

**SEXUAL HARASSMENT IN THE EYE OF THE BEHOLDER.  
ON THE DISSOLUTION OF PREDICTABILITY IN THE  
ELLERTH/FARAGHER MATRIX CREATED BY SUDERS  
FOR CASES INVOLVING EMPLOYEE PERCEPTION**

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*“Thoughts without content are empty, intuitions without concepts are blind.”<sup>1</sup>*

I. INTRODUCTION

Sexual harassment law works to protect employees from wrongful behavior.<sup>2</sup> When that protection fails, or, at a minimum, becomes conflicted when employee perception<sup>3</sup> motivates the dispute, the efficacy of the law becomes questionable. The questionable character of sexual harassment law in employee perception cases comes on the heels of several Supreme Court decisions beginning in 1998 when it decided *Burlington Industries, Inc. v. Ellerth*<sup>4</sup> and *Faragher v. City of Boca Raton*,<sup>5</sup> and continuing to the summer of 2004, when it decided *Pennsylvania State Police v. Suders*.<sup>6</sup>

The *Ellerth* and *Faragher* decisions set forth an entirely new matrix for determining sexual harassment liability. In the first section of the matrix, a court determines whether a supervisor’s or manager’s behavior led to an employee

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1. IMMANUEL KANT, *CRITIQUE OF PURE REASON* 61 (Norman Kemp Smith trans., Random House 1958) (1781).

2. AUGUSTUS B. COCHRAN III, *SEXUAL HARASSMENT AND THE LAW: THE MESHELLE VINSON CASE 2* (2004) (describing Meritor Savings Bank, *FSB v. Vinson*, 477 U.S. 57 (1986)).

3. The term “employee perception,” for the purposes of this analysis, refers to how the employee measures the level of harassment occurring in the workplace as opposed to how the employer or even a reasonable person would measure that harassment. See Richard C. Sorenson et al., *Solving the Chronic Problem of Sexual Harassment in the Workplace: An Empirical Study of Factors Affecting Employee Perceptions and Consequences of Sexual Harassment*, 34 CAL. W. L. REV. 457 (1997).

4. 524 U.S. 742 (1998).

5. 524 U.S. 775 (1998).

6. 124 S. Ct. 2342 (2004), *rev’g Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003).

suffering a tangible adverse employment action.<sup>7</sup> If the court finds in the employee's favor, the employer suffers strict liability.<sup>8</sup>

In the second section of the matrix, if there is no tangible adverse employment action, the court must determine whether the employer is eligible for an affirmative defense.<sup>9</sup> The employer can avoid liability entirely if (1) the employer promulgated an effective sexual harassment policy/complaint system and (2) the allegedly harassed employee failed to take advantage of the system in place.<sup>10</sup> The imposition of strict liability punishes employers who do not control how their supervisors and managers treat employees.<sup>11</sup> The affirmative defense releases employers who control the workplace by preventing and correcting improper employee treatment.<sup>12</sup> The combination of how the Court imposes strict liability and yet offers an affirmative defense relies entirely on the employer's behavior. Simply put, if the employer behaves "badly" by imposing a tangible adverse employment action, there is strict liability.<sup>13</sup> If the employer behaves "well," that is, by preventing and correcting wrongful behavior, there is no liability at all.<sup>14</sup>

The matrix offers predictability, simplicity, and, as a result, an incentive for employers to behave "well."<sup>15</sup> The court can often determine as a matter of law whether the employee suffered a tangible action and/or whether the employer sufficiently prevented and corrected improper behavior.<sup>16</sup> Such court determinations fulfill the predictability and practicability components of the matrix. In certain situations, however, courts must analyze employer behavior through the eyes of the employee.<sup>17</sup> Two areas in particular within the *Ellerth/Faragher* matrix do not focus on employer behavior but must rely on employee perception.<sup>18</sup>

When using the first section of the matrix, imposing strict liability is problematic when the aggrieved employee experiences constructive discharge.<sup>19</sup> The employer has constructively discharged the employee when an employer deliberately makes an employee's working conditions so intolerable that the employee must quit.<sup>20</sup> The doctrine of constructive discharge originated in cases

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7. *Ellerth*, 524 U.S. at 753-54; *Faragher*, 524 U.S. at 808.

8. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

9. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

10. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

11. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 802-03.

12. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

13. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

14. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

15. Karen M. Buesing & Gerard D. Solis, *Sexual Harassment: Effective Policies and Procedures After Faragher*, 3 (2001), at <http://www.bnabooks.com/ababna/eo/2001/buess.doc>.

16. See *infra* Part III.

<sup>17</sup> See *infra* Part III.

18. *Id.*

19. Constructive discharge refers to the termination of employment where "the abusive working environment became so intolerable that [the employee's] resignation qualified as a fitting response." *Pa. State Police v. Suders*, 124 S. Ct. 2342, 2347 (2004).

20. *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, 495 (4th Cir. 1972) (holding that the employer constructively discharged the employee because of his union activities). The National Labor Relations Board has established the two elements of constructive discharge as (1) the burdens imposed upon

under the National Labor Relations Act (NLRA) which expressly forbids unfair labor practices.<sup>21</sup>

The *Suders* decision relates to the first part of the matrix, because the Court addressed whether constructive discharge can constitute a tangible adverse employment action.<sup>22</sup> This recent decision both assists in the analysis of constructive discharge cases in the context of employee perception and, ironically, confuses the issue further. The assistance comes in the holding which states that constructive discharge can be a tangible adverse employment action.<sup>23</sup> The confusion comes in the requirement that an “official act” precipitate the constructive discharge and that the harassment be “worse case,” which the Court defined as “harassment ratcheted up to the breaking point.”<sup>24</sup>

Employee perception cases are not limited to constructive discharge, however. When using the second section of the matrix that provides the affirmative defense, employee perception continues to operate in conflict. When the employee fails to come forward in the belief that he or she will suffer retaliation, the matrix is unclear as to whether liability exists.<sup>25</sup> In both fear of retaliation and constructive discharges cases, employer behavior does not drive analysis based upon the matrix.<sup>26</sup> The matrix accordingly weakens or even fails because it no longer provides a clear resolution.

This article investigates how the *Ellerth/Faragher* matrix, which offers clear standards for employer liability, results in an evaluative gap when the basis of a claim involves the aggrieved employee’s perceptions. In exploring this gap, in Part II, we give context to the history of sexual harassment law culminating in the *Ellerth* and *Faragher* matrix. In Part III, we examine how the precedent that relies on an analysis of employer behavior under the *Ellerth/Faragher* matrix may negatively impact the clear resolution of employee perception-based claims, namely constructive discharge claims (as with the *Suders* case), and fear of retaliation claims. We finish in Part IV by exploring the strengths and weak-

the employee must cause, and the employer must intend to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign; and (2) those burdens were imposed because of the employee’s union activities. *Crystal Princeton Ref. Co. v. Int’l Chem. Workers Union*, 222 N.L.R.B. 1068, 1069 (1976). Currently, two circuit courts require that the employee show intolerable conditions and the employer’s specific intent to coerce the employee’s resignation. *Hukkanen v. Int’l Union of Operating Eng’rs.*, 3 F.3d 281, 284 (8th Cir. 1993); *EEOC v. Clay Printing Co.*, 955 F.2d 936, 944 (4th Cir. 1992). The other circuits apply the “reasonable employee” test, requiring the plaintiff to demonstrate that working conditions were so intolerable that a reasonable employee would be compelled to resign. *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994); *Stetson v. NYNEX Serv. Co.*, 995 F.2d 355, 361 (2d Cir. 1993); *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 242 (5th Cir. 1993); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 677 (7th Cir. 1993); *Morgan v. Ford*, 6 F.3d 750, 755-56 (11th Cir. 1993), *cert. denied*, 512 U.S. 1221 (1994); *Aviles-Martinez v. Monroig*, 963 F.2d 2, 6 (1st Cir. 1992); *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3d Cir. 1992); *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987); *Hopkins v. Price Waterhouse*, 825 F.2d 458, 472 (D.C. Cir. 1987), *aff’d in part and rev’d in part*, 490 U.S. 228 (1989).

21. See 29 U.S.C. § 141 (1988).

22. *Suders*, 124 S. Ct. at 2347.

23. *Id.* at 2351.

24. *Id.* at 2349, 2355 (holding that “worse case” harassment is that harassment which “is so intolerable as to cause a resignation”).

25. See *infra* Part III.B.

26. See *infra* Part IV.

nesses of the avenues of analysis available to courts, concluding that the weaknesses override the strengths, and demonstrating how fundamentally problematic the matrix is in cases involving employee perception.

## II. THE *ELLERTH/FARAGHER* MATRIX IN CONTEXT

In Title VII, Congress addressed the specific issue of workplace discrimination.<sup>27</sup> In *Griggs v. Duke Power Co.*,<sup>28</sup> the Supreme Court held that Title VII forbids both practices adopted with a discriminatory motive and also neutral practices that have a discriminatory effect on minorities and women.<sup>29</sup>

Congress augmented the *Griggs* decision when it passed the Civil Rights Act of 1991 (the Act).<sup>30</sup> The Act provided compensatory and punitive damages for disparate treatment lawsuits brought by private plaintiffs.<sup>31</sup> Responding to Congress's emphasis on employer liability, courts interpreting Title VII have proceeded to motivate employers to curb wrongful behavior.<sup>32</sup> Courts quickly recognized that "quid pro quo" sexual harassment—demanding sex as a condition for receiving job benefits—violated Title VII.<sup>33</sup> However, recognition of quid pro quo causes of action represented only a small step in the law's evolution.

In *Meritor Savings Bank FSP v. Vinson*,<sup>34</sup> the Supreme Court specified a new analysis when it used agency principles to develop a vicarious liability standard

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27. See EEOC, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, EEOC Notice 915.002 (June 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html> (stating that while Title VII and related legislation purports to remedy discrimination, "their primary purpose is to prevent violations") [hereinafter ENFORCEMENT GUIDANCE]; see generally MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 85-86 (5th ed., Aspen Law & Business 2000) (defining and explaining Title VII).

28. 401 U.S. 424 (1971).

29. *Id.* at 432.

30. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000(e) *et seq.*).

31. See *id.* Among the stated motivations driving the Act's passage was "the need to overturn *Price Waterhouse [v. Hopkins]*," which Congress believed had severely undercut Title VII's effectiveness. See H.R. REP. NO. 102-40(I), at 45 (1991). In *Price Waterhouse*, the Supreme Court held that an employer who made an employment decision based on discrimination could escape liability if it could prove that it would have made the same decision in the absence of discrimination. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989). This holding undermined Title VII's intent to completely eliminate intentional discrimination.

32. See, e.g., *City of Riverside v. Rivera*, 477 U.S. 561 (1986); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In recognizing sexual harassment as Title VII discrimination, the Court has relied, among other principles, on the power theory represented in the writing of Catherine MacKinnon and others. See, e.g., CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 57-99 (1979). Such theories asserted that women are treated differently as a group because they lack equal power to men, and sexual harassment perpetuates the power imbalance. MacKinnon therefore defined sexual harassment as "the unwanted disposition of sexual requirements in the context of a relationship of unequal power." *Id.*; see also Joanna P. L. Mangum, Note, *Wrightson v. Pizza Hut of America, Inc.: The Fourth Circuit's "Simple Logic" of Same-Sex Sexual Harassment Under Title VII*, 76 N.C. L. REV. 306, 320 (1997).

33. See Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 333-36 (1990).

34. 477 U.S. 57 (1986).

for harassment.<sup>35</sup> In addition, the Court held that Title VII encompasses “hostile work environment” harassment.<sup>36</sup> Because of the Court’s incorporation of vicarious liability in *Meritor*, lower courts developed differing standards for employer liability based on differing interpretations of agency principles.<sup>37</sup> Inevitably, even courts using similar analyses reached conflicting conclusions.<sup>38</sup>

In *Ellerth* and *Faragher*, both decided on the same day, the Supreme Court attempted to resolve some of the post-*Meritor* disparity over the standard for employer liability.<sup>39</sup> The Court stated that the terms “quid pro quo” and “hostile environment” were not controlling for purposes of determining employer liability.<sup>40</sup> The Court reasoned that the determinative objective question was whether a “tangible employment action” took place.<sup>41</sup> In cases in which there was no

35. See *id.* at 70-72. The Court relied upon the Restatement (Second) of Agency § 219 (1957), which states:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment. (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

RESTATEMENT (SECOND) OF AGENCY § 219 (1957).

36. See *Meritor*, 477 U.S. at 67. Hostile work environment harassment occurs when harassing conduct “unreasonably interfere[s] with an individual’s work performance or creat[es] an intimidating, hostile, or offensive working environment.” Paul, *supra* note 33, at 334 (quoting EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1990)). The Court in *Meritor* held that to establish a hostile working environment claim, harassment must be severe and pervasive. See *Meritor*, 477 U.S. at 67.

37. See, e.g., *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001); *Gentry v. Export Packaging Co.*, 238 F.3d 842 (7th Cir. 2001); *Star v. West*, 237 F.3d 1036 (9th Cir. 2001); *O’Rourke v. City of Providence*, 235 F.3d 713 (1st Cir. 2001); *White v. New Hampshire Dep’t of Corrections*, 221 F.3d 254 (1st Cir. 2000); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir. 2000); *Montero v. Agco Corp.*, 192 F.3d 856 (9th Cir. 1999); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999); *Brown v. Perry*, 184 F.3d 388 (4th Cir. 1999); *Shaw v. Autozone, Inc.*, 180 F.3d 806 (7th Cir. 1999); *Watts v. Kroger Co.*, 170 F.3d 505 (5th Cir. 1999); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139 (3rd Cir. 1999); *Greene v. Dalton*, 164 F.3d 671 (D.C. Cir. 1999); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258 (5th Cir. 1999); *Phillips v. Taco Bell Corp.*, 156 F.3d 884 (8th Cir. 1998).

38. See Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671 (2000).

39. *Ellerth*, 524 U.S. at 752-53; *Faragher*, 524 U.S. at 780.

40. *Ellerth*, 524 U.S. at 754. The Supreme Court stated that “cases based on threats which are carried out are referred to often as *quid pro quo* cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment.” *Id.* at 751. The Court also noted that the terms “quid pro quo” and “hostile work environment” do not appear in Title VII. *Id.* at 752. The Court noted that when used in *Meritor*, the terms served a specific and limited purpose — “to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive.” *Id.*

41. *Ellerth*, 524 U.S. at 753-54; *Faragher*, 524 U.S. at 807. In *Ellerth* the Court stated:

To the extent . . . [that the terms] illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant . . . . When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive.

tangible employment action, the employer could raise an affirmative defense.<sup>42</sup> However, the defense was unavailable if a tangible employment action occurred.<sup>43</sup>

In *Ellerth*, the Supreme Court granted review and certified the question of whether an employer is vicariously liable when a supervisor for the company threatens an employee with adverse employment action but does not fulfill those threats.<sup>44</sup> The Supreme Court's decision first dispelled contradictory lower court interpretations of *Meritor*.<sup>45</sup> As used in *Meritor*, quid pro quo and hostile work environment established the initial question of whether a plaintiff could prove discrimination in violation of Title VII.<sup>46</sup> The terms "quid pro quo" and "hostile work environment" are useful, the Court noted, only to distinguish between situations in which "threats are carried out and those where they are not or are absent altogether, but beyond this they are of limited utility."<sup>47</sup> "Quid pro quo" and "hostile work environment" do not appear in the text of Title VII and, according to the Court, should not form a standard by which to judge employer liability.<sup>48</sup>

The Court in *Meritor*, in fact, did not use the terms "quid pro quo" and "hostile work environment" to establish a liability standard.<sup>49</sup> However, lower courts following *Meritor* began to use the terms to establish a standard by which to hold employers vicariously liable.<sup>50</sup> The Court in *Ellerth* held that plaintiffs may introduce evidence of quid pro quo or hostile environment, but such evidence may not serve as the actual basis for a claim.<sup>51</sup> Instead, plaintiffs must now prove "that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands [in order to establish] that the employment decision itself constitutes a change in the terms and conditions of employment."<sup>52</sup>

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*Ellerth*, 524 U.S. at 753-54.

42. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807; see *infra* notes 34-51 and accompanying text.

43. *Ellerth*, 524 U.S. at 754; *Faragher*, 524 U.S. at 807.

44. *Ellerth*, 524 U.S. at 746-47.

45. See *Ellerth*, 524 U.S. 743 (1998).

46. *Id.* at 753.

47. *Id.* at 751.

48. *Id.* at 752.

49. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

50. See *Ellerth*, 524 U.S. at 752-53. (citing *Davis v. Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Nichols v. Frank*, 42 F.3d 503, 513-14 (9th Cir. 1994); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106-07 (3rd Cir. 1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir. 1992), *cert. denied*, 506 U.S. 1041 (1992); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989).

51. See *Ellerth*, 524 U.S. at 751, 753-54 (1998).

52. *Id.* at 753-54. Beyond such a limited use of the terms, the Court found that the general common law of agency will guide findings of vicarious liability. See *id.* at 754-55 (noting that even though it made significant amendments to Title VII after *Meritor*, Congress did not alter that case's holding that agency principles should guide employer liability). See *id.* at 764. The Court examined § 219 of the Restatement, detailed in note 35 *supra*. See *id.* at 758. The Court noted that the negligence standard under section 219(2)(b) of the Restatement—wherein an employer is liable even if it knew or should have known about the conduct and failed to stop it—"sets a minimum standard for employer liability under Title VII." *Id.* at 758-59. Because plaintiff *Ellerth* argued that employers should be vicariously liable for supervisors' acts, the Court examined section 219(2)(d). *Id.* Section

The Court noted that “[e]very Federal Court of Appeals to have considered the question has found vicarious [employer] liability when a discriminatory act results in a tangible employment action.”<sup>53</sup> Because a supervisor acts with the authority of the company and “tangible employment actions fall within the special province of the supervisor” subject to possible review by higher level supervisors, employer liability attaches when a tangible employment action is taken by a supervisor against a subordinate.<sup>54</sup> Courts therefore analyze the existence of a tangible employment action by referring to employer behavior.<sup>55</sup>

In the absence of tangible employment action, however, application of the strict liability standard does not occur.<sup>56</sup> When no tangible employment action takes place, the employer may utilize a two-pronged affirmative defense to preclude both liability and damages.<sup>57</sup> In recognition of Title VII’s goal of encouraging anti-harassment policies and grievance mechanisms, the affirmative defense consists of the following two elements: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee reasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>58</sup>

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219(2)(d) imposes “vicarious liability for intentional torts committed by an employee when the employee uses apparent authority (the apparent authority standard) or when the employee ‘was aided in accomplishing the tort by the existence of the agency relation.’” *Id.* at 759 (quoting RESTATEMENT (SECOND) OF AGENCY § 219 (1957)). Reasoning that the apparent authority standard is relevant “where the agent purports to exercise a power which he or she does not have, as distinct from where the agent threatens to misuse actual power,” the Court found apparent authority analysis inappropriate unless “it is alleged there is a false impression that the actor was a supervisor, when he in fact was not.” *Id.* at 759. Therefore, the Court found that the “aided in the agency standard” was the proper analysis when a party seeks to impose vicarious liability based on an agent’s misuse of delegated authority. *See id.* at 760. The Court further considered the issue of vicarious liability using the “aided in the agency standard” and found that the standard requires the “existence of something more than the employment relation itself.” *Id.* at 760. Without more, an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment. *See id.* Such a finding would be contrary not only to the general rule that sexual harassment by a supervisor is not automatically within the scope of employment and attributable to an employer but to the holding in *Meritor* and to the precedent that establishes a negligence standard for co-worker harassment. *See id.* (citing *McKenzie v. Ill. Dept. of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996) (discussing sex discrimination); *Blankenship v. Parke Care Ctrs., Inc.*, 123 F.3d 868, 872 (6th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998) (discussing sex discrimination); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1273 (7th Cir. 1991) (discussing race discrimination); 29 C.F.R. § 1604.11(d) (1997) (stating that the “knows or should have known” standard of liability applies for cases of harassment between “fellow employees”). *See also Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 50 (6th Cir. 1996), *cert. denied*, 519 U.S. 863 (1996).

53. *Ellerth*, 524 U.S. at 760.

54. *Id.* at 762.

55. *See id.* at 762-63 (stating that agency principles apply when a supervisor brings the company’s resources against the employee).

56. *See id.* at 763 (stating that only a supervisor may take steps that result in a tangible employment action).

57. *Ellerth*, 524 U.S. at 765.

58. *Id.* at 764-65.

In *Faragher*, the Court adopted the same holding as in *Ellerth*.<sup>59</sup> The Court held that “an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense” which looks at the reasonable care exercised to prevent any sexually harassing behavior as well as the employee’s failure to adequately take advantage of preventative or corrective opportunities.<sup>60</sup> The Court in *Faragher* reiterated *Meritor*’s requirement that general agency principles determine employer liability.<sup>61</sup> *Meritor*’s holding that an employer is not automatically liable for harassment by a supervisor remained intact. *Faragher*, nonetheless, recognized the tension between the new vicarious liability rule and *Meritor*.<sup>62</sup> The *Faragher* Court offered two alternatives to alleviate the tension, “one being to require proof of some affirmative invocation of that authority by the harassing supervisor, the other being to recognize an affirmative defense to liability in some circumstances, even when a supervisor has created the actionable environment.”<sup>63</sup> These alternatives are the basis of the matrix.

The first phase in the matrix is to determine whether an employer is subject to strict, vicarious liability for a supervisor’s sexual harassment when an employer takes a tangible employment action.<sup>64</sup> When there is no tangible employment action, an employer may use the second phase of the matrix and raise the two-pronged affirmative defense against liability to damages.<sup>65</sup> The first prong addresses “whether the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior.”<sup>66</sup> The second prong requires that the “plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>67</sup> While it appears that the prongs are balanced in that the first focuses on employers and the second on employees, the only significant circuit split arises in the second.<sup>68</sup>

### III. ANALYZING EMPLOYEE PERCEPTION CLAIMS UNDER A MATRIX DRIVEN BY EMPLOYER BEHAVIOR

Many of the disputes resolved within the matrix analyze employer behavior—did the employer impose a tangible adverse employment action, prevent the harassment, or correct the harassment? With strict liability in phase one of the matrix and an affirmative defense in phase two, analyzing employer behav-

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59. *Faragher*, 24 U.S. at 780.

60. *Id.*

61. *Id.* at 800. The Court in *Faragher* concluded that courts should consider harassment by supervisors outside the scope of employment because otherwise such harassment would also be within the scope of co-employees employment, rendering vicarious liability rather than negligence the standard for co-employee harassment. *Id.*

62. *Id.* at 794-95.

63. *Id.* at 804.

64. *Id.* at 808.

65. *Faragher*, 524 U.S. at 807.

66. *Id.*

67. *Id.*

68. See *infra* Part III.C.



ior in sexual harassment claims allows for resolution exactly as the Court intended—predictably with punishment for wrongful behavior and a defense for good behavior.<sup>69</sup> Not all cases decided under *Ellerth* and *Faragher*, however, fit within an analysis of employer behavior. In two notable exceptions, the court must determine liability from the perspective of the aggrieved employee. First, in phase one of the matrix, a court will occasionally address an employee's claim of constructive discharge when determining whether a tangible adverse employment action took place.<sup>70</sup> Second, in phase two of the matrix where courts apply the affirmative defense, some employees will allege a fear of retaliation.<sup>71</sup> Both types of employee perception claims, constructive discharge and fear of retaliation, do not fit cleanly within the *Ellerth/Faragher* matrix and its goal of having consistent, fair, and predictable determinations of employer sexual harassment liability. To determine how to run employee perception claims through the matrix, we must first analyze how the courts are struggling with constructive discharge in phase one and fear of retaliation in phase two.

#### A. Phase One of the Matrix: Is Constructive Discharge a Tangible Employment Action?

A tangible employment action, according to the Court in *Ellerth*, is “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.”<sup>72</sup> In most cases, applying this definition to the facts has been noncontroversial. For example, in *Forshee v. Waterloo Industries, Inc.*<sup>73</sup> the court held that the termination of the plaintiff the day after she refused a supervisor's sexual advance was clearly a tangible adverse employment action, as *Ellerth* defined the term to include “firing.”<sup>74</sup> Equal Employment Opportunity Commission (EEOC) Guidance offers further assistance by providing the following examples: hiring and firing, promotion and failure to promote,

69. See Marcia Coyle, *Sex Harassment Redefined in Several Rulings, High Court Ends Confusion Over Employer Liability*, NAT'L L.J., July 6, 1998, at A1.

70. See, e.g., *Pa. State Police v. Suders*, 124 S. Ct. 2342, 2347 (2004) (defining constructive discharge as the termination of employment where “the abusive working environment became so intolerable that [the employee's] resignation qualified as a fitting response”).

71. See, e.g., *Iduyusi v. Tenn. Dep't of Children's Servs.*, 30 Fed. Appx. 398 (6th Cir. 2002); *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014 (10th Cir. 2001); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001).

72. *Ellerth*, 524 U.S. at 761; see ENFORCEMENT GUIDANCE, *supra* note 27, at § IV.B. The EEOC Guidance defines tangible employment action as “a significant change in employment status” and provides the following characteristics of a tangible employment action:

A tangible employment action is the means by which the supervisor brings the official power of the enterprise to bear on subordinates, as demonstrated by the following: it requires an official act of the enterprise; it usually is documented in official company records; it may be subject to review by higher level supervisors; and it often requires the formal approval of the enterprise and use of its internal processes. 2. A tangible employment action usually inflicts direct economic harm. 3. A tangible employment action, in most instances, can only be caused by a supervisor or other person acting with the authority of the company.

ENFORCEMENT GUIDANCE, *supra* note 27, at § IV.B.

73. 178 F.3d 527 (8th Cir. 1999).

74. *Id.* at 530.

demotion, undesirable reassignment, a decision causing a significant change in benefits, compensation decisions, and work assignment.<sup>75</sup>

The matrix dictates that tangible adverse employment cases resolve predictably by applying strict liability if the employer behavior is “bad enough.” Issues concerning constructive discharge, however, test the matrix because employer behavior becomes secondary to an analysis of the aggrieved employee’s perception of that behavior.

Courts have traditionally treated constructive discharge as an actual discharge—which is a tangible employment action.<sup>76</sup> The Court in *Ellerth* explicitly stated that constructive discharge is a tangible employment action, but courts that have addressed this issue are split.<sup>77</sup> We will analyze the split both to reveal on which issues the courts disagree and how that disagreement impacts the matrix.

### 1. Circuit Split

#### a) Courts that Hold Constructive Discharge Is Not a Tangible Employment Action

The Second Circuit in *Caridad v. Metro-North Commuter Railroad*<sup>78</sup> and the Sixth Circuit in *Turner v. Downbrands, Inc.*<sup>79</sup> allowed an employer to assert the affirmative defense despite finding that the employer constructively discharged its employee.<sup>80</sup> The Second Circuit noted that the Supreme Court in *Ellerth* focused on the following language of the Restatement (Second) of Agency in determining when an employer is strictly liable for the discriminatory acts of its supervi-

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75. ENFORCEMENT GUIDANCE, *supra* note 27, at § IV.B; *see also* *Watson v. Norton*, 10 Fed. Appx. 669, 678 (10th Cir. 2001) (holding that when there is no change in salary, rank, or grade, there is no tangible adverse employment action); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 153-54 (3d Cir. 1999) (holding that when specific negotiated conditions of the plaintiffs’ move to Durham were disrupted, a tangible adverse employment action occurred).

76. *Jackson v. Ark. Dep’t of Educ.*, 272 F.3d 1020, 1026-27 (8th Cir. 2001) (finding that constructive discharge constitutes a tangible employment action); *Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160, 1171-74 (N.D. Iowa 2000).

77. *Ellerth*, 524 U.S. at 760-61 (stating that “[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits”); *see infra* Part III.A.3, Table 1.

78. 191 F.3d 283 (2d Cir. 1999).

79. 221 F.3d 1336, No. 99-3984, 2000 WL 924599 (6th Cir. June 26, 2000).

80. *Caridad*, 191 F.3d at 283; *see also* *EEOC v. Barton Protective Servs., Inc.*, 47 F. Supp. 2d 57, 60 (D.D.C. 1999) (stating even if a claim of constructive discharge was substantiated such a finding would not preclude the use of the affirmative defense on behalf of the employer); *Schoiber v. Emro Mktg. Co.*, No. 95-C-5726, 1999 WL 825275, at \*6 (N.D. Ill. 1999) (holding that employer did not constructively discharge plaintiff and reserving analysis of constructive discharge as a tangible employment action); *Desmarteau v. City of Wichita*, 64 F. Supp. 2d 1067, 1079 (D. Kan. 1999) (finding that tangible actions of the supervisor would logically exclude actions which are only constructively attributed to him and therefore the affirmative defense is still available); *Alberter v. McDonald’s Corp.*, 70 F. Supp. 2d 1138, 1147 (D. Nev. 1999) (holding that even though the employee resigned and was constructively discharged, such a discharge was not a tangible employment action); *Powell v. Morris*, 37 F. Supp. 2d 1011, 1019 (S.D. Ohio 1999) (holding that even though an employee suffered a constructive discharge, such a discharge was not meant to be a tangible employment action and the employer is not barred from asserting the affirmative defense).

sory employees: “[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: . . . (d) the servant . . . was aided in accomplishing the tort by the existence of the agency relation.”<sup>81</sup> The requirement of a tangible employment action by a harassing supervisor only imposes employer liability without the possibility of an affirmative defense. Therefore, where the employer is implicated in the harm visited upon the employee by his or her supervisor:

The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control . . . . A tangible employment decision requires an official act of the enterprise, a company act . . . . For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer . . . . Co-workers, as well as supervisors, can cause the constructive discharge of an employee. And, unlike demotion, discharge, or similar economic sanctions, an employee’s constructive discharge is not ratified or approved by the employer.<sup>82</sup>

Not only did the court in *Caridad* rely on *Ellerth*’s interpretation of the Restatement, it also relied on the Supreme Court’s definition of tangible employment action.<sup>83</sup> The Supreme Court defined tangible employment action 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.”<sup>84</sup> The Supreme Court omitted constructive discharge from its list of behaviors that constitute tangible employment actions.<sup>85</sup> This omission is noteworthy, particularly since the plaintiff in *Ellerth* herself claimed constructive discharge.<sup>86</sup> The Sixth Circuit agreed.<sup>87</sup>

Several district courts have followed *Caridad* by refusing to find strict liability for constructive discharge, holding that it is “not a ‘tangible employment action,’ as the Supreme Court used that term in *Ellerth* and *Faragher*, because it is not an action made with the authority or approval of the employer.”<sup>88</sup> Other dis-

81. *Caridad*, 191 F.3d at 294.

82. *Id.*

83. *See id.* at 294-95; *see also* Martha Chamallas, *Title VII’s Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 329 (2004).

84. *Ellerth*, 524 U.S. at 761.

85. *Caridad*, 191 F.3d at 294-95.

86. *Id.* at 295; *see also* Desmarteau v. City of Wichita, 64 F. Supp. 2d 1067, 1079 (D. Kan. 1999).

87. *Turner*, 2000 WL 924599, at \*1; *see also* Keaton v. State of Ohio, No. C2-00-1248, 2002 WL 1580567, at \*9 (S.D. Ohio June 3, 2002). The *Turner* court stated that constructive discharge did not constitute a tangible employment action, citing *Caridad* for that proposition. The Sixth Circuit aligned itself with the Second Circuit’s reasoning in *Caridad*, stating that a “claim of constructive discharge is not a tangible employment action for purposes of *Faragher* and *Ellerth*.” *Turner*, 2000 WL 924599, at \*1.

88. *Scott v. Ameritex Yarn*, 72 F. Supp. 2d 527, 595 (D.S.C. 1999) (citing *Caridad*, 191 F.3d at 294); *see also* EEOC v. Barton Protective Servs., Inc., 47 F. Supp. 2d 57 (D.D.C. 1999) (noting that plaintiff’s claim of constructive discharge would not amount to a tangible employment action even if proven); *Desmarteau v. City of Wichita, Kansas*, 64 F. Supp. 2d 1067, 1079 (following the holding in *Caridad* and explaining that “the focus [in *Ellerth*] on the tangible actions of the supervisor would logically exclude actions which are only ‘constructively’ attributed to him, and would exclude employment consequences arising from a plaintiff’s particular reaction to a hostile working environment”); *Alberter v. McDonald’s Corp.*, 70 F. Supp. 2d 1139, 1146 (D. Nev. 1999) (reasoning that “[c]onstructive

strict courts have agreed that constructive discharge is not a tangible employment action, but they have done so on grounds that differ from those articulated in *Caridad*. In *Powell v. Morris*,<sup>89</sup> the court held that a constructive discharge is not a tangible employment action,<sup>90</sup> reasoning that if the Supreme Court had intended to include constructive discharge, the Court “could have easily listed [it] along with the other incidents as constituting a tangible employment action.”<sup>91</sup>

#### b) Courts that Hold Constructive Discharge is a Tangible Employment Action

In direct opposition to the Second and Sixth circuits, the Third Circuit in *Suders v. Easton*<sup>92</sup> held that constructive discharge was a tangible employment action within the meaning of *Ellerth* and *Faragher*.<sup>93</sup> The plaintiff claimed she had no choice but to resign from her position as a communications operator with the Pennsylvania State Police.<sup>94</sup> She alleged that she could not continue her employment because several male supervisors engaged in sexually hostile behavior on the job.<sup>95</sup> Suders complained to the state police equal employment opportunity officer, but the officer refused to provide the proper forms for filing a complaint.<sup>96</sup> Eventually, the work environment deteriorated to such an extent that Suders claimed several defendants invented theft charges against her.<sup>97</sup> After being detained as a suspect, Suders resigned.<sup>98</sup> Suders then sued the Pennsylvania State Police and several individuals for discrimination and sexual harassment.<sup>99</sup> A federal district court dismissed her suit; she appealed to the Third Circuit.<sup>100</sup>

In attempting to run Suders’ claim through the matrix, the Third Circuit began by synthesizing pre-existing analyses of constructive discharge. The court in *Suders* made three observations:

- (1) although we have not definitively ruled on the issue, our recent decisions have suggested that a constructive discharge constitutes a tangible employment action;
- (2) none of the grounds advanced by [cases that find to the contrary] persuade us that a constructive discharge should not be held to constitute a tangible employment action;
- and (3) holding an employer strictly liable for a constructive discharge resulting from an actionable harassment of its supervisors more faith-

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discharge does not meet the definition of ‘tangible employment action’ as described in [*Ellerth*], [because] constructive discharge . . . is not an action taken by an employee’s supervisor”).

89. 37 F. Supp. 2d 1011 (S.D. Ohio 1999).

90. *Id.* at 1019.

91. *Id.*

92. 325 F.3d 432 (3d Cir. 2003) *rev’d sub nom.* Pa. State Police v. Suders, 124 S. Ct. 2342 (2004).

93. *See id.* at 435.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 439.

99. *Id.* at 435.

100. *Id.* at 439.

fully adheres to the policy objectives set forth in *Ellerth* and *Faragher* and to our own Title VII jurisprudence.<sup>101</sup>

As for its first observation, the court relied on previous cases.<sup>102</sup> For example, the court in *Durham Life Insurance Co. v. Evans*<sup>103</sup> found that the plaintiff resigned due to humiliating and sexist remarks, the removal of her office, and the disappearance of her files.<sup>104</sup> The *Durham Life Insurance* court ruled that the resignation was a constructive discharge which constituted a tangible employment action, thereby barring the employer's use of the affirmative defense.<sup>105</sup> The court in *Suders* also noted the case of *Cardenas v. Massey*,<sup>106</sup> in which the plaintiff claimed that a racially hostile work environment resulted in his constructive discharge.<sup>107</sup> The Third Circuit reversed summary judgment for the employer, noting that "[i]f Cardenas convinces a jury that he was victimized by a hostile work environment created by [the defendants], it is certainly possible that the same jury would find that the hostile environment was severe enough to have precipitated Cardenas' resignation, i.e., a constructive discharge."<sup>108</sup> Although the circuit court left the ultimate question of liability for the district court, it assumed that a constructive discharge was a tangible adverse employment action.<sup>109</sup>

The court's second observation in *Suders* was that the holdings were unpersuasive in cases where constructive discharge was not found to constitute a tangible employment action.<sup>110</sup> The court examined *Caridad's* proposition that the Supreme Court's omission of constructive discharge was an intentional exclu-

101. *Id.* at 454.

102. *See id.* at 455 (explaining its holdings in *Durham Life Insurance Co. v. Evans*, 166 F.3d 139 (3d Cir. 1999) and *Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001)).

103. 166 F.3d 139 (3d Cir. 1999).

104. *Id.* at 144.

105. *Id.* at 155; *see also Kohler v. Inter-Tel Techs.*, 244 F.3d 1167 (9th Cir. 2001); *White v. N.H. Dep't of Corr.*, 221 F.3d 254, 261-62 (1st Cir. 2000) (finding that employer constructively discharged plaintiff by removing her from her unit, thereby disallowing the employer's use of the affirmative defense); *Landgraf v. USI Film Prods.*, 968 F.2d 427, 429 (5th Cir. 1992) (holding that to establish constructive discharge, plaintiff must prove that her working conditions were so difficult or unpleasant that a reasonable person in her shoes would have felt compelled to resign); *Jones v. USA Petroleum Corp.*, 20 F. Supp. 2d 1379, 1385 (S.D. Ga. 1998) (incorporating the *Ellerth* affirmative defense as part of a more stringent constructive discharge analysis); *Lintz v. Am. Gen. Fin., Inc.* 50 F. Supp. 2d 1074, 1083 (D. Kan. 1999) (holding that if an employee's work conditions were intolerable and she had no other choice but to quit, then the employee can claim she was constructively discharged. In *Kohler*, the Ninth Circuit declined to decide the issue of whether a constructive discharge constitutes a tangible employment action. *Kohler*, 244 F.3d at 1168. The plaintiff alleged that her supervisor sexually harassed her during the entire period of her four months employment by making unwelcome sexual remarks, advances, and physical contact. *Id.* at 1168. The plaintiff soon quit as a result of the sexual harassment and claimed that her constructive discharge was a tangible employment action. *Id.* at 1169. The court, leaving the issue open, found a lack of causation and therefore did not address whether a constructive discharge was tantamount to a tangible employment action. *Id.* at 1176.

106. *See* 269 F.3d 251 (3d Cir. 2001).

107. *Id.* at 266-67.

108. *Id.*

109. *Id.*

110. *See Suders v. Easton*, 325 F.3d at 454.

sion from the list of representative tangible employment actions.<sup>111</sup> The court noted that “the Supreme Court made it clear that it intended to provide a non-exclusive list of clear cases of tangible employment actions, on one hand, and broader categories, on the other.”<sup>112</sup> Several aspects of the definition in *Ellerth* support the conclusion that the Supreme Court intended the definition to be non-exhaustive.<sup>113</sup> As other courts have noted, the use of the qualifier “such as” indicates that tangible employment actions are not limited to those that follow the qualifier.<sup>114</sup> “By employing this structural technique, the Supreme Court recognized a simple reality of harassment in the modern workplace: tangible employment actions often take the form of subtle discrimination not easily categorized as a formal discharge or demotion.”<sup>115</sup> Finally, the court stated that by holding so, they “effectively encourage employers to be watchful of sexual harassment in their workplaces and to remedy complaints at the earliest possible moment; otherwise, they risk losing the benefit of the affirmative defense should victimized employees feel compelled to resign.”<sup>116</sup>

The Eighth Circuit has also held that a constructive discharge constitutes a tangible employment action. In *Jaros v. Lodgenet Entertainment Group*,<sup>117</sup> the court held that a constructive discharge does in fact constitute a tangible employment action.<sup>118</sup> Several district courts have followed the reasoning employed by the Second and Eighth circuits.<sup>119</sup>

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111. *Id.* at 455.

112. *Id.*

113. *Id.*

114. See *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 93 (2d Cir. 2002).

115. See *Suders v. Easton*, 325 F.3d at 456.

116. *Id.* at 458.

117. 294 F.3d 960 (8th Cir. 2002) (relying on *Jackson v. Ark. Dep't of Educ.*, 272 F.3d 1020 (2002)).

118. *Id.* at 966.

119. *Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160, 1170-1173 (N.D. Iowa 2000). The court in *Cherry* stated that the test of whether a constructive discharge is a tangible employment action is not dependent on who caused the discharge; rather, the question is whether constructive discharge caused by a supervisor “constitutes a significant change in employment status.” *Id.* at 1170. The court also pointed out that a constructive discharge “that results from the sexually harassing conduct of a supervisor is no less the act of the employer than a firing, failure to promote, demotion, or reassignment.” *Id.* at 1173. *Lintz v. Am. Gen. Fin., Inc.*, 50 F. Supp. 2d 1074 (D. Kan. 1999) (noting that the parties agreed that constructive discharge constitutes tangible employment action); *Galloway v. Matagorda County*, 35 F. Supp. 2d 952, 957 (S.D. Tex. 1999) (stating that “constructive discharge qualifies as a tangible employment action”); *Jones v. USA Petroleum Corp.*, 20 F. Supp. 2d 1379, 1383 (S.D. Ga. 1998) (holding the same as *Lintz*). See also *Vasquez v. Atrium Door & Window Co. of Ariz., Inc.*, 218 F. Supp. 2d 1139 (S.D. Ariz. 2002) (“First, the Supreme Court’s list of tangible employment actions in *Ellerth* was likely not intended to be either exhaustive or exclusive of a constructive discharge. Therefore, the exclusion of constructive discharge from the list of examples does not exclude the possibility that constructive discharge may be a tangible employment action. Second, the Court’s holding herein is consistent with the remedial purposes of Title VII. Precluding an interpretation that constructive discharge was not a tangible employment action would be contrary to this purpose. Such a holding would not protect an employee from the unlawful behavior of a supervisor who creates ‘intolerable and discriminatory working condition[s]’ and would likely insulate the employer from liability if the victimized employee were forced to quit. Third, as the Supreme Court noted, ‘a tangible employment action in most cases inflicts direct economic harm.’ No doubt, so does a constructive discharge. The economic injury and impact to the employee is the same, i.e., loss of employment, regardless of whether he or she is unlawfully terminated from employment or construc-

## 2. Pennsylvania State Police v. Suders: The Supreme Court Resolves the Circuit Split

The United States Supreme Court granted certiorari from the Third Circuit's decision in *Suders v. Easton*, and heard arguments on March 31, 2004.<sup>120</sup> On June 14, 2004, the Court issued its opinion regarding the question of "whether a constructive discharge brought about by supervisor harassment ranks as a tangible employment action and therefore precludes assertion of the affirmative defense articulated in *Ellerth* and *Faragher*."<sup>121</sup>

The Court resolved the split affirmatively by finding that constructive discharge can be a tangible adverse employment action as long as the harassment presents a "worse case" scenario, "harassment ratcheted up to the breaking point."<sup>122</sup> This holding ostensibly resolves the question of whether constructive discharge can satisfy the first prong of the matrix. While this holding appears to bring clarity to constructive discharge cases, in fact, the Court arguably creates confusion that did not previously exist by adding wide room for interpretation in the requirement that the plaintiff prove he or she reached a breaking point. To find that harassment is "worse case" or that a plaintiff has reached a breaking point is likely to be an issue of fact. Accordingly, by introducing an issue of fact into the determination, a constructive discharge is, at best, "maybe" a tangible adverse employment action.<sup>123</sup> If the court cannot impose strict liability as a matter of law, then, in constructive discharge cases, the matrix stalls while the court makes factual determinations—a delay that does not exist in most other tangible adverse employment action cases.<sup>124</sup>

The Court also imposed an extra element by holding that even if the plaintiff experienced a constructive discharge, employers could use the affirmative defense when that constructive discharge is not accompanied by an official act.<sup>125</sup> "[W]hen an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, we here hold, calls for extension of the affirmative defense to the employer."<sup>126</sup> Accordingly, some constructive discharge cases, for example, constructive discharge cases without an official act, will still allow the employer to avoid strict liability.

tively discharged. A constructive discharge is usually more drawn out over time and, thereby, subjects the employee to more painful abuse than a direct unlawful termination and yet, in an unfair irony, a contrary holding would leave the employee with no legal remedy for enduring the discriminatory working condition in the optimistic hope that it would stop." (citations omitted).

120. Pa. State Police v. Suders, 124 S. Ct. at 2342 (2004), *rev'g* Suders v. Easton, 325 F.3d 432 (3d Cir. 2003).

121. *Id.* at 2350.

122. *Id.* at 2355. See also Shari M. Goldsmith, *The Supreme Court's Suders Problem: Wrong Question, Wrong Facts Determining Whether Constructive Discharge is a Tangible Employment Action*, 6 U. PA. J. LAB. & EMP. L. 817, 827 (2004) (explaining the level of severity necessary in general to make constructive discharge actionable).

123. See Art Gutman, *The Supreme Court's Ruling in Suders—They Missed the Boat*, THE INDUS.-ORG. PSYCHOL., at 92-99, available at [http://www.siop.org/tip/backissues/Oct04/PDF/422\\_092to099.pdf](http://www.siop.org/tip/backissues/Oct04/PDF/422_092to099.pdf) (Oct. 2004).

124. See Nancy R. Mansfield and Joan T.A. Gabel, *An Analysis of the Burlington and Faragher Affirmative Defense: When are Employers Liable?*, 19 LAB. LAW. 107, 115 (2003).

125. Pa. State Police v. Suders, 124 S.Ct. at 2355.

126. *Id.*

The court put forth several reasons for insisting upon an official act. First, the employer exercises greater control over official acts, and absent an official act, “the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force.”<sup>127</sup> Second, an official act accompanying a constructive discharge provides more certainty that “the supervisor’s misconduct has been aided by the agency relation.”<sup>128</sup> Recalling the reasons behind the affirmative defense, the Court reasoned that “when a supervisor’s harassment of a subordinate does not culminate in a tangible employment action . . . it is ‘less obvious’ that the agency relation is the driving force.”<sup>129</sup> The uncertain agency relation present in a constructive discharge without an official act “justifies affording the employer the chance to establish, through the *Ellerth/Faragher* affirmative defense, that it should not be held vicariously liable.”<sup>130</sup>

The Court then provided two examples of when application of the new standard is appropriate for utilizing the affirmative defense in constructive discharge cases. *Reed v. MBNA Marketing Systems, Inc.*, a First Circuit case, involved a constructive discharge claim.<sup>131</sup> The First Circuit held that the affirmative defense was available to the employer because there was no official act involved in the supervisor’s behavior.<sup>132</sup> The Court contrasted *Reed* with *Robinson v. Sappington*, a Seventh Circuit decision which held that an official act underlay a constructive discharge.<sup>133</sup> In *Robinson*, the plaintiff complained of sexual harassment by a judge for whom she worked which caused the judge to transfer her to work for a second judge.<sup>134</sup> The plaintiff heard that working for the second judge would probably be “hell,” and that it was in her “best interest to resign.”<sup>135</sup> According to the Seventh Circuit, the first judge’s decision to transfer the plaintiff provided the “official act” accompanying the constructive discharge, thereby prohibiting the employer from asserting the affirmative defense.<sup>136</sup>

The Supreme Court ultimately remanded the *Suders* case to determine the circumstances surrounding the plaintiff’s decision to leave her employment.<sup>137</sup> Subsequent interpretation of the Supreme Court’s holding in *Suders* has an interesting potential. Before this decision, constructive discharge cases relied on an analysis of the employee’s perception of the severity of the harassment. That factor remains to some degree as the Court requires a showing of “worse case” severity.<sup>138</sup> By requiring an official act, the Court essentially brings the analysis back to employer behavior, a standard that previous history indicates will run more smoothly through phase one of the matrix. On the other hand, the matrix

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127. *Id.*

128. *Id.*

129. *Id.* at 2353.

130. *Id.* at 2355.

131. *Reed v. MBNA Marketing Sys.*, 333 F.3d 27 (1st Cir. 2003).

132. *Id.* at 33.

133. *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003).

134. *Id.* at 323-24.

135. *Id.* at 324.

136. *Id.* at 337.

137. *Pa. State Police v. Suders*, 124 S. Ct. at 2357.

138. *Id.* at 2955.



could stall, much in the same way that the original Circuit split caused it to break down, if the courts are inconsistent when weighing the official act against the “worse case” harassment.

#### B. Phase Two of the Matrix: Should an Employee’s Fear of Retaliation Eliminate the Affirmative Defense?

Phase Two of the *Ellerth/Faragher* matrix offers employers an affirmative defense and the opportunity to completely avoid liability as long as there is no tangible employment action.<sup>139</sup> The affirmative defense has two prongs: first, the employer must exercise reasonable care to prevent and to promptly correct any sexually harassing behavior; second, the employer must show the employee did not reasonably take advantage of any preventive or corrective opportunities the employer provided or that the employee failed to avoid harm otherwise.<sup>140</sup> The Supreme Court maintained in *Ellerth* that the affirmative defense and its liability “escape hatch” was appropriate because harassment is unlikely to occur if employers and employees fulfill their respective obligations.<sup>141</sup>

For an employer to successfully navigate phase two of the matrix, it must have had an effective complaint procedure which, according to the Court, encouraged employees to report harassment early enough for an employer to intervene before liability arose.<sup>142</sup> Courts have generally found that the employer will prevail if either (1) a reasonable person in the employee’s position would have come forward earlier<sup>143</sup> in order to prevent the harassment from becoming more severe or (2) the employee entirely failed to report the harassment.<sup>144</sup>

139. See *Ellerth*, 524 U.S. at 753-54; *Faragher*, 524 U.S. at 808.

140. *Ellerth*, 524 U.S. at 765. The court in *Ellerth* found that the affirmative defense has its limits. Courts have generally declined to extend the affirmative defense to other circumstances or claims. See *Laroche v. Denny’s, Inc.*, 62 F. Supp. 2d 1375, 1384 n.14 (S.D. Fla. 1999) (declining to extend the affirmative defense to public accommodation cases); *Lintz v. Am. Gen. Fin., Inc.*, 50 F. Supp. 2d 1074, 1081 (D. Kan. 1999) (declining to extend the *Ellerth/Faragher* affirmative defense to a claim attempting to hold an employer liable under a negligence theory).

141. *Ellerth*, 524 U.S. at 765.

142. *Id.* But see ENFORCEMENT GUIDANCE, *supra* note 27, at § V.B (stating that liability can arise despite the exercise of reasonable care by both employer and employee because of the vicarious liability standard).

143. *Montero v. AGCO Corp.*, 192 F.3d 856 (9th Cir. 1999) (finding that waiting two years was an unreasonable time to wait to report harassment as the employer had a well-known policy prohibiting sexual harassment).

144. *Idusuyi v. Tenn. Dep’t of Children’s Servs.*, 30 Fed. Appx. 398, 403-04 (6th Cir. 2002); *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 245 (2d Cir. 2001); *Montero v. AGCO Corp.*, 192 F.3d 856, 863-64 (9th Cir. 1999); *Brown v. Perry*, 184 F.3d 388, 397 (4th Cir. 1999) (noting that a reasonable person would not place herself in the situation to be harassed if she could have avoided it and by doing so the employee unreasonably failed to avoid the harm); *Shaw v. Autozone, Inc.* 180 F.3d 806, 813 (7th Cir. 1999); *Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1999); *Walton v. Johnson & Johnson Servs., Inc.*, 203 F. Supp. 2d 1312, 1322-24 (M.D. Fla. 2002) (noting that waiting three months after the first harassment to file a grievance is unreasonable and claiming that fear of retaliation does not cure the fact that the employee failed to take advantage of the employers grievance policy); *Hardy v. Univ. of Ill.*, No. 00C7639, 2002 WL 909184, at \*8-10 (N.D. Ill. 2002) (holding that an employee acted unreasonably when she waited to report her grievance until the harassment ended, provided incomplete details about the harassment, and failed to give complete details of the harassment until two months

### C. If the Employee Did Not Report Harassment, Was the Failure to Report Reasonable?

When an employee does not report harassing behavior, the employee fails to take advantage of the employer's preventive measures. The court generally considers this failure to report unreasonable, even if the employee had a subjective reason for not reporting the harassment.<sup>145</sup> For example, in *Leopold v. Baccarat, Inc.*,<sup>146</sup> the Second Circuit found that when an employee failed to take advantage of the employer's internal complaint procedures, the employer should prevail on the second prong of the affirmative defense.<sup>147</sup> In that case, the court rejected the employee's contentions that the employer would not take her complaint seriously and that she feared retaliation because the extensive record did not substantiate her fears.<sup>148</sup> The court held that her unsubstantiated concerns were unreasonable justifications for failing to avail herself of the company's grievance policy.<sup>149</sup> While most courts have found that a general fear of retaliation is not a sufficient justification for failure to report harassment, not all courts agree.<sup>150</sup>

#### 1. Courts that Hold Failure to Report Due to Fear of Retaliation Is Unreasonable

Many courts have held that an employee's fear of retaliation by the employer does not make a failure to report harassment reasonable.<sup>151</sup> While the facts of these opinions differ, the holdings are relatively consistent in that fear, alone, is insufficient to alleviate the obligation to come forward. These findings

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after filing the grievance). See also ENFORCEMENT GUIDANCE, *supra* note 27, at § V.D. ("An employee who failed to complain does not carry a burden of proving the reasonableness of that decision. Rather, the burden lies with the employer to prove that the employee's failure to complain was unreasonable.")

145. *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 414 (5th Cir. 2002); *Idusuyi v. Tenn. Dep't of Children's Servs.*, 30 Fed. Appx. 398, 403-04 (6th Cir. 2002); *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 243 (2d Cir. 2001); *Montero v. AGCO Corp.*, 192 F.3d 856, 863 (9th Cir. 1999).

146. 239 F.3d 243 (2d Cir. 2001).

147. *Id.* at 245.

148. *Id.* at 246.

149. *Id.*

150. See *infra* Part III.B.

151. *Iduyusi*, 30 Fed. Appx. at 403-4 (holding "it [was] unreasonable for employees to pass their own judgments—absent any supporting facts—about how effectively an employer's sexual harassment polices operate"); *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405 (5th Cir. 2002); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001) (holding that a general fear of retaliation does not excuse a failure to report sexual harassment); *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014 (10th Cir. 2001) (following *Barrett* in holding that a general fear of retaliation will not excuse a failure to report); *Leopold v. Baccarat, Inc.*, 239 F.3d 243 (2d Cir. 2001); *Montero v. AGCO Corp.*, 192 F.3d 856 (9th Cir. 1999); *Mangrum v. Republic Indus., Inc.*, 260 F. Supp. 2d 1229 (N.D. Ga. 2003); *Murray v. City of Winston Salem*, 203 F. Supp. 2d 493, 501 (M.D.N.C. 2002); *Sconce v. Tandy Corp.*, 9 F. Supp. 2d 773 (W.D. Ky. 1998) (finding that a threat of retaliation is not enough to satisfy a failure to report without corroborating evidence); *Willingham v. QMS, Inc.*, 1999 U.S. Dist. LEXIS 20423 (S.D. Ala. 1999).

come despite empirical evidence that there is a chasm between courts' expectations for employees and what they are actually willing to do.<sup>152</sup>

## 2. Courts that Hold Failure to Report Due to Fear of Retaliation Is Reasonable

Several district court cases hold that an employee's failure to report harassment or take advantage of the remedial system is reasonable if the employee fears retaliation. For example, in *Maple v. Publ'ns Int'l, Ltd.*,<sup>153</sup> the court found that the question of whether the employee's failure to report was unreasonable was an issue for the trier of fact.<sup>154</sup> The court found that because other employees had little success with reporting problems to human resources and her boss threatened to fire her when she rejected him, a jury may find that her failure to report was reasonable.<sup>155</sup> Similarly, in *Dise v. Henderson*,<sup>156</sup> the employee reported a previous problem, but was told that she had no recourse because she was a temporary employee.<sup>157</sup> The employer also reduced her hours.<sup>158</sup> The court found that because of this prior inaction upon receiving her complaint, a jury may find that a failure to report a subsequent situation was not unreasonable.<sup>159</sup> While these cases contrast to those courts' decisions that have found a fear of retaliation does not justify a failure to come forward, they do still require some minimal corroboration of the fear the employees felt.

## IV. THE STRENGTHS AND WEAKNESSES OF THE AVENUES OF ANALYSIS AVAILABLE TO COURTS

"[A] common aspect of sexual harassment is that the harasser is in a position of power over the victim of the harassment and that unwanted sexual advances toward the victim constitute an exercise of that power."<sup>160</sup> The expression of power is closely tied to how the employee fears and acts upon that power, both by leaving the employment and by fearing retaliation. Retaliation is a manifestation of the underlying basis for sexual harassment—power—and the employee's rejection of that power.<sup>161</sup> When that power is rejected, retaliation is a likely response.<sup>162</sup>

152. Chamallas, *supra* note 83, at 374 (citing U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES 30 (1994) and Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 AM. PSYCHOL. 497, 498 (1991)).

153. *Maple v. Publ'ns Int'l, Ltd.*, No. 99-C6936, 2000 WL 1029112 (N.D. Ill. 2000).

154. *Id.* at \*5.

155. *Id.*

156. *Dise v. Henderson*, No. 99-C1432, 2001 WL 11057 (N.D. Ill. 2001).

157. *Id.* at \*2.

158. *Id.* at \*3.

159. *Id.* at \*7.

160. ROSEMARIE SKAINE, POWER AND GENDER: ISSUES IN SEXUAL DOMINANCE AND HARASSMENT, 65 (1996).

161. Ann C. Wendt & William M. Slonaker, *Sexual Harassment and Retaliation: A Double-Edged Sword*, SAM ADVANCED MGMT J., Autumn 2002, at 49. See also Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197 (2004) (empirically analyzing the gap between the numbers of sexual harassment victims who report and who

Harassment victims fear this retaliation.<sup>163</sup> Additional emotional responses include shock, insecurity, confusion, shame, and guilt, along with physical reactions such as headaches, lethargy, panic reactions, and nightmares.<sup>164</sup> These responses combined with statistics that show that many women either suffer retaliation or complain of it indicate that a “general fear of retaliation” may be more than the *Ellerth/Faragher* matrix allows it to be.<sup>165</sup>

Statistics show that retaliation claims have risen recently.<sup>166</sup> Retaliation for reporting sexual harassment, though, is even more prevalent. One study approximates that 47 percent of women who report sexual harassment may experience retaliation (Figure 1).<sup>167</sup> In another study, 70 percent of women that did not report their harassment claimed that fear of retaliation was a moderate or strong reason for their failure to come forward.<sup>168</sup> Researchers attribute this

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do not, and concluding that the requirement to report may not be reasonable since so few victims do so).

162. Lawton, *supra* note 161, at 243 (holding that some believe that men misinterpret women’s actions because of socialization and experiences in life). See Roy W. Ralston, *Issues Regarding the Social Psychology and Structural Consequence of Sexual Harassment*, 23(2) SOCIAL BEHAVIOR AND PERSONALITY 105, 106-107 (1995). Because of this misperception, men are more prone to accept harassing conduct as it was acceptable until the relatively recent widespread addition of women to the workplace. *Id.* at 107. Conversely, activities that men, because of their socialization, believe to be acceptable, women interpret as quite the opposite. *Id.* at 109. This socialization, which is male-dominated, shapes women’s reactions to “put up with a lot” and continue the existing structure. SKAINE, *supra* note 160, at 77. The addition of women into managerial positions, however, has changed the structure of organizations that were once dominated by men. *Id.* An allegation of sexual harassment, as interpreted by men, could be used to quickly change the dynamics of the organization (i.e. attempt to change the structure and power). *Id.*

163. See ANNE LEVY & MICHELE A. PALUDI, *WORKPLACE SEXUAL HARASSMENT* 59 (1997); Chamallas *supra* note 83, at 375 (citing Louise F. Fitzgerald et. al., *Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122 (1995) and noting various things victims of harassment fear including “fear of retaliation, of not being believed, of hurting one’s career, or of being shamed and humiliated”).

164. Levy and Paludi, *supra* note 163.

165. See discussion *supra* Part III.B. Courts have held that a plaintiff’s general fear of retaliation makes the failure to report the harassment to the employer unreasonable, therefore allowing the defendant to avail itself of the affirmative defense. See discussion *supra* Part III.C.; LEVY & PALUDI, *supra* note 163, at 59. See also Wendt & Slonaker, *supra* note 161, at 54. Wendt and Slonaker report an increase in both evidence of retaliation and retaliation claims when women reported harassment. *Id.* In many cases, a company, or the alleged harasser, defends itself by arguing that any adverse employment action against the harassment victim was not based on retaliation, but poor work performance. However true it may be in some cases, this may also be caused by the harassment itself. Some career effects are work habit changes, reduced performance, and withdrawal. LEVY & PALUDI, *supra* note 163, at 59. Therefore, it is easy to envision a cycle of harassment, decreased performance, and a work action that is retaliatory in nature but may be blamed on the employee’s declining work performance.

166. Wendt & Slonaker, *supra* note 161, at 49.

167. *Id.* at 54 (“Retaliation claims based on sexual harassment compared with original sexual harassment claims occur substantially more frequently than any of the other retaliation claims compared with their respective original basis.”). See also Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms From Absolute Retaliation Protection: Why Everyone, Including Employers, Loses*, 5 EMPLOYEE RTS. & EMP. POL’Y J. 549, 586-87 (2001) (stating that between one-third and sixty percent of employees that report harassment experience retaliation).

168. Marshall, *supra* note 167, at 587.

high rate of retaliation in sexual harassment claims to the underlying basis of sexual harassment – power.<sup>169</sup>

**Figure 1**

Women's Retaliation Claims by Original Bases Compared to Nonretaliation Claims Filed During 1985 through 1999

Basis	Retaliation Claims	Nonretaliation Claims	Percentage
Race	158	1,114	14
Sex-Gender	77	543	14
Sex-Pregnancy	4	255	2
Sex-Harassment	129	275	47
Disability	56	453	12
Age	43	345	12
National Origin	7	48	15
Religion	6	37	16
Not Identified*	35	0	N/A
No Basis**	0	175	N/A
<b>Total</b>	<b>515</b>	<b>3,245</b>	<b>N/A</b>

\*Original Basis not identified

\*\*Claimants failed to state a *prima facie* case.

Source: Wendt & Slonaker

The relationship in employee perception cases between constructive discharge and fear of retaliation becomes clearer when one considers that retaliation takes many forms (Figure 2).<sup>170</sup> One study found termination was the most common retaliatory mechanism and twenty-seven percent of these terminations were constructive discharges.<sup>171</sup> That twenty-seven percent of retaliation cases stem from constructive discharge shows a fundamental connection in the two types of employee perception cases this paper addresses, particularly since the *Suders* decision allows employers to prevent and correct as long as the constructive discharge is not accompanied by an official act. Employee perception that causes the employee to leave the employment and employee perception that causes the employee to be afraid appear related, with equal potential to stall application of the *Ellerth/Faragher* matrix.

169. Wendt & Slonaker, *supra* note 161, at 54. See also discussion *supra* Part III. Part III discusses the societal and psychological relationships of power to sexual harassment. A contrary position states that retaliation is part of the employer's right to control its employees and to prevent them from filing complaints with little merit. Marshall, *supra* note 167, at 586-87.

170. Wendt & Slonaker, *supra* note 161, at 55.

171. *Id.* Another common form of retaliation is economic loss, which includes demotion, reduction of wages or hours, and an exclusion from training. Aggression, further harassment, and miscellaneous acts rounded out the most common forms of retaliation. *Id.*

**Figure 2**  
Retaliatory Actions Identified by Claimants (n=129)

	Percentage
Termination	61
Economic Loss	15
Aggression	13
Sexual Harassment	2
Miscellaneous Actions	9
Total	100

Source: Wendt & Slonaker

The EEOC provides guidance on employees' fear in sexual harassment cases.<sup>172</sup> The EEOC states that retaliation should be construed broadly and is not required to affect the "terms or conditions of employment."<sup>173</sup> The manual discourages any activity that may negatively affect the conditions of employment, whether material or not, that will deter an employee from taking the protected action of reporting harassment and receiving a remedy.<sup>174</sup> "An interpretation of Title VII that permits some forms of retaliation to go unpunished would both undermine the effectiveness of the EEO statutes and conflict with the language of the anti-retaliation provisions."<sup>175</sup>

The majority of courts, nonetheless, hold that failure to report sexual harassment due to a general fear of retaliation is not reasonable.<sup>176</sup> These holdings exist despite the statistical evidence that employees fear retaliation and that their fear is justified, making a simple solution in employee perception cases difficult.<sup>177</sup> The *Ellerth/Faragher* affirmative defense exists to alleviate employer strict liability. In the absence of an adverse tangible employment action, including constructive discharge cases unaccompanied by an official act, the employee must report the harassment to give the employer the opportunity to correct and to remediate the problem. If the employer does not have that opportunity because the employee fears retaliation, then the employer will essentially suffer strict liability for any harassment because apparently almost all employees fear retaliation.

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172. EEOC, EEOC COMPLIANCE MANUAL, Directives Transmittal No. 915.003, Retaliation (May 20, 1998), available at <http://www.eeoc.gov/policy/docs/retal.pdf> [hereinafter EEOC COMPLIANCE MANUAL].

173. *Id.* § 8-II.D.3.

174. *Id.*

175. *Id.*

176. See *Iduyisi v. Tenn. Dep't. Children's Serv.*, 30 Fed. Appx. 398, 403-4 (6th Cir. 2002); *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405 (5th Cir. 2002); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001); *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014 (10th Cir. 2001); *Leopold v. Baccarat, Inc.*, 239 F.3d 243 (2d Cir. 2001); *Montero v. AGCO Corp.*, 192 F.3d 856 (9th Cir. 1999); *Mangrum v. Republic Indus., Inc.*, 260 F.Supp.2d 1229 (N.D. Ga. 2003); *Murray v. City of Winston Salem*, 203 F. Supp. 2d 493, 501 (M.D.N.C. 2002); *Willingham v. QMS, Inc.*, 1999 U.S. Dist. LEXIS 20423 (S.D. Ala. 1999).

177. See Wendt & Slonaker, *supra* note 161, at 55.

Is there is a way to balance the employer's opportunity to remedy harassment and the employee's right to experience and react to their fear? Courts have two options to handle this quandary. The first option is an objective test—since every harassed employee will fear retaliation, each employee must come forward to report. The second option also assumes that every employee will fear retaliation and therefore requires every employer to establish procedures that ensure an employee can report without fear of retaliation. However, there are problems with each option.

The employee must report the harassment and take advantage of an employer's remedial scheme to negate the employer's affirmative defense. This option is very employer-friendly as it places the burden on the employee to overcome his or her fear and report. With this option, courts could never find that a failure to report was reasonable due to fear of retaliation, even though the fear was subjectively unavoidable.

On the other hand, in an employee-friendly option, the employer would have to take additional steps to create a system where the employee could report with no fear of retaliation. Placing this burden on an employer would support the existence and adequacy of a remedial scheme.<sup>178</sup> Such steps could include an "800 number" or reporting service with no connection to the employer's management structure, or neutral, non-supervisory members of the Human Resources staff so that there are several people within the company to whom the employee could report.<sup>179</sup> Another alternative is to outsource the mechanism by which employees may report sexual harassment claims and to hire a third party to investigate those claims.<sup>180</sup> This option may be favorable to small businesses with no Human Resources department because it will maintain the confidentiality of the complaints in a neutral manner.<sup>181</sup> The service allows employees to dial an 800 number which prompts them to enter responses about their complaint through an automated system.<sup>182</sup> The employee then receives a follow-up call within eight hours from a manager with the company to which the service was outsourced, and the employer also receives a call within 12 hours.<sup>183</sup> Al-

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178. Although this would place the burden on the employer, it may not be sufficiently different from the current scheme. The defendant has the burden to prove that the employee's failure to report was unreasonable. "A credible fear must be based on more than the employee's subjective belief. Evidence must be produced to the effect that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints." *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001).

179. See John J. Fons, *The Case for Compliance: Now it's a Necessity, Not an Option*, 13 BUS. LAW TODAY 27, 31 (2003).

180. See Jonathan Day, *The Problem of Perceptions: Reasons for Outsourcing the Sexual Harassment Investigation*, 27 EMP. RELATIONS TODAY, Spring 2000, at 101-07. This option may be favorable to small businesses with no Human Resources department because it will maintain the confidentiality of the complaints in a neutral and relatively cost-effective manner. An example of a third party reporting service is T.R. Anton, a company based out of California. See Jeremy Quittner, *The Latest in Outsourcing: A Harassment Hotline*, BUS. WK. ONLINE, at <http://www.businessweek.com/smallbiz/news/date/9809/e980916.htm> (Sept. 16, 1998).

181. See Day, *supra* note 180, at 101-07.

182. See Quittner, *supra* note 180.

183. *Id.*

though an automated system may seem impersonal, the service is relatively cost effective.<sup>184</sup>

## V. CONCLUSION

Employer behavior is the guide in most cases for determining liability under the *Ellerth/Faragher* matrix. Employer behavior, however, does not drive the determination in two related claims that, rather, rely upon employee perception—constructive discharge and fear of retaliation. Both employee perception claims derive from the employee's view and are further related by evidence that one of the main types of retaliation employees experience is constructive discharge.<sup>185</sup>

Fear of retaliation and constructive discharge further overlap when one considers that each must typically be accompanied by something objective in order to be actionable. Under *Suders*, constructive discharge must be accompanied by an official act while many courts require fear of retaliation claims be accompanied by some type of overt act—a conflicted combination of increased dependence on both subjective employee perception and objective analysis of employer behavior. Without the official act or corroboration, employees face coming forward despite both the fear of retaliation and the certain psychological impact that comes with the sexual harassment. The pervasiveness of fear of retaliation for reporting sexual harassment alone renders employee response and unwillingness to come forward a near-certainty. In such an atmosphere, a court's requirement for a harassed employee to report over that fear is an objective line in the sand that does not square with the subjective reaction of the employee, hence a "stall" in the *Ellerth/Faragher* matrix.

The matrix, however, serves the valuable function of providing efficiency and predictability in the resolution of sexual harassment claims in an effort to protect employees who have less power in such situations. It is, accordingly, highly ironic that the very claims that derive from employee perception are the ones that stall the matrix and lead to inconsistent outcomes across courts and circuits. Therefore, a standard that consistently considers employee perception in the context of employer behavior, but is not dependent on employer behavior, is imperative if the matrix is to serve its intended function.

Such a standard is a challenge. For example, if every employee who feared retaliation could avoid reporting the harassment, there would be no conflict and the matrix would not stall—but given that virtually all employees fear retaliation, no one would be obligated to come forward. Similarly, if all employees who felt uncomfortable at work when suffering harassment could claim constructive discharge without something further to show that their suffering was significant, every employee would claim constructive discharge and every employer would experience strict liability. Neither option improves the efficiency of the matrix.

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184. See *id.* The president of Anton estimates that the company successfully serviced over 100 companies, totaling over 20,000 employees, within its first two years of existence. *Id.*

185. See Wendt & Slonaker, *supra* note 161, at 55.



On the other hand, the current split in the circuits certainly undermines the matrix as well. The *Suders* Court's requirement of an "official act" in constructive discharge claims essentially requires the pre-existence of a tangible adverse employment action before finding strict liability. If there is already an official act, there is no longer any need to question the constructive discharge. Constructive discharge becomes meaningless as a determining factor in finding strict liability under prong one of the matrix.<sup>186</sup>

A more reasonable approach lies with the EEOC, which mandates that constructive discharge exists when the employer "imposes intolerable working conditions in violation of Title VII when those conditions foreseeably would compel a reasonable employee to quit, whether or not the employer specifically intended to force the victim's resignation."<sup>187</sup> This mandate is relatively similar to the "breaking point" determination imposed by the *Suders* Court. If the court stopped with the "breaking point" requirement, and did not impose the "official act" requirement, the matrix would be hampered to some degree by the factual determination, but a balance would exist. Employees could prove constructive discharge in a manner creating strict liability under prong one of the matrix without a pre-existing official act. This approach respects the employee's perception of the level of harassment in the workplace without making the employer's behavior irrelevant.<sup>188</sup>

With regard to fear of retaliation, courts should strive for a similar balance. Title VII's anti-retaliation provision is in place to shield those who seek the statute's protection.<sup>189</sup> If those who fear wrongful behavior still must come forward, that protection is arguably lost. If, however, everyone fears that wrongful behavior, then no one would come forward. Without required employee reporting, the remedial components of the affirmative defense that create incentives for employers to prevent and correct might be diminished. If courts required a similar standard for fear of retaliation as we suggest for constructive discharge—that an employee who reasonably fears retaliation receives either protection from coming forward or some guarantee against the retaliation as with anonymous reporting—then as with constructive discharge claims, both the

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186. See Albert J. Solecki Jr. & Lori A. Mazur, *Does Constructive Discharge Bar an Employers' Defense?*, EMP. L. STRATEGIST, (Feb. 2004), at [http://www.goodwinprocter.com/publications/solecki\\_mazur\\_02\\_04.pdf](http://www.goodwinprocter.com/publications/solecki_mazur_02_04.pdf) (describing why *Suders* holding regarding constructive discharge essentially forces an issue of fact.)

187. EEOC, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT, No. N-915-050 (Mar. 19, 1990), at <http://www.eeoc.gov/policy/docs/currentissues.html> (citing *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 343-44, 41 (10th Cir. 1986); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 888 (3rd Cir. 1984); *Nolan v. Cleland*, 686 F.2d 806, 812-15 (9th Cir. 1982); *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982); *Clark v. Marsh*, 655 F.2d 1168, 1175 n.8 (D.C. Cir. 1981); *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980)).

188. See Chamallas, *supra* note 83, at 390-91 (analyzing a range of responses to constructive discharge cases including an employer-friendly approach, an employee-friendly approach and a third balanced approach based on causation).

189. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 704(a), 78 Stat. 241, 257 (1964); Rosalie Berger Levinson, *Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623, 635 (2003).

employee's perception and the employer's behavior impact the outcome equally. With balance there is efficiency and the matrix can function.