 n.4. Indeed, after *Meritor*, this Court has held that "[it] [is] not entitled to recognize [a theory of vicarious liability for misuse of supervisory authority] under Title VII unless [it] 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." *Faragher*, 524 U.S. at 804. Consequently, unlawful harassment by a supervisor, in and of itself, that ultimately causes a constructive discharge is insufficient to impose strict liability on the employer; and the employer should be afforded the opportunity to assert the affirmative defense crafted by this Court in *Faragher* and *Ellerth*. Not only does this agency principle respect the holding *Meritor*, it also does justice to the statutory policy of Title VII and the EEOC's enforcement efforts, both of which have been consistently recognized by this Court.

It is axiomatic that the holdings in *Meritor*, *Faragher* and *Ellerth* are not only consistent with agency principles, but they also provide employers with an incentive to adopt and enforce strong anti-harassment policies. Indeed, this approach is endorsed in SHRM's literature and training programs. By contrast, the holding of the Third Circuit would have the opposite effect. If employers are subjected to liability despite their efforts to prevent and remediate unlawful workplace harassment, they could become less motivated to adopt the policies and practices espoused by their human resource professionals and to devote time and financial resources to address this issue. This is not a result that SHRM—or this Court—should promote.

Point II

The Statutory Policy Encouraging Prevention Is At Odds With Finding Constructive Discharge To Be A Tangible Employment Action.

Consistent with this Court's recognition that it is constrained by its holding in *Meritor*, it also acknowledged that "[a]lthough *Meritor* suggested the limitation on employer liability stemmed from agency principles, . . . other considerations might be relevant as well." *Ellerth*, 524 U.S. at 764. In this vein, this Court has repeatedly recognized that the "primary objective" of Title VII is "to influence primary conduct, . . . not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 806 (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)). Concurrently with that acknowledgement, this Court also recognized that "[a]s long ago as 1980, the EEOC, charged with the enforcement of Title VII. . . adopted regulations advising employers to 'take all steps necessary to prevent sexual harassment from occurring, such as informing employees of their right to raise and how to raise the issue of harassment'" and that "in 1990 the EEOC issued a policy statement enjoining employers to establish a complaint procedure 'designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor." *Faragher*, 524 U.S. at 806 (quoting 29 C.F.R. § 1604.11(f)(1997); EEOC Policy Guidance on Sexual Harassment, 8 FEP Manual 405:6699 (Mar. 19, 1990)). Further, this Court has noted that:

> ***Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms.*** Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, . . . and the EEOC's policy of encouraging the development of grievance procedures.

> To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.

Ellerth, 524 U.S. at 764 (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984); 29 C.F.R. § 1604.11(f)(1997); EEOC Policy Guidance on Sexual Harassment, 8 BNA FEP Manual 405:6699 (Mar. 19, 1990); *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 358 (1995)) (emphasis added). In addition, this Court observed that "Title VII borrows from tort law the avoidable consequences doctrine, . . . and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances." *Ellerth*, 524 U.S. at 764 (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232 n.15 (1982)).

Based on the foregoing, this Court determined that:

> It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. ***Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive***.

Faragher, 524 U.S. at 806 (emphasis added). Against this backdrop, the Court created the *Faragher/Ellerth* affirmative defense:

> An 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. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at 765. The *Faragher/Ellerth* affirmative defense takes into account the "prophylactic" nature of Title VII and recognizes the imposition of an affirmative obligation on the employer to implement and maintain effective employment policies aimed at preventing and correcting unlawful harassment in the workplace. *See Ellerth*, 524 U.S. at 764. Nevertheless, the Court further held that "[n]o affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion or undesirable reassignment." *Ellerth*, 524 U.S. at 765.

Therefore, the Court required some adverse employment action taken by the employer, separate and apart from the supervisor's unlawful harassment, which constitutes a significant change in employment status or inflicts direct economic harm on the victim-employee. *See Ellerth*, 524 U.S. at 761-62. However, neither the unlawful harassment nor the employee's decision to terminate his or her employment constitutes an employment action contemplated by this Court. Indeed, neither is sufficient to deprive entirely the employer's ability to demonstrate that it has both heeded the mandate of this Court and respected the spirit and purpose of Title VII by fulfilling its affirmative obligation to implement and maintain employment policies and internal grievance mechanisms aimed at preventing and correcting promptly unlawful workplace harassment.

Point III

A Constructive Discharge Is Not A "Tangible Employment Action" Pursuant To This Court's Definition in *Ellerth.*

This Court defined tangible employment action in *Ellerth* as:

> . . . ***a significant change in employment status***, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision

> causing a significant change in benefits.

Ellerth, 524 U.S. 761 (emphasis added). Further, a tangible employment action is an act taken by a "supervisor or other person ***acting with authority of the company***" that inflicts "***direct economic harm***" on the employee. *Ellerth*, 524 U.S. 762 (emphasis added). Moreover,

> [a] tangible employment decision <u>***requires***</u> ***an official act of the enterprise, a company act***. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. . . . The supervisor often must obtain the ***imprimatur of the enterprise and use its internal processes***.

Ellerth, 524 U.S. 762 (emphasis added).

Under that rationale, this Court unanimously opined that unlawful supervisory harassment does not constitute a tangible employment action because it is not an official act of the employer: "a supervisor's creation of a hostile work environment is neither within the scope of his employment, nor part of his apparent authority . . . . Indeed, a hostile work environment is ***antithetical*** to the interests of the employer." *Ellerth*, 524 U.S. at 769 (dissenting opinion) (emphasis added). Furthermore, the reaction of a victim-employee to the alleged unlawful workplace harassment, whether it be to tolerate or submit to sexual abuse or to quit employment, does not convert the unlawful harassment into a tangible employment action. *See Marsicano v. American Society of Safety Engineers*, No. 97-C-7819, 1998 WL 603128 at *6

(N.D. Ill. Sept. 4, 1998) ("as defined by the Supreme Court, the concept of tangible employment action for vicarious liability purposes does not embrace a responsive action on the part of the employee that brings about a change in employment status"). Therefore, to rise to the level of a tangible employment action, the employer, or the supervisor acting within the scope of his employment, must take some independent employment action, other than the harassment, that significantly changes the employee's employment status or directly inflicts economic harm on the employee. *Ellerth*, 524 U.S. at 761-62. In the case of a constructive discharge, however, there is nothing independent, but only the degree of harassment itself.

As noted in *Ellerth*, unlike unlawful harassment, a supervisor's employment decision that adversely affects the employee's employment is often accompanied by official paperwork and is subject to review and ratification by the employer. *See Ellerth*, 524 U.S. at 762. It is, therefore, reasonable to hold an employer responsible for the action recommended by the supervisor because the employer is given the opportunity to examine the circumstances on which the supervisor's decision rested to detect whether the supervisor's decision was ill-motivated. Thus, when ratified by the employer, the supervisor's decision becomes that of the employer; and agency principles are appropriately invoked.

Conversely, "unlike demotion, discharge, or similar economic sanctions, an employee's constructive discharge is not ratified or approved by the employer." *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 294 (2d Cir. 1999). As even the Third Circuit conceded, "as regards the specific event which terminates the employer-employee relationship, a constructive discharge may not bear the 'imprimatur of the enterprise' . . . in the same way as a formal termination." *Suders*, 325 F.3d at 458 (quoting *Ellerth*, 524 U.S. at 762). Thus, when an employee quits his or her employment, the employer is presented with a *fait-accompli*, which requires no ratification from the employer and for which the employer had no prior notice and no opportunity to investigate the circumstances leading to that quit. Indeed, while the resignation by an employee may have been motivated by the conduct of a non-conforming supervisor, that conduct cannot be attributed to the employer because it neither bears the imprimatur of the enterprise nor does it invoke the employer's internal process. Additionally, while it is proper to require an employer to look behind the actions of its supervisors who recommend employment actions that adversely affect employees, it is both inappropriate and too onerous a burden for employers to attempt to question each employee who resigns. Even if the ex-employee would cooperate in an exit interview (and many will not), the Third Circuit expects the employer to investigate each and every resignation to ascertain whether any particular quit was due to unlawful workplace harassment that was never previously reported as required by company policy. Beyond that, once an employee quits, the employer loses any control over that employee and can no longer rectify a situation that the employee believed was beyond repair. For these reasons, agency principles do not come into play; and strict vicarious liability may not be imposed – especially for an employee who did not meet the second prong of the *Faragher/Ellerth* affirmative defense because he/she "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765.

Despite the foregoing, the Third Circuit disregarded the holdings of this Court when it expressly "reject[ed] any rule requiring a plaintiff-employee alleging a constructive discharge to show an official company act in order to prove a tangible employment action." *Suders*, 325 F.3d at 459. In so doing, the Third Circuit boldly and inappropriately rejected the this Court's definition of tangible employment decision in *Ellerth*.

Point IV

Allowing A Plaintiff To Control Whether The Employer May Assert The *Faragher/Ellerth* Affirmative Defense Minimizes The Incentive For Employees To Complain To The Employer Prior To Commencing Legal Action.

This Court has determined that "[d]issuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII." *Kolstad v. American Dental Assoc.*, 527 U.S. 526, 545 (1999). However, the Third Circuit's decision did just that by giving employees a legally sanctioned way to make an end-run around the utilization of the employment policies and internal grievance mechanisms this Court has required employers to implement.

Further, the Third Circuit's holding proposes a rule that entirely ignores the significance of employer adopted anti-harassment policies and internal grievance mechanisms, which are encouraged and supported by SHRM. Because the Third Circuit's holding eliminates an employee's need to exhaust an employer's internal grievance mechanisms, employers' policies and procedures that designate specific members of management as agents to receive and act on harassment complaints become superfluous. Thus, while employers have implemented internal grievance mechanisms geared to address workplace harassment, which frequently include contact individuals to whom employees may complain (including SHRM members or individuals who have been trained by SHRM members regarding topics such as how to recognize unlawful harassment, complaint intake procedures, confidentiality protection and effective listening techniques), the Third Circuit's holding sends employees an unmistakable message that the internal mechanisms are not of paramount importance. Instead of encouraging employees to exhaust the employer's internal grievance mechanisms, the Third Circuit's decision emboldens employees to disregard the procedures contained in employers' anti-harassment policies by terminating their own employment.

Additionally, this holding, by encouraging a bypass of the employer's internal mechanisms, drives employees into court and overburdens the already congested court dockets. For this reason, if the Third Circuit decision is affirmed, the employer's exposure to vicarious liability will be left to the control of the employee, without regard to the employer's efforts to comply with Title VII.

Finally, contrary to the pronouncements of this Court, the Third Circuit's holding diminishes the importance of the employers' affirmative obligation to provide internal grievance mechanisms because it renders the employer's efforts to comply with Title VII entirely irrelevant to the imposition of vicarious liability for the acts of a rogue supervisor who has ignored the instructions of the company's human resource professional to document employee performance issues and seek approval before taking any tangible employment action. Because the Third Circuit's decision renders employers' efforts to be good corporate citizens irrelevant as soon as an employee decides to quit and allege constructive discharge, employers may not make the implementation and maintenance of employment policies and internal grievance mechanisms a priority if they will be discounted once an employee makes the decision to terminate his or her own employment – without ever taking the steps required under company policies to avoid conditions before they become intolerable.

By allowing employees to simply quit, allege constructive discharge, and file a claim under Title VII, the Third Circuit has assured plaintiff employees a tactical advantage of holding their employers vicariously liable for alleged unlawful harassment while depriving employers of the ability to assert a defense that should be available to companies who "do the right thing" but their employees do not.

CONCLUSION

For all of the foregoing reasons, SHRM respectfully requests that this Court reverse the Third Circuit's decision and hold that a constructive discharge does not constitute a tangible employment action.

Respectfully submitted,

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