

TITLE VII'S MIDLIFE CRISIS: THE CASE OF CONSTRUCTIVE DISCHARGE

MARTHA CHAMALLAS*

I. INTRODUCTION

Understanding Title VII law has never been easy. From the beginning, there have been sharp disputes about the meaning of “discrimination” under the Act¹ and the degree to which employers should be held strictly accountable for discriminatory actions of supervisors and employees. Early debates tended to pit those who envisioned the Act as a results-oriented measure aimed at ending racial and gender hierarchies in the workplace against those who viewed the legislation primarily as a process-oriented check against the use of race or gender as a factor in employer decisionmaking.² The former generally endorsed a broad interpretation of the Act generous to plaintiffs, while the latter tended to be more receptive to interpretations favoring employers.

* Robert J. Lynn Chair in Law, Moritz College of Law, Ohio State University. I wish to thank the participants of faculty workshops at Ohio State, Northwestern, Iowa, Tennessee, and Washington & Lee for their incisive questions and comments, which were of enormous help to me in working through the doctrinal and theoretical puzzles in this complicated area of law. I am particularly grateful to John Allen, Debbie Brake, Jim Brudney, Ruth Colker, Quince Hopkins, Joe King, Peter Shane, Marshall Shapo, and Paul Zwier for their input on earlier versions of this Article. Many thanks as well to my research assistants, Michael Blum, Hailey Vaughn, and Jana Brown, for their valuable work on this project.

1. Neither the original 1964 Civil Rights Act nor the 1991 Act defined the term “discrimination.” The 1991 Act, however, did make it clear that practices with a disparate impact could violate the law, even if they were not intentionally discriminatory. See 42 U.S.C. § 2000e(k)(1)(A)(B)(C) (1994).

2. Compare Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 73–75 (1972) (endorsing a results-oriented approach to disparate impact theory), with Michael Evan Gold, *Griggs’ Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 432 (1985) (arguing that Congress in 1964 did not endorse disparate impact theory).

The fault lines in contemporary scholarship are much harder to characterize. Contemporary doctrinal debates have tended to focus narrowly on particular statutory provisions or modes of proof, and emerging theories do not always line up as predictably along ideological lines.³ The interplay between Congress and the Supreme Court has only made things messier: On several occasions, Congress has stepped in to express its disapproval of conservative Court rulings,⁴ without, however, dramatically changing the prevailing judicial approach to interpreting the Act.⁵ The last major statutory revision was the 1991 Civil Rights Act, a sweeping reform that affected each major framework of liability,⁶ introduced jury trials, and significantly altered the remedial scheme of the Act.⁷

3. For example, one recent major theoretical article favors large-scale structural changes in workplaces to promote gender equity, but advocates leaving employers considerable freedom to devise their own substantive rules and procedures to comply with Title VII. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 462-64 (2001). This proposal goes against the conventional wisdom that fears that privatization will result in placing low priority on gender equity, subordinating equality to the goals of promoting efficiency or preserving traditional ways of doing business. See generally Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMPLOYEE RTS. & EMPLOY. POL'Y J. 1 (1999) (discussing employer litigation-prevention strategies that may mask discrimination).

4. See, e.g., Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1994) (overruling *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), by placing pregnancy within the meaning of discrimination "on the basis of sex"); Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071 (1991) (overruling or changing five Supreme Court opinions, including aspects of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)).

5. The latest empirical evidence indicates that appellate courts prefer defendants in employment discrimination suits. See Theodore Eisenberg & Stewart J. Schwab, *Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in the U.S. Courts of Appeals* (July 16, 2001) (unpublished manuscript) (finding that 5.8% of employer victories are reversed on appeal, compared to a reversal rate of 43.6% for plaintiff victories—a gap that is bigger than any other category of cases, including civil prisoner cases), available at <http://www.findjustice.com/ms/pdf/double-standard.PDF>; Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 949 (2002). Trial judges also tend to favor defendants in employment discrimination suits. See Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560 (2001) (stating that plaintiffs are only half as successful when their cases are tried before a judge).

6. The 1991 Act codified the mixed-motivation framework for individual disparate treatment cases, see 42 U.S.C. § 2000e(m), (g)(2)(B); clarified that there is no business-necessity defense for systemic disparate treatment, see 42 U.S.C. § 2000e(k)(2); revamped the framework for disparate impact litigation, see 42 U.S.C. § 2000e(k)(1)(A); and provided damages and jury trials for suits alleging intentional discrimination, including harassment suits, see 42 U.S.C. § 1981a.

7. Plaintiffs alleging intentional discrimination are now entitled to jury trials and may seek compensatory and punitive damages, changes that some have argued have made Title VII more tort-like in character, rather than exclusively equitable and preventive. See David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 918 (1993).

After more than a decade of litigation under the revised Act, it is fair to say that Title VII law has never been more complex and confusing. The number of available frameworks of liability has increased and each has become increasingly elaborate.⁸ Calls for simplification abound,⁹ as commentators seem to recognize that there is something unseemly about a law prohibiting employment discrimination that few employees can comprehend. As I see it, Title VII is experiencing a midlife crisis as it transforms into a highly technical field where nonspecialists fear to tread.

At this point in Title VII's life, it is particularly difficult to define the boundaries of the various types of claims and to arrive at an appropriate categorization of cases.¹⁰ For example, are some cases by their nature harassment rather than disparate treatment cases, or is it simply a matter of the litigation strategy pursued by the plaintiff's attorney? Should the categorization of a case affect the available remedies, or does it simply change the model used to establish liability? How can we best describe the boundaries in Title VII law—as clearly distinct, somewhat overlapping and permeable, or wholly illusory?

In this Article, I attempt to get at the boundary crisis by examining an important corner of Title VII doctrine—the law governing claims of constructive discharge.¹¹ A constructive discharge occurs when an

8. As I count them, there are currently four basic frameworks of liability, each with its own special elements and allocations of burden of proof. The field is now divided into (1) individual disparate treatment, (2) systemic disparate treatment, (3) disparate impact, and (4) harassment. The conventional wisdom may still be that there are three basic frameworks of liability: individual disparate treatment, systemic disparate treatment, and disparate impact, with harassment classified as a variation of individual disparate treatment. The specialized rules governing hostile environment cases, however, justify treating harassment as a distinctive framework, even though the Court regards harassment as a form of intentional discrimination. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998) (“Sexual harassment under Title VII presupposes intentional conduct.”).

9. See, e.g., Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539 (2001) (decrying the “disarray of the lower federal courts that has persisted for more than twenty years”); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1799 (1998) (arguing for a streamlined cause of action focusing on causation, harm, and employer responsibility); John Valery White, *The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law*, 53 MERCER L. REV. 709, 710 (2002) (describing the structure of disparate treatment proof as “wildly complicated”). But see Henry L. Chambers, Jr., *Discrimination, Plain and Simple*, 36 TULSA L.J. 557, 579–80 (2001) (arguing that simplification of Title VII doctrine may produce inequities in race discrimination cases).

10. See Cheryl L. Anderson, “Thinking Within the Box”: *How Proof Models Are Used to Limit the Scope of Sexual Harassment Law*, 19 HOFSTRA LAB. & EMP. L.J. 125, 126–27 (2001) (criticizing the Seventh Circuit Court of Appeals for its treatment of Title VII proof models as rigid boxes, making it more difficult for plaintiffs to plead and prove their case).

11. For a synopsis of the general law governing constructive discharge, see *infra* notes 42–71.

employee quits her job¹² in response to intolerable working conditions, often a sexually hostile environment. I chose this topic because constructive discharge is a recurring type of discrimination claim that has never comfortably fit within the conventional categories of Title VII. Constructive discharge cases lie at the cusp of two very common types of discrimination cases: claims of disparate treatment alleging discriminatory discharge and harassment claims stemming from sexually hostile environments.

In part because of this classification dilemma, the lower courts are experiencing considerable difficulty handling even routine constructive discharge cases. The current split in the circuits centers on whether employers should be held vicariously liable for the acts of supervisors who cause their employees to quit their job.¹³ The courts' problems with constructive discharge go much deeper, however, affecting both the substantive elements of the claim and its connection to other Title VII causes of action. The courts have yet to develop a workable approach that does not end up treating constructive discharge cases as an anomaly.

Whatever its location within the doctrinal structure of Title VII, constructive discharge is important as a claim in its own right. The reason constructive discharge cases are so numerous is that sexual harassment victims so often quit their job in response to their discriminatory treatment.¹⁴ Employment discrimination lawyers know that employees are reluctant to sue their current employer and will often file a claim only after

12. Throughout this Article, I refer to constructive discharge victims as women. I recognize that men as well as women can be constructively discharged from their job. However, because constructive discharge so often stems from sexually hostile environments and the large majority of sexual harassment victims are women, it seems appropriate to use "she" when describing constructive discharge plaintiffs. See EEOC, SEXUAL HARASSMENT CHARGES, EEOC & FEPAS COMBINED: FY 1992-2002 (noting that in 2002, 14.9% of sexual harassment charges were filed by men), at <http://eeoc.gov/stats/harass.html>.

13. See *infra* Part II.C.

14. See Frances S. Coles, *Forced to Quit: Sexual Harassment Complaints and Agency Response*, 14 SEX ROLES 81, 89 (1986) (finding that nearly twenty-five percent of employees filing complaints of sexual harassment resigned due to harassment); Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 28, 31 (1993) (noting that, although there are no carefully controlled studies of effects of harassment, existing studies indicate ten percent of harassment victims report leaving their job as a result of harassment); Audrey J. Murrell, Josephine E. Olson & Irene Hanson Frieze, *Sexual Harassment and Gender Discrimination: A Longitudinal Study of Women Managers*, 51 J. SOC. ISSUES 139, 141 (1995) ("[O]ne of the frequent responses to harassment is to quit one's job."); Ronni Sandroff, *Sexual Harassment: The Inside Story*, WORKING WOMAN, June 1992, at 50 (noting that twenty-five percent of readers who reported sexual harassment said they were fired or forced to quit their job).

they have left their job.¹⁵ Constructive discharge claims are thus one important vehicle by which sexual harassment is challenged by employees and scrutinized in the courts.

This Article first takes a close look at the legal status of the constructive discharge claim under Title VII. My point of departure is the familiar scenario in which a plaintiff asserts that she was forced to quit because of her supervisor's persistent harassment. In Part II, I summarize the general law governing constructive discharge and its connection to sexual harassment doctrine.¹⁶ Under the prevailing doctrine, a plaintiff alleging constructive discharge must prove more than that she quit her job when faced with the "severe or pervasive" harassment that defines a sexually hostile environment. Instead, the high threshold of proof commonly imposed in constructive discharge cases requires plaintiffs to prove that working conditions had become so intolerable that a reasonable employee would have quit in response.

In Part II, I also discuss how the general law of constructive discharge has been affected by two recent Supreme Court rulings governing employer liability in sexual harassment cases.¹⁷ The burning question that has not yet been addressed by the Court is whether the affirmative defense that employers are now permitted to invoke in hostile environment cases will also be available in constructive discharge cases. This seemingly small doctrinal issue could affect the outcome in many cases because, in practice, the affirmative defense has proven to be of great value to employers, often resulting in defense victories on summary judgment.¹⁸ In many cases, employers are able to assert the affirmative defense and defeat the claims of employees who have been subjected to even the most severe forms of harassment, largely because those employees have failed to pursue formal complaints through their employers' internal grievance procedures.

In the final section of Part II, I review the current split in the circuit courts as to the proper approach to analyzing constructive discharge

15. See Theresa Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 124-25 (2001) ("[M]any plaintiffs' lawyers would tell you that once an employee complains about discrimination on the job, he or she can usually consider that employment relationship over."); Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 LAW & SOC'Y REV. 67, 75 (1999) (noting that among thirty-one women studied, "job loss, or fear of it, was the primary consideration for a serious consideration of litigation").

16. See *infra* Part II.A-B.

17. See *infra* Part II.B.

18. See *infra* text accompanying notes 89-92.

claims.¹⁹ So far, two major positions have emerged. The first allows employers to assert the affirmative defense and draws no distinction between ordinary hostile environment cases and claims of constructive discharge.²⁰ The second line of cases imposes automatic liability on employers and treats constructive discharge as a “tangible employment action” that differentiates it from ordinary hostile environment cases.²¹ For the most part, however, the lower court decisions have only scratched the doctrinal surface and have not yet clearly explained how constructive discharge fits into the broader Title VII structure.

To see what lies underneath the classification dilemma, Part III analyzes constructive discharge along five distinct (but interrelated) Title VII categorical axes. First, at the most superficial level, there is the question of whether a claim of constructive discharge in a harassment suit should be treated as a *tangible employment action* or under the *hostile environment* rubric.²² Second, scratching the surface a bit is whether such a constructive discharge is more properly regarded as a type of *disparate treatment* that results in a termination (akin to a conventional discharge) or, alternatively, as a particularly virulent kind of *harassment*.²³ Third, on a bit more abstract level, one might ask whether the categorization of such constructive discharge cases depends on the official or formal nature of an employer’s action (with an emphasis on the official decisionmaking *process*) or turns on the *effect*²⁴ or impact that the employer’s behavior has on the targeted employee, regardless of the informal or unofficial nature of the employer’s behavior.

Under current law, the answers to the foregoing three category questions are not merely academic, but have a significant effect on substantive law and employer liability. This is because the categorization determines the fourth question of whether the employer will be held *vicariously liable* for the acts of its supervisory employees or will be able to escape liability if it is not at fault under a specialized set of *negligence* principles.²⁵ Fifth and finally, there is the nagging question of whether the problem posed by a constructive discharge case is primarily a question of

19. See *infra* Part II.C.

20. See *infra* Part II.C.1.

21. See *infra* Part II.C.2.

22. See *infra* Part III.A.

23. See *infra* Part III.B.

24. See *infra* Part III.C.

25. See *infra* Part III.D.

remedy (i.e., applying the appropriate standards for the award of backpay) rather than *substantive law*.²⁶

Ultimately, I conclude that, with respect to each of these five axes, it cannot be said that constructive discharge, by its nature, falls on one side of the fence rather than the other. Once unpacked, the classification may have less to do with the nature of the claim than with general attitudes toward sexual harassment and injuries linked to women.²⁷ My dissection of the constructive discharge claim leads me to believe that underneath the categorization dilemma lies a contest over who should be held responsible for the loss of the employee's job—the employee or her employer. My primary point is that at the crux of the constructive discharge litigation is a question of attribution of responsibility, rather than one of the proper characterization of the nature of the action.²⁸

Part IV turns from doctrine and category dilemmas to those policy considerations especially relevant for constructive discharge cases. I focus on the emerging requirement placed on employees to report harassment through their employer's internal grievance procedures and discuss how this requirement is at odds with the way employees actually behave and respond to harassment.²⁹ This part reviews the social science literature on sexual harassment reporting³⁰ and discusses some of the drawbacks of employer-controlled systems of dispute resolution.³¹

Part V then sets forth four guiding principles for interpreting Title VII that I argue courts should consider before finally settling on an approach to constructive discharge.³² The first two principles relate to how business enterprises are perceived by the courts. I urge courts to recognize the importance of informal, as well as formal, corporate and institutional structures³³ and to recognize the use and significance of informal, as well as formal, power of supervisors within the organization.³⁴ The third principle relates to the way courts judge the actions of employees who claim to have suffered discrimination. I make the case for treating the common or typical response of victims as a reasonable response and for stopping the practice of penalizing or blaming victims for acting the way

26. *See infra* Part III.E.

27. *See infra* text accompanying notes 214–42.

28. *See infra* text accompanying notes 140–43.

29. *See infra* Part IV.

30. *See infra* text accompanying notes 270–74.

31. *See infra* text accompanying notes 293–301.

32. *See infra* Part V.

33. *See infra* text accompanying note 306.

34. *See infra* text accompanying note 307.

most employees would under the circumstances.³⁵ Against the grain of the case law, I also argue that employees should have the right to quit their job if they are forced to work in a hostile environment.³⁶ The fourth and final principle relates to categorization of harm stemming from discrimination in the workplace. I urge recognition of the interrelationship between economic harms on the one hand and psychological harms on the other.³⁷ Because one type of harm frequently coexists with the other, or tends to produce the other, I believe it is futile and unwise for courts to try to draw sharp lines between economic and other losses. Instead, each should be treated as a legitimate, job-related injury worthy of compensation.

Overall, I maintain that following these four principles would strengthen the law's capacity to prevent and remedy harassment and would further the goal of compensating victims of employment discrimination. Although informed by feminist theory and social science research, I regard these principles as simple statements of policy, fully consistent with the language and history of the Act and easily incorporated into judicial interpretations of Title VII.

In Part VI of this Article, I return to constructive discharge and outline three possible models for courts to use in this type of case.³⁸ In addition to the two models most often advocated by defendants³⁹ and plaintiffs respectively,⁴⁰ I develop a causation-based model that embraces the four guiding principles discussed above.⁴¹ My proposal would streamline the constructive discharge claim by focusing on three basic elements: (1) discrimination, (2) causation, and (3) damages. Under this simplified model, a plaintiff would be entitled to recover damages for constructive discharge whenever she proved that discrimination—either in the form of a hostile work environment or some other discrete discriminatory action—proximately caused her to quit her job.

II. CONSTRUCTIVE DISCHARGE IN LEGAL CONTEXT

These days, the prototypical Title VII constructive-discharge case is a harassment case. More precisely, it is a case of virulent sexual harassment in which conditions have become so intolerable for a female employee that

35. See *infra* text accompanying note 309.

36. See *infra* text accompanying notes 310–11.

37. See *infra* text accompanying notes 314–18.

38. See *infra* Part VI.

39. See *infra* Part VI.A.

40. See *infra* Part VI.B.

41. See *infra* Part VI.C.

she is forced to quit her job. Factually, the prototypical constructive discharge case is closely tied to the hostile environment claim. The employee attempts to prove that the hostile environment caused her to quit and what would otherwise be regarded as a voluntary resignation should be treated as an involuntary termination.

A. GENERAL LAW OF CONSTRUCTIVE DISCHARGE

Under the general law of constructive discharge, if the plaintiff is successful in proving such a paradigm case of constructive discharge, she will be entitled to recover two sets of damages: not only those damages flowing from the hostility of supervisors and co-workers while on the job, such as emotional distress and possibly punitive damages, but also damages flowing from the loss of her job—most notably, backpay and frontpay.⁴² It is important to note at the outset that courts generally will not allow a plaintiff who quits to recover backpay and frontpay unless she proves a constructive discharge.⁴³ Victims of hostile environments who cannot prove constructive discharge are thus limited to those compensatory and punitive damages traceable to the abuse on the job.

The difference in available remedies between a hostile environment and constructive discharge case is not the only difference between the two causes of action. By far, most courts also employ a more stringent standard of liability for proof of constructive discharge than they do for proof of hostile environment. The most important threshold requirement for establishing a hostile environment claim is a showing that the harassment was severe or pervasive.⁴⁴ Courts routinely state that it is not enough to prove isolated instances of harassment, unless the incidents are unusually

42. Backpay and frontpay are particularly important, however, because they are not capped. See *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848–54 (2001).

43. But see Mark S. Kende, *Deconstructing Constructive Discharge: The Misapplication of Constructive Discharge Standards in Employment Discrimination Remedies*, 71 NOTRE DAME L. REV. 39, 52–57 (1995) (describing an approach, adopted by a small minority of courts, that does not require proof of constructive discharge to recover backpay).

44. In addition to proof of severe or pervasive harassment, the plaintiff in a hostile environment claim must show (1) unwelcome harassment, (2) based on sex or gender, and (3) respondeat superior (i.e., in a case of co-worker harassment, that the employer knew or should have known of the harassment and failed to take corrective action). In the case of a supervisor, there is strict liability, subject to the *Ellerth/Faragher* defense, which is discussed in Part II.B, *infra*. See generally Theresa Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791, 796–97 (2002) (citing cases).

severe.⁴⁵ Proof of constructive discharge, however, typically requires even more than a showing of severe or pervasive harassment.⁴⁶ The most common formulation of the constructive discharge standard requires the plaintiff to prove that the employer has rendered the employee's working conditions so intolerable that a reasonable person would quit her job.⁴⁷ Most significantly, several courts in recent cases have concluded that not all hostile environments are "intolerable" under the stringent constructive discharge standard, with the result that plaintiffs who have quit their job due to unlawful harassment may nevertheless lose on their claim of constructive discharge.⁴⁸ Factfinders are thus called on to make fine calibrations of the magnitude of the harassment faced by the plaintiff, implicitly judging between harassment that is bad enough to amount to a change in working conditions for the plaintiff (the "severe or pervasive" standard for hostile environments), but not bad enough to justify plaintiff quitting her job (the "intolerable" standard for constructive discharge).

Additionally, in a few jurisdictions, there is the lingering question of proof of employer intent in constructive discharge cases. In the minority of jurisdictions, the employee must provide evidence of an employer's specific intent to force the employee to resign.⁴⁹ This evidence may be especially difficult to come by in those cases of sexual harassment in which the harasser's motivation appears to be to pressure the plaintiff to have sex rather than to induce her to quit her job. In the majority of jurisdictions,

45. See, e.g., *Jones v. Clinton*, 990 F. Supp. 657, 675–76 (E.D. Ark. 1998) (finding a single incident of harassment not sufficiently severe to constitute a hostile environment, despite an allegation that Clinton exposed himself and requested that the plaintiff perform oral sex).

46. See *Landgraf v. USI Film Prods.*, 968 F.2d 427, 430 (5th Cir. 1992) ("To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment."); *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 28 (1st Cir. 2002); *Campbell v. Fla. Steel Corp.*, 919 S.W.2d 26, 34 (Tenn. 1996); *Stacy v. Shoney's, Inc.*, 955 F. Supp. 751, 756 (E.D. Ky. 1997).

47. The leading case is *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61 (5th Cir. 1980). See *infra* text accompanying notes 56–58, 251–61.

48. See, e.g., *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1159 (8th Cir. 1999) (entitling the plaintiff to a trial on the hostile environment claim, but rejecting summary judgment on the constructive discharge claim); *Coffman v. Tracker Marine L.P.*, 141 F.3d 1241 (8th Cir. 1998) (entitling the plaintiff to emotional distress damages on the retaliation claims, but denying backpay because there was no constructive discharge).

49. See HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* § 2.50, at 109–10 (2001); Cathy Shuck, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKELEY J. EMP. & LAB. L. 401, 413–18 (2002) (discussing the Second and Fourth Circuits' interpretation of the intent requirement). In labor law cases, the NLRB also requires employees to prove the employer's specific intent to force the employee to resign. See *Crystal Princeton Ref. Co.*, 222 N.L.R.B. 1068 (1976); Roslyn Corenzwit Lieb, *Constructive Discharge Under Section 8(a)(3) of the National Labor Relations Act: A Study in Undue Concern over Motives*, 7 INDUS. REL. L.J. 143, 156 (1985).

however, an “objective” test of deliberateness is used, requiring only that the plaintiff demonstrate that the employer’s conduct would have the foreseeable result of creating working conditions so unpleasant or difficult that a reasonable person in the plaintiff’s position would feel forced to resign.⁵⁰

In sum, the current law of constructive discharge has both a substantive and a remedial dimension. As a matter of substantive law, constructive discharge requires a showing of intolerable working conditions and turns on whether the plaintiff is able to convince the factfinder that she was justified in quitting her job under the circumstances. The most important remedial consequence is that, absent proof of constructive discharge, the plaintiff will not be able to recover the economic or other losses tied to losing her job, even if she maintains that the hostile environment caused her to quit and is successful in establishing a Title VII violation via a hostile environment claim.

It is instructive to note that the calibrated distinction between a mere hostile environment claim and a hostile environment claim that amounts to a constructive discharge is a recent doctrinal development that was not present when the constructive discharge doctrine was first imported into Title VII law.⁵¹ The early Title VII constructive-discharge cases tended not to be sexual harassment/hostile environment suits for the simple reason that the Supreme Court did not endorse the hostile environment cause of action until 1986.⁵² Instead, the prototypical case of constructive discharge in this early era often centered on a discrete discriminatory act, such as a

50. LEWIS & NORMAN, *supra* note 49, § 2.50, at 110.

51. The constructive discharge doctrine was imported from labor law. *See infra* text accompanying notes 195–203. For examples of early labor cases in which union supporters complained of management behavior designed to force them to quit, see *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, 494 (4th Cir. 1972); *NLRB v. Saxe-Glassman Shoe Corp.*, 201 F.2d 238, 243 (1st Cir. 1953); and *NLRB v. East Texas Motor Freight Lines*, 140 F.2d 404, 405 (5th Cir. 1944). Constructive discharges may also be alleged in connection with an employer’s material breach of contract. In these cases, constructive discharge is not treated as a separate cause of action, but rather supplies proof of the discharge element in a claim based on breach of contract. *See* MARK A. ROTHSTEIN, CHARLES B. CRAVER, ELINOR P. SCHROEDER & ELAINE W. SHOEN, *EMPLOYMENT LAW* § 8.7, at 695 (2d ed. 1999).

52. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), held that Title VII was not limited to the kind of quid pro quo harassment that almost invariably resulted in economic loss. The Court endorsed the 1980 EEOC Guidelines, which defined as actionable “conduct [that] has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” *Id.* at 58 (citing 29 C.F.R. § 1604.11(a)(3) (1985)).

demotion,⁵³ being passed over for promotion,⁵⁴ or being paid a discriminatory wage,⁵⁵ which the plaintiff claimed caused her to quit her job in response. For example, one frequently cited opinion written by Judge Frank Johnson in the Fifth Circuit—*Bourque v. Powell Electrical Manufacturing Co.*⁵⁶—involved a woman who started her career as a secretary and sought to be promoted to the predominantly male job of buyer. The plaintiff persuaded her employer to try her out in the buyer's position at her secretary's salary, but she expected to receive pay comparable to her male counterparts once she showed her supervisors that she could do the work satisfactorily. When the employer refused to pay her a comparable wage even though her supervisors were pleased with her work in the new position, the plaintiff quit in protest. The court rejected plaintiff's constructive discharge claim, holding that "discrimination manifesting itself in the form of unequal pay cannot, alone, be sufficient to support a finding of constructive discharge."⁵⁷ The court indicated that something more was needed to find the requisite intolerable conditions for a constructive discharge, hinting that this case was not like the aggravated situation of continuing discrimination and harassment.⁵⁸

At this early period in the development of sexual harassment law, before the maturity of the hostile environment claim, there were few occasions to compare the level of harassment required for a Title VII violation and the presence of aggravating factors sufficient to warrant a finding of constructive discharge.⁵⁹ Indeed, one influential commentary on constructive discharge law seems to have assumed that the presence of "continuing affronts or hostile working conditions"⁶⁰ would be enough to establish a constructive discharge, suggesting that the terms "severe or pervasive" and "intolerable working conditions" might well turn out to be synonymous.

53. See *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986) (remanding to determine whether a demotion caused a constructive discharge); *Henry v. Lennox Indus.*, 768 F.2d 746, 751–52 (6th Cir. 1985) (affirming that a demotion and failure to promote constitutes a constructive discharge).

54. See *Muller v. United States Steel Corp.*, 509 F.2d 923, 929 (10th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975) (finding no constructive discharge due to a discriminatory denial of promotion).

55. See *Waters v. Heublein, Inc.*, 23 Fair Empl. Prac. Cas. (BNA) 351 (N.D. Cal. 1978) (holding a discriminatory wage insufficient to establish a constructive discharge).

56. *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61 (5th Cir. 1980).

57. *Id.* at 65 (citing *Cullari v. East-West Gateway Coordinating Counsel*, 457 F. Supp. 335, 341 (E.D. Mo. 1978)).

58. *Id.* at 66.

59. See, e.g., *Coley v. Consol. Rail Corp.*, 561 F. Supp. 645, 651 (E.D. Mich. 1982) (finding a constructive discharge simply from an employer's failure to remedy a hostile environment).

60. Martin W. O'Toole, Note, *Choosing a Standard for Constructive Discharge in Title VII Litigation*, 71 CORNELL L. REV. 587, 606 (1986).

The important point here, however, is to underscore that when the standard of intolerable conditions became part of the substantive Title VII constructive-discharge law, the courts were primarily searching for a way to distinguish tolerable discriminatory acts from intolerable working conditions to assure that not all claims of discrimination allowed plaintiffs to quit their job in protest. They did not devise the intolerable working conditions requirement as a deliberate contrast to the severe or pervasive requirement for hostile environment cases. As noted earlier,⁶¹ however, recent cases have tended to assume that the constructive discharge standard is more stringent than the hostile environment standard without thoroughly analyzing the difference between constructive discharge claims that are predicated on hostile environments and older-style claims that stem from discrete discriminatory acts.

Additionally, before the establishment of the hostile environment claim, courts simply assumed that constructive discharges would entail vicarious liability for the employer.⁶² Proof of a constructive discharge amounted to proof that the employer, not the employee, was responsible for the termination and was treated like other discriminatory discharges that gave rise to vicarious liability. Doubts about whether the employer should be vicariously liable for constructive discharge emerged only when the courts balked at imposing vicarious liability for supervisor-caused sexually hostile environments in which plaintiffs alleged no other economic harm. As I develop in depth later in this Article,⁶³ the courts' reluctance to impose vicarious liability surfaced when constructive discharge became cognitively linked to the disfavored claim for sexual harassment and the prototypical victim became a woman.

On the remedial side, the significance of a finding of constructive discharge has also evolved over time. Because Title VII contains an

61. See *supra* text accompanying notes 44–48.

62. See, e.g., *Goss v. Exxon Office Sys.*, 747 F.2d 885 (3d Cir. 1984) (finding a constructive discharge arising from being assigned a new, less lucrative territory upon returning to work following a miscarriage); *Nolan v. Cleland*, 686 F.2d 806, 812–13 (9th Cir. 1982) (affirming that a constructive discharge stemming from discrimination based on a plaintiff's marriage should be treated like a formal discharge); *Held v. Gulf Oil Co.*, 684 F.2d 427 (6th Cir. 1982) (upholding damages for a constructive discharge claim arising from a combination of gender-based discrimination and sexual harassment). In one of the first federal appellate court decisions to recognize the hostile environment claim, the court treated the plaintiff's constructive discharge claim as a claim involving a tangible employment detriment, in contrast to her claim for a hostile work environment. *Henson v. City of Dundee*, 682 F.2d 897, 906, 909 (11th Cir. 1982). Although the court upheld the lower court's ruling that the plaintiff did not quit because of the intolerable environment, it noted in dicta that vicarious liability was appropriate for claims asserting tangible job detriments. See *infra* discussion accompanying notes 210–13.

63. See *infra* Part III.D.

express “duty to mitigate” provision,⁶⁴ any recovery of backpay has always been limited to amounts that the plaintiff did not, or reasonably could not, recoup through securing comparable employment after quitting her job. Thus, even the plaintiff who proves constructive discharge is not entitled to sit tight and wait to be vindicated through a judgment awarding reinstatement and backpay. Instead, Title VII explicitly requires backpay awards to be reduced by “interim earnings or amounts earnable with reasonable diligence.”⁶⁵ Through the duty to mitigate, Congress provided a powerful incentive for potential Title VII claimants to seek new jobs and reduced the possibility that plaintiffs would use discrimination as an excuse to quit their job and receive pay while they stayed at home and litigated their claim. From the beginning, the constructive discharge claim has merely assured that plaintiffs would be compensated for the loss of their job in the event that they could not find comparable employment, making the claim most important for employees who work in unique positions or who are discharged in bad economic times.⁶⁶

Before the passage of the 1991 Civil Rights Act, however, prevailing on the constructive discharge claim was particularly important for plaintiffs. Prior to the 1991 Amendments, only equitable remedies were permitted against employers,⁶⁷ such that backpay was generally the only form of monetary relief available to plaintiffs.⁶⁸ Plaintiffs who complained of hostile environments and who quit their job in response could only recover a money judgment if they proved constructive discharge because no award for the psychological and other noneconomic harm associated with being subjected to repeated sexual harassment was available. The 1991 Act first introduced tort-like remedies into the Act, allowing plaintiffs

64. 42 U.S.C. § 2000e-5(g)(1) (2000). For a discussion and critique of the statutory duty of mitigation, see Howard C. Eglit, *Damages Mitigation Doctrine in the Statutory Anti-Discrimination Context: Mitigating Its Negative Impact*, 69 U. CIN. L. REV. 7 (2000).

65. 42 U.S.C. § 2000e-5(g)(1).

66. One state court has even required a plaintiff who was constructively discharged to accept an unconditional offer of reinstatement from her former employer or be barred from recovering backpay. See *Pollock v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 770 (Mo. Ct. App. 1999). In that case, the employer claimed that the plaintiff's refusal to return to work was unreasonable because the harasser was no longer employed by the defendant.

67. Significantly, because individual supervisors are not subject to personal liability under Title VII, only employers are liable under the Act. See *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 180-81 (4th Cir. 1998); *Huckabay v. Moore*, 142 F.3d 233, 241 (5th Cir. 1998); *Cross v. Ala. Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1504 (11th Cir. 1995); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-16 (2d Cir. 1995); *Miller v. Maxwell's Int'l*, 991 F.2d 583, 587-88 (9th Cir. 1993).

68. Frontpay is also awarded if reinstatement is delayed or is not possible. See *Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391 (6th Cir. 1990); *Patterson v. Am. Tobacco Co.*, 535 F.2d 257, 269 (4th Cir. 1976).

to recover compensatory and punitive damages and have these claims tried before a jury. Now, hostile environment claimants may recover damages for the harm they sustain while on the job that stems from the harassment itself. Thus, even if the constructive discharge claim is unsuccessful, recovery for hostile environment alone might justify bringing the suit. In many cases, however, proof of constructive discharge and attendant recovery of backpay likely remains crucial: The 1991 legislation capped compensatory and punitive damages at between \$50,000 to \$300,000, depending on the size of the employer,⁶⁹ and the Supreme Court has placed strict limitations on the recovery of punitive damages in cases of vicarious liability where top management is not aware of the misconduct of lower-level supervisors.⁷⁰

In contrast, backpay and frontpay are considered equitable remedies not subject to the caps on recovery.⁷¹ These remedies may still represent the largest heading of monetary relief, especially for highly compensated employees who cannot find comparable work. The significance of recovering on the constructive discharge claim thus must be assessed on a case-by-case basis and remains particularly important for hostile environment claimants who have not suffered other economic loss in the form of discriminatory demotions, unequal pay, or lost promotions.

Beyond delineating the elements of the specific claim for constructive discharge and their remedial consequences, the most vexing problem in this area of law involves harmonizing the doctrinal requirements for constructive discharge with the rapidly developing framework for hostile environment litigation. Although not every case of constructive discharge is predicated on a hostile environment, now that this type of constructive discharge has become the paradigm case, judges find that they must look closely at the two claims and determine whether existing proof requirements continue to make sense in the overall scheme of harassment and disparate treatment law evolving under Title VII.

B. HOSTILE ENVIRONMENT LAW AND THE REQUIREMENT OF NOTICE

The problem of harmonizing claims of hostile environment and claims of constructive discharge came more sharply into focus with the 1998

69. 42 U.S.C. § 1981a(b)(3) (2000).

70. See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544-45 (1999) (finding no vicarious liability for punitive damages if an employer made good-faith efforts to comply with Title VII).

71. See *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852-54 (2001).

Supreme Court decisions in *Burlington Industries, Inc. v. Ellerth*⁷² and *Faragher v. City of Boca Raton*.⁷³ Both these cases involved claims for sexually hostile environments in which the plaintiffs alleged that they were harassed by their supervisors. Although the plaintiffs in each case quit their job in response to the harassment, in neither case was the specific claim of constructive discharge before the Court.⁷⁴ Rather, the issue that principally occupied the Court was the extent to which employers should be strictly liable for the harassment of supervisors. More specifically, the Court framed the issue as whether a plaintiff who suffered “no adverse, tangible job consequences”⁷⁵ could recover against an employer without proof of the employer’s negligence or fault. The plaintiff in *Ellerth* had been told by her supervisor that he “could make [her] life very hard or very easy”⁷⁶ and made other intimidating sexual overtures toward her, but he never carried through on the threats. The sexual harassment of the plaintiff in *Faragher* took the form of repeated offensive touchings and remarks, without express or implied threats of dismissal.⁷⁷ Under the framework prevailing in the lower courts, *Ellerth* could arguably have been classified as a quid pro quo case, subjecting the employer to vicarious liability for the implied threats of retaliation. In contrast, *Faragher* would in all likelihood have been classified as a hostile environment case. When the Court decided the pair of cases, no consensus had emerged among the lower courts as to whether such “pure” hostile environment cases should be governed by negligence or strict liability.

The Court took this opportunity to refine the framework of analysis for sexual harassment litigation. It set the new demarcation line as between cases involving tangible employment actions and all other cases, which would now fall into the category of hostile environment claims. This new demarcation line resolved the category problem of *Ellerth*: Because the case involved only unfulfilled threats with no resulting tangible detriment to the plaintiff, it was placed in the hostile environment category, even though it might have qualified as a quid pro quo claim under the old scheme.

72. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

73. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

74. The question was never even before the Seventh Circuit. The appellate court considered only whether unfulfilled threats to deny a promotion or raise constituted a tangible employment action. *See Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160, 1174–75 (N.D. Iowa 2000) (citing *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 492–94 (7th Cir. 1997) (appeal consolidated with *Ellerth*)).

75. *Ellerth*, 524 U.S. at 747.

76. *Id.* at 748.

77. Although *Faragher* was not litigated as an unfulfilled threats case, the plaintiff did allege that her immediate supervisor had said, “date me or clean the toilets for a year.” *Faragher*, 524 U.S. at 780.

In important dicta, the Court discussed the meaning of “tangible employment action,” a term it imported from Title VII case law in other contexts.⁷⁸ It first focused on the effect that such an action has on employees, noting 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.”⁷⁹ It then theorized on the connection between tangible employment actions and the special power wielded by supervisors. The Court explained that “[t]angible employment actions fall within the special province of the supervisor,”⁸⁰ and that “[w]hen a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. . . . As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury.”⁸¹ Finally, the Court reflected on the connection between tangible employment actions and the official acts of the enterprise, noting that “[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act.”⁸²

This description of tangible employment actions led the Court to conclude that automatic vicarious liability was warranted when the plaintiff alleged such an injury. It was convinced that, in that class of case, the agency relation sufficiently aided the supervisor in carrying out the harassment and that the employer should be liable, even if the supervisor acted against company policy and the employer was not negligent in failing

78. *Ellerth*, 524 U.S. at 761. The Court cited four disparate treatment cases in which the courts denied recovery because plaintiffs had not proven a “materially adverse” employment action. *Id.* For a discussion of the courts’ propensity to establish threshold “adversity” requirements in Title VII cases, see Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1142–47 (1998). Some lower courts, however, have recently drawn a distinction between a “material adverse” action and a “tangible adverse” action. See *Suders v. Easton*, 325 F.3d 432, 434 n.1 (3d Cir. 2003); *Gonzales v. Beth Isr. Med. Ctr.*, 262 F. Supp. 2d 342, 351–52 (S.D.N.Y. 2003).

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

80. *Id.* at 762.

81. *Id.* at 761–62. The Court also noted the connection between a tangible employment action and direct economic harm. The Court explained that “[a] tangible employment action in most cases inflicts direct economic harm.” *Id.* at 762.

82. *Id.* The Court also noted that tangible employment actions, presumably in contrast to less official acts, were documented and subject to review. “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.” *Id.* (internal citations omitted).

to prevent the harassment.⁸³ This pronouncement was in line with the unanimous holding of the lower courts prior to *Ellerth/Faragher* to impose vicarious liability in quid pro quo cases.

The more difficult issue for the Supreme Court was how to approach liability in cases of supervisory harassment that did not culminate in a tangible employment action. For these hostile environment cases, the Court devised a novel solution that imposed vicarious liability on employers but permitted them to plead and prove an affirmative defense fashioned along negligence principles.⁸⁴ The new two-prong affirmative defense was clearly the centerpiece of the Court's ruling and would prove to be the most-litigated aspect of the new jurisprudence on sexual harassment. Specifically, the Court held:

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 preventive or corrective opportunities provided by the employer or to avoid harm otherwise.⁸⁵

The affirmative defense essentially requires the employer to prove that it was not negligent in failing to prevent or correct the harassment and, most significantly for purposes of this analysis, that the plaintiff was negligent in failing to mitigate her own harm. The Court explained that the second prong of the defense would normally be satisfied by a showing that the plaintiff failed to report the harassment via the complaint procedure

83. See *id.* at 764–65. In *Faragher*, Justice David Souter cited additional rationales for holding an enterprise vicariously liable for tangible employment actions. He noted that some courts have adopted a variation of the proxy theory, which holds that a supervisor's act "merges" with that of the employer, and further noted that other courts regard vicarious liability as proper because a supervisor acts within the scope of his authority when making hiring, firing, and promotion decisions. *Faragher v. City of Boca Raton*, 524 U.S. 775, 790–91 (1998).

84. Not all state courts have adopted the *Ellerth/Faragher* approach in interpreting state antidiscrimination statutes. See, e.g., *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 913–14 (Alaska 1999) (imposing vicarious liability for harassment by supervisors even in a pure hostile work environment case); *Pollock v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 766 (Mo. Ct. App. 1999).

85. *Ellerth*, 524 U.S. at 765 (internal citation omitted).

provided by the employer, although it recognized that such a failure might not always be regarded as unreasonable.⁸⁶

It should be noted that the *Ellerth/Faragher* framework applies only to cases in which supervisors create the hostile environment. In the many cases involving hostile environment caused by co-workers or third parties, such as regular customers or suppliers, the courts have never imposed strict liability.⁸⁷ Because only supervisors are plausibly agents of the employer, if the harassment is perpetrated by co-workers, the employer is responsible only for its own negligence in failing to prevent or correct the harassment. In such cases, the courts have required plaintiffs, as part of their prima facie case of sexual harassment, to prove that the employer knew or should have known of the harassment and failed to take prompt corrective action.⁸⁸ Nothing in *Ellerth/Faragher* suggests a departure from that approach.

Since *Ellerth/Faragher*, a significant number of courts have ruled for employers in hostile environment cases,⁸⁹ often on summary judgment motions,⁹⁰ because the plaintiffs failed to report the harassment through designated channels⁹¹—a response that is quite common among harassment victims who seldom file formal complaints.⁹² For such plaintiffs who quit their job in response to harassment by their supervisor and subsequently

86. “[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care . . . is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally . . . satisfy the employer’s burden under the second element of the defense.” *Id.*

87. See, e.g., *Swinton v. Potomac Corp.*, 270 F.3d 794, 803 (9th Cir. 2001) (noting that a negligence standard, not strict liability, applies in cases in which the harasser is a co-worker); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 766 (2d Cir. 1999) (noting that a negligence standard applies in cases of harassment by outsiders, such as customers).

88. See *Faragher*, 524 U.S. at 796–800; LEWIS & NORMAN, *supra* note 49, § 2.22, at 74–77.

89. See *Beiner*, *supra* note 15, at 117, 120–29; Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 708–15 (2000). Cf. Ann Juliano & Stewart Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 587, 591 (2001) (noting that prior to *Ellerth/Faragher*, plaintiffs who failed to report lost seventy-six percent of the time).

90. See, e.g., *Jones v. USA Petroleum Corp.*, 20 F. Supp. 2d 1379 (S.D. Ga. 1998). For an empirical study of post-*Ellerth/Faragher* cases granting summary judgment in favor of employers because plaintiffs failed to use available grievance procedures, see David Sherwyn, Michael Heise & Zev J. Eigen, *Don’t Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265 (2001). See also John H. Marks, *Smoke, Mirrors, and the Disappearance of “Vicarious” Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1435 (2002).

91. See *Jones*, 20 F. Supp. 2d at 1385 (“[T]he new keystone to a sexual harassment claim is notice.”).

92. See *infra* discussion accompanying notes 270–74.

charge that they were constructively discharged, the characterization of their case is important. Specifically, if the case is classified as a tangible employment action, the affirmative defense is not available and their failure to report will not prevent the imposition of vicarious liability. If the case is classified solely as a hostile environment action, however, the affirmative defense is available and the plaintiff's failure to report the harassment could prove fatal to her claim for injuries stemming both from the hostile environment and her subsequent loss of employment.

One last doctrinal wrinkle related to notice requirements that needs to be considered emanates from the substantive law of constructive discharge rather than the Supreme Court's hostile environment rulings. Many jurisdictions have held that for a plaintiff to succeed in proving that conditions have become so intolerable that she was forced to quit her job, she must first give her employer an opportunity to correct the problem.⁹³ The reasoning here is that it cannot be said that working conditions are intolerable unless there is no recourse within the organization.⁹⁴ The courts have stated that, ordinarily, this requires that the plaintiff not assume the worst and not jump to conclusions.⁹⁵ To establish intolerability, the plaintiff is often required to report the problem and give management an opportunity to correct it before concluding that quitting is the only reasonable course of action.⁹⁶

That a possible notice requirement is built into the substantive law of constructive discharge complicates matters because it resembles, but does not duplicate, the affirmative defense available to employers in hostile

93. See *Howard v. Burns Bros., Inc.*, 149 F.3d 835, 842 (8th Cir. 1998); *Kilgore v. Thompson & Brock Mgmt.*, 93 F.3d 752, 754 (11th Cir. 1996); *Wal-Mart Stores, Inc. v. Itz*, 21 S.W.3d 456, 474-75 (Tex. Ct. App. 2000). One court even concluded that a plaintiff had not given management sufficient opportunity to correct the problem for purposes of establishing intolerability under the constructive discharge claim, even though it upheld a jury finding that the employer's response to her complaint had been inadequate with respect to her claim of retaliation. See *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1247 (8th Cir. 1998). *But see Stricker v. Cessford Constr. Co.*, 179 F. Supp. 2d 987, 1005 (N.D. Iowa 2001) (finding that a plaintiff may prove constructive discharge even if she does not report harassment in certain cases); *Pollock v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 764 (Mo. Ct. App. 1999) (stating that a complaint of sexual harassment is not a necessary precondition to a claim of constructive discharge).

94. In *Meritor Savings Bank v. Vinson*, the concurring justices noted that "[w]here a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination and thus to award reinstatement or backpay." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 78 (1986) (Marshall, J., concurring).

95. See *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987); *Beran v. Pizza Hut of Titusville*, No. 96-8254, 1997 WL 842395 (S.D. Fla. Aug. 19, 1997), *rev'd in part, vacated in part* by *Beran v. Pizza Hut of Am.*, 177 F.3d 981 (11th Cir. 1999).

96. See Sara Kagay, Note, *Applying the Ellerth Defense to Constructive Discharge: An Affirmative Answer*, 85 IOWA L. REV. 1035, 1049-50 (2000).

environment cases. Even if plaintiffs succeed in establishing that a constructive discharge is a tangible employment action, they may still fail to establish intolerability (and thus constructive discharge) because they did not report the harassment and provide the employer with an opportunity to correct the problem. Additionally, if the court decides that constructive discharges are not tangible employment actions, there will still be a need to reconcile the two notice requirements. Should the courts borrow the substantive law of constructive discharge and place the burden on the plaintiff to prove that she gave the employer an opportunity to correct the problem? Or does the hostile environment case law supersede the substantive law of constructive discharge and place the burden on the employer to prove that the plaintiff unreasonably failed to report the harassment?⁹⁷

The resolution of this subissue depends largely on how the courts reconcile the doctrines that lie at the intersection of constructive discharge and hostile environment law more generally. Before getting into a more extended analysis of the problems posed by the constructive discharge claim,⁹⁸ I first present a summary of the current split in the courts on the all-important threshold issue of whether a constructive discharge is a tangible employment action.

C. THE SPLIT IN THE LOWER COURTS

Since *Ellerth/Faragher* refined the distinction between tangible employment actions and hostile environment cases, the lower courts have been forced to address the issue of the proper categorization of constructive discharge cases. Two major approaches emerged in the case law, although neither position has garnered widespread support.

The issue will soon be decided by the U.S. Supreme Court, which recently granted certiorari to resolve the split in the circuits.⁹⁹ The Court will likely choose between one of two major approaches that have emerged in the lower courts. One group of cases led by the Second Circuit regards constructive discharges as mere hostile environment cases.¹⁰⁰ These cases stress that because co-workers as well as supervisors can cause constructive discharges, such actions do not represent official acts of the enterprise. The other major approach espoused by the Third Circuit treats constructive

97. See *infra* discussion accompanying notes 329–30.

98. See *infra* Part III.

99. See *Pa. State Police v. Suders*, 72 U.S.L.W. 3105 (U.S. Dec. 1, 2003).

100. See *infra* text accompanying notes 103–11.

discharges as tangible employment actions.¹⁰¹ These cases emphasize that the effect on the plaintiff is the same regardless of whether the supervisor actually fires the employee or takes other deliberate actions that force her to quit. Finally, a middle-ground position on this issue is possible; some lower courts, for example, have approached the question of whether a constructive discharge amounts to a tangible employment action on a case-by-case basis.¹⁰²

1. Constructive Discharges Are Not Tangible Employment Actions

The leading case holding that constructive discharges are not tangible employment actions is *Caridad v. Metro-North Commuter Railroad*,¹⁰³ a Second Circuit case brought by a woman electrician who quit her job after being subjected to unwanted sexual touchings by her supervisor and hostile treatment by her male co-workers. This was a case in which the categorization of the harassment as constituting a mere hostile environment was crucial to the outcome. Because the plaintiff failed to report the incidents, ultimately the employer was able to avoid liability by establishing the *Ellerth/Faragher* affirmative defense.

The *Caridad* court did not believe that a constructive discharge qualified as a tangible employment action because it was not a harm that was invariably caused by supervisors. The court reasoned that “[c]o-workers as well as supervisors can cause the constructive discharge of an employee”¹⁰⁴ and cited a passage from *Ellerth*¹⁰⁵ that distinguished the kinds of harms that could be inflicted by co-workers from those harms that are distinctively associated with the official power of the supervisor. Additionally, the court stressed that a constructive discharge was not an official act of the enterprise, “[a]nd unlike demotion, discharge, or similar economic sanctions, an employee’s constructive discharge is not ratified or approved by the employer.”¹⁰⁶ Finally, the court noted that, although the plaintiff in *Ellerth* alleged that she had been constructively discharged, the

101. See *infra* text accompanying notes 112–24.

102. See *infra* text accompanying notes 125–35.

103. 191 F.3d 283 (2d Cir. 1999).

104. *Id.* at 294.

105. The *Caridad* court said:

A co-worker can break a co-worker’s arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. But one co-worker . . . cannot dock another’s pay, nor can one co-worker demote another. . . . 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.

Id. (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998)).

106. *Id.*

Supreme Court seemed to proceed on the assumption that the plaintiff had not suffered a tangible employment action and that the only debatable issue in the case was whether unfulfilled threats should trigger strict liability.¹⁰⁷

Caridad's short treatment of the proper categorization of the constructive discharge claim is formalist and turns on a characterization of the constructive discharge claim that purports to fit all cases, regardless of the facts. The court seemed most persuaded by its view of the nature of the constructive discharge claim in the abstract, as a kind of hybrid claim that conceivably could flow from all intolerable working conditions, whether imposed by supervisors or co-workers. That the plaintiff in the actual case before it alleged that she quit primarily because of the actions of her supervisor was not dispositive. Instead, the court focused on the hypothetical case in which co-workers or third parties are responsible for a plaintiff's resignation. The court read *Ellerth* as laying down a bright-line rule that disallowed the affirmative defense only in the type of case which, by its very nature, involved abuse by supervisors. The conceptual move in *Caridad* was first to emphasize the uniqueness of constructive discharge as an economic harm not invariably caused by supervisors and then to place it in the residual hostile environment category.

Caridad has been followed by several district courts.¹⁰⁸ These courts have emphasized the lack of official action in constructive discharge cases. They have stressed the unique nature of constructive discharge cases in which it is the employee, rather than the employer, who makes the decision to resign, and often there is "no documentation, no review, and no use of internal procedures."¹⁰⁹ In addition to this formalist argument, a few courts have offered a policy rationale for categorizing constructive discharge as a hostile environment claim rather than a tangible employment action. These courts reason that if employers were vicariously liable for constructive discharge claims, employees could "convert a hostile environment claim

107. *Id.*

108. See *Morton v. Steven Ford-Mercury of Augusta*, 162 F. Supp. 2d 1228, 1244 (D. Kan. 2001); *Scott v. Ameritex Yarn*, 72 F. Supp. 2d 587, 594–95 (D.S.C. 1999); *Powell v. Morris*, 37 F. Supp. 2d 1011, 1019 (S.D. Ohio 1999). See also *Alberter v. McDonald's Corp.*, 70 F. Supp. 2d 1138, 1147 (D. Nev. 1999) (holding that constructive discharge is not a tangible employment action, without citing *Caridad*); *EEOC v. Barton Protective Servs.*, 47 F. Supp. 2d 57, 59–60 (D.D.C. 1999) (holding, prior to *Caridad*, that constructive discharge is not a tangible employment action); *Willie v. Hunkar Labs.*, 724 N.E.2d 492, 505 (Ohio Ct. App. 1998) (Gorman, J., dissenting) (noting that the majority assumes that constructive discharge is not a tangible employment action). In an unpublished opinion, the Sixth Circuit cited the rule in *Caridad* with approval, but concluded that the plaintiff had not established a constructive discharge in any event. *Turner v. Dowbrands, Inc.*, No. 99-3984, 2000 WL 924599, at *1–6 (6th Cir. June 26, 2000).

109. *Scott*, 72 F. Supp. 2d at 595.

into a constructive discharge claim simply by resigning without first seeking redress”¹¹⁰ In their view, such an opportunity would substantially undermine the affirmative defense and “gut the *Ellerth/Faragher* goal of encouraging sensible grievance procedures.”¹¹¹ The courts’ treatment of the policy rationale for allowing the affirmative defense has, however, been quite brief and cursory. Notably lacking is an analysis of how the onerous proof requirements of constructive discharge, aside from the *Ellerth* defense, might affect a plaintiff’s decision to quit her job, or any discussion of how the remedial consequences of constructive discharge, specifically the statutory duty to mitigate damages, might play into a plaintiff’s weighing of her options.

2. Constructive Discharges Are Tangible Employment Actions

The leading case holding that a constructive discharge is a tangible employment action is *Suders v. Easton*,¹¹² the case taken up by the U.S. Supreme Court that will ultimately resolve the conflict in the lower courts. *Suders* is a Third Circuit case involving harassment of a woman employed by the Pennsylvania State police. It was decided nearly three years after *Caridad* and represents the most extensive judicial treatment of the issue.¹¹³ By the time *Suders* was decided, it had become increasingly clear that the outcome of cases could turn on the categorization of the constructive discharge claim.

Suders responds to both the formalist and policy arguments presented in *Caridad* and its progeny. Overall, the opinion emphasizes the actual effect of the harassment on the plaintiff, rather than the abstract nature of the claim of constructive discharge.

Suders first took issue with the narrow definition of “tangible employment action” as an action that by its nature can only be inflicted by a supervisor. In the Third Circuit’s view, the fact that, in a hypothetical case, co-workers could force an employee into resigning was “beside the point.”¹¹⁴ The court reasoned that co-workers were as capable as

110. *Id.*

111. *Id.* (quoting *Jones v. USA Petroleum Corp.*, 20 F. Supp. 2d 1379, 1384 (S.D. Ga. 1998)). See also *Barton Proactive Servs.*, 47 F. Supp. 2d at 60.

112. *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003), cert. granted sub nom. Pa. State Police v. *Suders*, 72 U.S.L.W. 3105 (U.S. Dec. 1, 2003).

113. The *Suders* opinion drew heavily on the analysis presented in *Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160 (N.D. Iowa 2000). The Eighth Circuit followed *Cherry* and held that a constructive discharge was a tangible employment action. See also *Jaros v. Lodgenet Entm’t Corp.*, 294 F.3d 960, 966 (8th Cir. 2002); *Jackson v. Ark. Dep’t of Educ.*, 272 F.3d 1020, 1026 (8th Cir. 2001).

114. *Suders*, 325 F.3d at 457.

supervisors of being the perpetrators of tangible employment actions and did not limit tangible employment actions to such events traditionally associated with supervisors, such as hirings, firings, or demotions.¹¹⁵ For the Third Circuit, the term “tangible employment action” was a “flexible concept” that could encompass “the form of subtle discrimination not easily categorized as a formal discharge or demotion.”¹¹⁶ Under this approach, the touchstone of a tangible employment action is the nature of the harm inflicted on the plaintiff, namely, a “significant change in employment status.”¹¹⁷

In contrast to *Caridad*'s formalist approach, which turns on the abstract nature of the constructive discharge claim, *Suders* is more realist in approach because it stresses actual effects. The court was most persuaded by the fact that a constructive discharge had precisely the same impact on the employee as a formal discharge since, by definition, a constructive discharge transforms the status of the employee from “employed” to “terminated” and causes economic harm.¹¹⁸ Under the *Suders* approach, the fact that it is the employee, not the employer, who takes the final action by quitting does not make it qualitatively different from other discharges.

Suders's response to the argument that a constructive discharge should not be regarded as a tangible employment action because it does not constitute “an official act of the enterprise”¹¹⁹ relies heavily on the substantive law of constructive discharge. The court stressed that it was a “fundamental principle of our jurisprudence that a constructive discharge, once proved, operates as a functional equivalent of an actual termination” and “becomes, for all intents and purposes, the act of the employer.”¹²⁰ It regarded the specialized test for proving constructive discharge—specifically, proof of intolerable working conditions that make it reasonably foreseeable that an employee would resign—as tantamount to a showing that the employer ratified or approved the action. The court believed that even though it is the employee who tenders her resignation, legal proof that suffices to establish the discharge, in the eyes of the law, also ties the act to the employer for purposes of vicarious liability. In

115. *Id.* (“[M]any tangible employment actions may be perpetrated by either supervisors or co-workers. After all, supervisors and co-workers alike can make obscene gestures, lewd comments, sexual propositions, or steal another employee’s clients.”).

116. *Id.* at 456.

117. *Id.* (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)).

118. One exception to this result would be if the employee immediately secures a new job with the same or better compensation.

119. *Ellerth*, 524 U.S. at 762.

120. *Suders*, 325 F.3d at 458.

essence, proof of the substantive elements of constructive discharge establishes that the act is fairly attributable to the employer, presumably without further reference to the law of agency or the law of sexual harassment.¹²¹

Suders also disputed the notion that only actions documented in official records and subject to review by higher level supervisors could qualify as tangible employment actions. The court was concerned that such a narrow view would exclude the classic quid pro quo case in which an employee decides to submit to a supervisor's demand to have sex in order to retain her job. Despite the lack of official documentation in such a case, the court believed that the supervisor "invoked the official authority of the enterprise" when he made the explicit threats. Likewise, in a constructive discharge case, the court reasoned 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."¹²²

Finally, the *Suders* court offered a policy rationale for treating constructive discharges as tangible employment actions on a par with other discharges. Failure to do so, in the court's opinion, "could have the perverse effect of discouraging an employer from actively pursuing remedial measures and of possibly encouraging intensified harassment."¹²³ In other words, employers would be able to accomplish indirectly, and perhaps in a more abusive fashion, what they may not be able to do directly. The court was concerned that if it ruled otherwise and allowed employers to assert the affirmative defense in constructive discharge cases, there would be little impetus for employers to be "watchful of sexual harassment at the earliest possible moment," so as not to lose their legal defense should the victim feel compelled to resign. In contrast to *Caridad*,

121. One state court decision interpreting state antidiscrimination laws, decided before *Suders*, followed the same reasoning, treating constructive discharges like actual discharges. See *Champion v. Nationwide Sec., Inc.*, 545 N.W.2d 596, 600 (Mich. 1996) ("It is well established that the law does not differentiate between employees who are actually discharged and those who are constructively discharged. . . . [O]nce individuals establish their constructive discharge, they are treated as if their employer had actually fired them.").

122. *Suders*, 325 F.3d at 459. In any event, the Third Circuit pointed out that it is not always the case that there is no documentation or review of resignations, whether they are classified as constructive discharges or voluntary quits. Although "the termination will look to the supervisor's superiors like a voluntary quit," the critical fact is the importance of an employee being taken off the payrolls. The courts reasoned that since "there is always some paperwork involved in an employee's quitting, the higher-ups in the company will have some ability to monitor constructive discharges . . ." *Id.* (quoting *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 515 (7th Cir. 1997)).

123. *Id.* at 461.

the *Suders* court did not worry that plaintiffs would rely on constructive discharge doctrine as an excuse to quit and bypass the employer's grievance policy. It felt that the stringent substantive requirements for proving a constructive discharge would make it "highly unlikely that employees will walk off the job at the first sign of harassment and expect to prevail under Title VII."¹²⁴ Instead, *Suders* expressed the opposite concern that if vicarious liability were denied in constructive discharge cases, employers would be able to convert a disparate treatment claim for discriminatory discharge into a hostile environment claim, thereby avoiding strict liability and the incentive strict liability creates for employers to screen, train, and stand behind the acts of supervisors.

3. Some Constructive Discharges Are Tangible Employment Actions

Most courts have not yet subscribed to either of the majority positions and have yet to commit themselves on the categorization of constructive discharge. In a few of the lower court cases, moreover, it is possible to discern a third approach to constructive discharge that takes a middle-ground position, classifying some, but not all, constructive discharges as tangible employment actions. So far, this middle-ground position has been articulated in cases involving non-sexual forms of harassment and discrimination that produce economic injury prior to the time of the plaintiff's resignation. In these cases, the tangible, economic loss preceding the constructive discharge has prompted the courts to regard the constructive discharge as a tangible harm as well.

One important case is *Durham Life Insurance Co. v. Evans*,¹²⁵ decided in the Third Circuit before *Suders*. The plaintiff in *Evans* was a female insurance sales agent who was subjected to sexual and non-sexual forms of harassment before leaving the firm. She alleged that she had been stripped of the support she needed to do her job by hostile supervisors who also denigrated her verbally and touched her in a sexually offensive manner. Initially, the non-sexual harassment in *Evans* took the form of assigning plaintiff a disproportionate number of lapsed policies that had the effect of depressing her pay by fifty percent. It then escalated to taking away her office and secretary and depriving her of essential client files she needed to maintain her policies.

124. *Id.*

125. *Durham Life Ins. Co. v. Evans*, 166 F.3d 139 (3d Cir. 1999).

In his opinion for the Third Circuit panel,¹²⁶ Judge Edward Becker concluded that the loss of the plaintiff's office, the dismissal of her secretary, the missing files, and the assignment of lapsed policies were all tangible employment actions.¹²⁷ Taken together, these conditions justified the plaintiff's decision to quit because they met the standard of intolerability for constructive discharge. This determination entitled the plaintiff to recover a sizeable award for backpay, in addition to the amount she recovered for the mental distress she suffered as a result of the defendant's harassment.¹²⁸ The court was careful to note, however, that it was not establishing "a blanket rule that any constructive discharge is a tangible employment action,"¹²⁹ but merely holding that, in this instance, "the tangible adverse actions . . . would foreseeably have led a reasonable person to resign."¹³⁰

Although he did not elaborate on this point, Judge Becker's opinion seemed to turn on the fact that the discriminatory actions taken by the supervisor prior to the time the plaintiff quit produced tangible economic consequences and thus, in and of themselves, qualified as a "significant change in employment status" under the *Ellerth/Faragher* test.¹³¹ The court did not specify how it would classify a constructive discharge claim emanating from a hostile environment that consisted exclusively of "intangible" sexual harassment that did not produce a direct economic injury.

The *Evans* case-by-case approach has been followed by several courts, some finding that the constructive discharge did not amount to a tangible employment action.¹³² One case, for example, refused to find a tangible employment action when the plaintiff quit after being sexually pursued by her boss.¹³³ The harassment that preceded the alleged constructive

126. No opinion in *Evans* commanded a majority. Judge Leonard Garth took the position that because the plaintiff proved a constructive discharge, she had proved a tangible employment action for which the employer was vicariously liable, essentially adopting the approach that the Third Circuit would later embrace in *Suders*. *Id.* at 149 n.5. Judge Joseph Weis stated that he would allow the *Ellerth/Faragher* defense in "mixed" cases of sexual and non-sexual harassment, but found the employer's grievance procedure inadequate in this case. *Id.* at 161-62 (Weis, J., concurring).

127. *Id.* at 153.

128. The plaintiff recovered \$310,156 in lost earnings and fringe benefits and \$100,000 for emotional distress. *Id.* at 144, 161.

129. *Id.* at 155 n.11.

130. *Id.*

131. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

132. See *Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1231-32 (10th Cir. 2000) (finding a tangible employment action preceding the plaintiff's termination, but no constructive discharge).

133. *Elmasry v. Veith*, No. 98-696-JD, 2000 U.S. Dist. LEXIS 340, at *1 (D.N.H. Jan. 7, 2000) (unpublished opinion).

discharge was mostly of the sexual variety: The plaintiff's boss made sexual comments to her, tried to get her to kiss him, frightened her by his persistence, and embarrassed her because she believed that others might think they were sexually involved. The court read *Evans* as requiring a finding that the tangible act be "an official act of the enterprise" and concluded that the plaintiff had not "experienced an official company act tantamount to a tangible employment action."¹³⁴ In addition to finding no economic harm stemming from the harassment that preceded the constructive discharge, the court seemed to treat sexualized harassment as "unofficial," even when it came from a supervisor and prompted the plaintiff to quit her job. It contrasted the sexual pursuit the plaintiff experienced in that case with the non-sexual harassment in *Evans* and concluded that the sexual harassment was less tangible and egregious than *Evans*, without going so far as to say that it was non-job-related. This case suggests that it would be difficult to establish a tangible employment action when the constructive discharge emanates from harassment that is sexual in nature and appears to the court to be more personal than official or job-related.

The remedial implications of the case-by-case approach are not easy to trace. When the acts that precede the plaintiff's resignation produce economic harm, in and of themselves, the plaintiff presumably may sue for two distinct periods of economic loss, namely, the period before and after termination of employment. In addition, in such a case, the plaintiff may assert a claim for emotional distress stemming from the pre-termination harassment that produced her resignation and conceivably may also seek recovery for any post-termination emotional distress she suffered as a result of her unemployment. *Evans* seemed to treat both the pre-termination economic loss (i.e., loss of compensation from being assigned lapsed policies) and the post-termination economic loss (i.e., loss of backpay) as part of the claim for constructive discharge. The court did not limit the

134. *Id.* at *15–16. The court did not consider whether the plaintiff was constructively discharged because "even if she were constructively discharged, that discharge does not rise to the level of a tangible employment action." *Id.* at *15–16. It is not clear why the court believed that its conclusion as to the tangible employment action issue vitiated the plaintiff's constructive discharge claim. Conceivably, the plaintiff could have prevailed on the constructive discharge claim, even if it were not classified as a tangible employment action, if the plaintiff established the substantive elements of the constructive discharge claim and the employer was unsuccessful in establishing the *Ellerth/Faragher* defense. Curiously, the court allowed the plaintiff's hostile environment claim to proceed to trial, concluding that the employer had not established the *Ellerth/Faragher* defense as a matter of law. *Id.* at *25–28. Because the opinion did specify whether the plaintiff sought backpay, however, it is not clear whether the plaintiff would have gained any additional relief by pursuing a constructive discharge claim.

constructive discharge damages to the loss of backpay; it instead treated the pre-termination economic loss as inseparable from the damages attributable to the constructive discharge. The court also allowed the plaintiff to recover for emotional distress. Significantly, *Evans* apparently regarded this element of damage as part of the constructive discharge claim and as not being subject to the *Ellerth/Faragher* defense. It did not require the plaintiff to establish a claim for hostile environment in order to secure the emotional distress award. Thus, once the constructive discharge was classified as a tangible employment action, the court allowed all damages under that rubric, whether for economic or noneconomic losses.¹³⁵

III. DISSECTING CONSTRUCTIVE DISCHARGE

The three approaches to the proper characterization of the constructive discharge claim that have surfaced in the lower courts are preliminary in the sense that they do not yet offer a way to integrate the substantive law of constructive discharge into the law of harassment. Nor do they give any definitive guidance as to how the precise elements of damages should be matched with the substantive claims. Even at this stage, however, it is possible to extract from these cases the pivotal questions that will likely frame any subsequent analysis of this vexing doctrinal issue. The following section elaborates on the reasoning of the lower courts by analyzing the constructive discharge issue along five doctrinal axes that track the main boundary lines of Title VII's frameworks for litigating individual claims of discrimination.

A. TANGIBLE EMPLOYMENT ACTION/HOSTILE ENVIRONMENT

The split in the courts over the proper characterization of the constructive discharge claim is understandable because, at least superficially, a plausible case can be made for either position. This is because the constructive discharge claim indeed seems to reside at the boundary or cusp of the categorical divide between tangible employment actions and hostile environment claims. A constructive discharge is not the classic type of tangible employment action consisting of a discharge by a

135. The *Evans* solution to remedies does not invariably flow from a case-by-case approach to classifying constructive discharges as tangible employment actions. Because the case-by-case approach scrutinizes the events preceding the plaintiff's termination and distinguishes non-sexual, tangible actions from sexual, intangible actions, this method might suggest that only the tangible injuries—the economic losses, both pre- and post-termination—ought to be recoverable in the tangible employment action/constructive discharge claim, relegating emotional losses exclusively to the hostile environment action.

supervisor in which economic harm flows from official action. Nor, however, is a constructive discharge the classic hostile environment case in which the plaintiff remains in her job and suffers noneconomic harm of the sort that comes with working in a discriminatory environment. To my mind, there is nothing in the *Ellerth/Faragher* definition of a tangible employment action that satisfactorily resolves the classification quandary.

Insofar as the division between tangible employment actions and mere hostile environments constructs a line between formal and informal action of supervisors, employers' arguments that constructive discharges should *not* be classified as tangible employment actions seem strong. In this respect, constructive discharges are like other constructive conditions that are not found in the formal structures and policies of an organization. Employers may argue, with some force, that the hostile environment claim is in reality a claim that imposes liability for constructive conditions: Under relevant Supreme Court precedents,¹³⁶ severe or pervasive harassment is treated as a constructive condition of employment and is actionable under Title VII's ban on discriminatory "compensation, terms, conditions, or privileges of employment."¹³⁷ Under this line of argument, the Supreme Court can be seen as having made the decision to erect more exacting proof requirements with respect to liability for constructive conditions—both in terms of quantum of harm suffered by the employee and the requisite showing of employer responsibility—than it has for cases involving explicit discriminatory terms and conditions. It thus makes sense to assimilate constructive discharge cases to other hostile environment cases in which there has been no deployment of official power or change in the formal structures or policies of the employer.

On the other hand, insofar as the division between tangible employment actions and mere hostile environment claims turns on the distinction between economic and noneconomic harms, the plaintiffs' arguments that constructive discharges should be classified as tangible employment actions are more persuasive. The very recognition of the claim for constructive discharge, under Title VII and other fields of law, signals the need to provide a vehicle for recovery of the substantial economic harm that can sometimes flow from abuse of informal power wielded by supervisors. Under this line of argument, the Supreme Court

136. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752–53 (1998); *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63–67 (1986).

137. 42 U.S.C. § 2000e-2(a)(1) (2000).

precedents may be viewed as placing a higher priority on the recovery of economic loss—the kind of harm most readily associated with employment-related injuries. The greater proof requirements of the hostile environment case, plaintiffs would argue, stem from the Court's greater reluctance to permit recovery for intangible harms—the kind of harm most often linked to private tort claims outside the employment realm. Because constructive discharge undeniably causes economic loss and unemployment is arguably the most tangible loss an employee can suffer from discrimination in employment, it makes sense to assimilate constructive discharges to other types of discharges and treat them as tangible employment actions.

These two opposing lines of argument mirror the approaches taken in *Caridad* and *Suders*. *Caridad*'s emphasis on the fact that constructive discharges are not invariably caused by supervisors and do not represent the official act of the enterprise places primary weight on the “constructive” feature of constructive discharge. In contrast, *Suders*'s emphasis on the economic nature of the harm inflicted by constructive discharge places primary weight on the “discharge” feature of constructive discharge and downplays the informal nature of the supervisory action. The choice between the two approaches seems to turn on which feature of the unique constructive discharge claim is selected as more essential to, or representative of, the claim—a choice that was not made by the Supreme Court in *Ellerth/Faragher*.

As an abstract matter, neither standard provides a secure footing for characterization of the constructive discharge claim. Both the formal/informal distinction and the economic/noneconomic distinction are unstable categories that tend to break down in practice, making it precarious to ground the choice of standard on such logical analysis alone. Like so many other important interpretations of Title VII, the choice of a standard for constructive discharge claims is a matter of judgment that should be informed by policy considerations and rationalized within the larger frameworks of Title VII doctrine.

To demonstrate the instability of the formal/informal distinction, posit a case¹³⁸ in which an employee asserts that she has been subjected to a sexually hostile environment. She complains to her employer, urging management to discipline the harassers and take other steps to change the

138. This hypothetical is based on the facts of *Pollard v. E.I. du Pont de Nemours Co.*, 213 F.3d 933 (6th Cir. 2000), *aff'd*, 532 U.S. 843 (2001). The trial judge awarded the plaintiff backpay, without mentioning constructive discharge.

climate of the workplace. The employee subsequently goes on medical leave and, prior to her scheduled return, is asked to attend a return-to-work meeting with officials from the company. At the meeting, she again insists that the employer rectify the situation and is told that no changes will be made. When she refuses to return to work under those conditions, she is fired. Under those circumstances, should we treat the employee's discharge as an ordinary discharge? Or is this really a case of constructive discharge because, by refusing to return to work, the employee has in effect quit in protest?

If the touchstone of a constructive discharge is its lack of formality, compared to an actual discharge that entails some formal action, the discharge in the hypothetical case should be regarded as an actual discharge, given that the employee was indeed fired by an official of the company. When we scratch the surface a bit, however, we can see that the legality of the firing in this case will likely turn on whether the company had a right to refuse the employee's request to correct the allegedly hostile environment and whether the employee was justified in refusing to return to work until the changes had been made. In other words, it is likely that a court analyzing this case would gauge the legality of the firing by reference to the standards for constructive discharge (i.e., whether conditions were so intolerable that a reasonable employee would quit under the circumstances). This suggests that the case is really a constructive discharge case, despite the formal act of firing.

The point of this hypothetical is to show that formality may not always be an unailing guide to characterizing a case as either an actual or a constructive discharge.¹³⁹ Such instability at the margins of a legal category would not pose a problem, of course, if the imposition of vicarious liability (or conversely, the availability of the affirmative defense) did not depend solely on the characterization of the case as either an actual discharge or a constructive discharge case. In the hypothetical case, the formalist approach taken by *Caridad* suggests that vicarious liability should be imposed, but leaves us without a standard for determining the legality of the firing, since presumably it would be impermissible to borrow the intolerability standard associated with constructive discharge to resolve an actual discharge case.

139. See *McGregory v. Crest/Hughes Techs.*, 149 F. Supp. 2d 1079, 1087–88 (S.D. Iowa 2001) (holding that, as a matter of law, an employee had voluntarily quit after being absent three days, despite a formal letter of separation from the employer); *Mich. Dep't of Civil Rights v. Edward W. Sparrow Hosp. Ass'n*, 377 N.W.2d 755, 763–64 (Mich. 1985) (debating whether a plaintiff who was sent home for improper dress was fired or quit).

However, what seems to be at the crux of the hypothetical case, and perhaps in all cases of constructive discharge, is a question of attribution of responsibility, rather than simply the proper characterization of the nature of the action. Underneath the categorization dilemma lies a contest over who should be held responsible for the loss of the employee's job—the employee or the employer. In the hypothetical case, it seems fair to conclude that the employee should prevail and her employer should be held responsible only if the working conditions were such that they would have afforded the employee or other reasonable employees justification to quit their job. That the employer actually fired the plaintiff strikes me as largely irrelevant in the hypothetical case, given that employers generally have the right to fire employees who refuse to work. Simply because a supervisor's decision to fire an employee might be determinative in another case, and might make it easy to attribute responsibility for the termination solely to the employer, does not mean that such attribution is justified whenever an employer takes the final step and discharges an employee.¹⁴⁰ Once the artificiality of the formal/informal distinction is so exposed, it seems unwise to attach vicarious liability automatically to all actual discharges, and to deny vicarious liability in all cases of constructive discharge, without further examining the policies at stake in attributing responsibility for the discharge to either party.

Similarly, the economic/noneconomic distinction that supports classifying constructive discharges as tangible employment actions is not a simple description of the nature of a plaintiff's injury, but likely also masks difficult questions of attribution of responsibility. It is significant that the court in *Suders* characterized constructive discharges as inflicting "direct economic harm."¹⁴¹ Although it is undeniable that discharges of any sort—whether actual or constructive—cause economic harm, it is debatable whether the economic harm associated with constructive discharges should be regarded as "direct." In a case in which a supervisor's harassment mounts to the point that the plaintiff feels she must quit because she can no longer endure the harassment, it is the psychological pressure placed on the plaintiff that brings about the economic injury. In this respect, the

140. In fact, to take this argument to an absurd level, we could hold an employee responsible for not showing up for work and insisting on working even after she is fired. Because we do not require employees to give their employer such a second chance, however, we attribute the unemployment to the employer's action in firing the employee, even though we do not know whether the employer would have changed its mind and allowed the plaintiff to return to work, if only she had asked.

141. *Suders v. Easton*, 325 F.3d 432, 457–58 (3d Cir. 2003) (quoting *Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160, 1172–73 (N.D. Iowa 2000)).

economic harm may seem more indirect than directly caused by the harassment.

In such a case, however, it may be fair to characterize the economic harm as “direct” if we can confidently place the blame for the plaintiff’s response on the supervisor. If, for example, the supervisor’s action is such that we would have expected an employee to quit in response and we do not see the employee’s action as unforeseeable or as breaking the chain of causation, we are more likely to regard the harm as direct and simultaneously to attribute the termination to the supervisor rather than to the employee. To use a tort analogy, the economic harm is likely to be labeled as direct if the supervisor’s action is viewed as the proximate cause of the harm and the employee’s action in quitting is not regarded as a superseding cause. Just as normative judgments about the behavior of the parties lie beneath assessments of proximate cause in tort law,¹⁴² it is likely that normative judgments also affect whether the employer is seen as inflicting direct economic harm in a case of alleged constructive discharge. In each context, the question of who should be held responsible is intertwined with, and inseparable from, the question of who caused the harm and the description of the nature of the harm itself. If the employer is deemed responsible, we are apt to describe the harm as direct economic harm; if the employee is deemed responsible, we are apt to see and describe the harm as psychological in nature, causing only incidental or indirect economic harm.

Because constructive discharges are not easily categorized as either tangible employment actions or pure hostile environment claims, it is necessary to dig deeper into the structure of the Title VII liability scheme to seek a way out of the category dilemma. Both “tangible employment actions” and “hostile environment” are terms used to classify the two main types of harassment. When the frame is expanded beyond harassment to include other types of biased behavior, we find that discrete acts of discrimination, such as biased discharges, are typically regarded as “disparate treatment,” while a continuing course of discriminatory conduct, particularly if it consists of sexual conduct, is most often labeled “harassment.”¹⁴³ Whether a constructive discharge should be classified as

142. See generally RESTATEMENT (THIRD) OF TORTS § 29, at 2–4 (Tentative Draft No. 3, 2003); DAN B. DOBBS, THE LAW OF TORTS § 180, at 443 (2000) (“The proximate cause issue, in spite of the terminology, is not about causation at all but about the appropriate scope of responsibility.”) (internal footnote omitted); LEON GREEN, RATIONALE OF PROXIMATE CAUSE (1927); MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW § 55.04, at 308–09 (2d ed. 2003).

143. In a case involving the limitations period under Title VII, the Supreme Court has recently drawn a distinction between disparate treatment claims involving discrete discriminatory acts and

a form of disparate treatment or as harassment thus provides another way into the debate.

B. DISPARATE TREATMENT/HARASSMENT

To determine whether a constructive discharge should be assimilated to an actual discharge and regarded as a kind of disparate treatment, it is helpful to consider the situation of an employee who is faced with the prospect of working in a hostile environment. If the employee decides to stay on the job and oppose the harassment by complaining to management, she runs the risk that, instead of responding fairly to her grievance, the employer might retaliate against her, perhaps even discharging her from her position. In such an eventuality, the employee not only would have a claim for the emotional distress she suffered from the hostile environment, but would also be able to assert a claim for retaliatory discharge, seeking recovery for the economic damages she sustained as a consequence of losing her job.¹⁴⁴ Her situation would be akin to the classic quid pro quo harassment case in which a supervisor fires an employee for refusing to have sex with him. Title VII presumably protects the employee from retaliatory discharge in both contexts. The employer may not fire an employee who refuses to remain silent about discriminatory conditions or insist that an employee engage in sex to keep her job. In both cases, it is the employee's resistance to discriminatory conditions and proposals that prompts the retaliation. Moreover, both retaliatory dismissal and quid pro quo harassment clearly result in a tangible employment action—each consists of an actual discharge and causes economic harm.

In this respect, the tangible employment action framework looks very much like the general framework used for retaliation claims. Indeed, in asserting retaliation claims, plaintiffs have long been required to prove that they suffered "adverse action,"¹⁴⁵ similar to the requirement that plaintiffs prove a tangible employment action to qualify for vicarious liability (with no affirmative defenses) under *Ellerth/Faragher*. Most importantly for our purposes, the retaliatory framework is a variation of the basic disparate

claims of hostile environment. The Court explained that "[h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002).

144. Section 704(a) makes it unlawful for an employer to discriminate against an employee because "he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing. . . ." 42 U.S.C. § 2000e-3(a) (2000).

145. For a discussion of the courts' varying interpretation of the adverse action requirement in retaliation cases, see LEWIS & NORMAN, *supra* note 49, § 2.40, at 104-07.

treatment framework, with its key elements of unequal treatment, discriminatory intent, and a causal connection between the discriminatory act and the asserted harm. The retaliation/disparate treatment framework bears little resemblance to the framework for proving hostile environment claims, which requires proof of repeated or severe acts of harassment and does not require the plaintiff to prove that the hostile environment resulted in a tangible harm.¹⁴⁶

The key issue then becomes whether constructive discharges are sufficiently similar to retaliatory discharges that they should also be regarded as disparate treatment rather than harassment. In the constructive discharge situation, of course, the employee faced with a hostile environment decides to quit, rather than continue to endure the discriminatory conditions. Her decision not to persist in opposing the discriminatory conditions arguably distinguishes the constructive discharge from the prior retaliatory situations.¹⁴⁷

Assume, for example, that the employee quits when management fails to remedy the hostile environment after she complains. The plaintiff alleges that she was constructively discharged because she could not reasonably continue to work under such intolerable conditions. If the plaintiff's claim of constructive discharge is credited, it could be argued that her resignation is the equivalent of forced submission. Rather than actively resist the harassment by staying on the job and protesting, the plaintiff in the constructive discharge case has chosen to do what her employer wants her to do, namely, to resign; and, as a consequence, she has been forced to give up a job she otherwise would have kept. By resigning, moreover, the employee in the constructive discharge case relieves the employer of taking the final step to end the plaintiff's resistance to the hostile environment. The practical effect of the plaintiff's quitting means that the employer will not have to retaliate against her by discharging her. For plaintiffs who succeed in proving that they had little choice but to resign, it is not hard to imagine that resistance on their part could well have

146. See, e.g., *Heuer v. Weil-McLain*, 203 F.3d 1021 (7th Cir. 2000) (drawing a sharp distinction between retaliation and hostile environment claims). Although some commentators classify all harassment cases (including hostile environment claims) as disparate treatment cases, the courts do not apply *Hicks's* disparate treatment framework in hostile environment cases. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). It thus makes more sense to regard harassment as a kind of intentional discrimination with a separate framework for liability.

147. Of course, it is possible that an employee could stay on the job but decide not to complain about the continuing discrimination and harassment. Although her silence in such a case could also be interpreted as "submission," particularly in contrast to the employee who quits, such an employee retains the possibility of resisting in the future by staying on the job.

resulted in a retaliatory dismissal by an employer bent on preserving discriminatory working conditions.¹⁴⁸ Plaintiffs could thus argue that there is little meaningful difference between constructive discharge and retaliatory discharge and that they should be treated the same under the law.

A plaintiff who has been constructively discharged might also analogize her situation to an employee who submits to quid pro quo sexual harassment. In both situations, the employer makes an illegal demand and renders it impossible for the plaintiff to stay on the job on her own terms. In the constructive discharge situation, the employer demands that the plaintiff continue to work in a hostile environment; in the quid pro quo case, the employer demands that the plaintiff engage in sex. Although it may seem strange to equate the case of a woman who gives in to her supervisor's demand for sex to that of a woman who quits when faced with intolerable working conditions, in each situation the employee capitulates by behaving the way the supervisor wants her to behave. From the employee's perspective, the powerlessness that accompanies either act of submission may feel the same, whether the employee gives into her supervisor's desire for sex or accedes to her supervisor's desire for her to quit her job.

Analogizing constructive discharge cases to forced submission cases, however, does not solve the legal classification problem. The confusion that currently surrounds constructive discharge cases also clouds the treatment of cases of quid pro quo harassment, where the plaintiff submits rather than resists. Prior to *Ellerth/Faragher*, it was clear that vicarious liability would be imposed in all quid pro quo cases, whether there was retaliation or submission.¹⁴⁹ In this vital respect, such cases were treated like other disparate treatment cases. Under *Ellerth/Faragher*, however, it is not clear how submission cases will now be treated.

The problem arises from the fact that by submitting, rather than resisting, the plaintiff arguably prevents (or preempts) the employer from imposing a tangible job detriment. Take, for example, a case in which the

148. In some cases, of course, a supervisor might not be willing to take that final step of actually discharging the employee in retaliation for her opposition to the hostile environment. The fact that such cases exist, however, does not defeat the argument that an employer who sets out to force the plaintiff to quit is likely to retaliate against the employee who refuses to do so.

149. See *Nichols v. Frank*, 42 F.3d 503, 512–14 (9th Cir. 1994) (holding an employer vicariously liable for granting an employee's leave requests after the employee submitted to sexual conduct); *Karibian v. Columbia Univ.*, 14 F.3d 773, 777–79 (2d Cir. 1994) (holding that a quid pro quo claim is equally valid for a plaintiff who submits to a threat and thus suffers no economic harm).

employer threatens to fire the plaintiff if she refuses to have sex with him, and the plaintiff reluctantly agrees to the sex to keep her job. The loss suffered in such a case is the loss of the plaintiff's sexual autonomy, rather than economic loss associated with unemployment. The employer may argue that, in a submission case, the plaintiff's loss is intangible and does not change her job status, pointing out that she has remained employed throughout. Under this reasoning, submission cases are like cases of unfulfilled threats in that both fail to produce a negative employment consequence. Under *Ellerth/Faragher*, the argument is that neither is actionable unless the plaintiff proves liability under the hostile environment framework, complete with the employer's affirmative defense.

In a significant new ruling, however, the Second Circuit has taken the position that forcing an employee to submit to sexual activity as a condition of retaining the employee's job is a tangible employment action and gives rise to vicarious liability. In *Jin v. Metropolitan Life Insurance Co.*,¹⁵⁰ the plaintiff was sexually abused by her supervisor on a weekly basis. The abuse was particularly severe: He bit, kissed, and fondled her alone in his office, and he forced her to unzip his pants and ejaculated on her.¹⁵¹ For a time, she endured this harassment because he threatened to fire her if she did not comply.¹⁵² She also unsuccessfully tried to avoid him by working during hours when he was not supposed to be present.¹⁵³ Despite the severity of the harassment, Jin lost at the trial level because the jury concluded that the employer had proven the affirmative defense.¹⁵⁴

The Second Circuit reversed and agreed with the plaintiff that forced submission should be treated as a tangible employment action, even though the employer never carried through with his threats to discharge her because the plaintiff decided to comply. In contrast to its stance in *Caridad*, the court took a realist approach and reasoned that the supervisor had effectively used his power over Jin to force her to comply. Even though the supervisor's power could be considered informal, in that it had not been explicitly ratified by the employer, the court chose to regard it as "an act of the employer" because the supervisor had "brought the official power of the enterprise to bear on Jin by explicitly threatening to fire her if she did not submit and then allowing her to retain her job based on her

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

151. *Id.* at 88–89.

152. *Id.* at 89.

153. *Id.*

154. *Id.* at 90–91.

submission.”¹⁵⁵ For the Second Circuit, as long as the consequence of the supervisor’s action was “tangible,” it need not be “adverse” in its negative sense. It sufficed that the plaintiff had received a job benefit by submitting, which the court characterized as the retention of her job.¹⁵⁶

The *Jin* court acknowledged, however, that its ruling would have been different if Jin had resisted her supervisor’s demands and the supervisor had then backed down and not followed through with his threats.¹⁵⁷ Putting the plaintiff to the hard choice of whether to resist or comply is no longer enough to invoke vicarious liability, as it was when the quid pro quo terminology was first used by the courts. Since *Ellerth/Faragher*, the crucial issue is not whether the supervisor threatens to tie sex to job retention, benefits, or detriments, but how the courts characterize the upshot of the supervisor’s illegal demands. Notably, *Jin* did not require the loss the plaintiff suffered to be strictly economic in nature¹⁵⁸ and was willing to characterize retention of a job as an employment benefit.¹⁵⁹ However, we can expect other courts to read *Ellerth/Faragher* as requiring that a plaintiff demonstrate that she suffered an adverse change in employment status before imposing vicarious liability.

The difficulty in developing a compelling rationale to retain vicarious liability in submission cases after *Ellerth/Faragher* is not surprising. It flows from the problem of carving out some types of sexual harassment and treating them like disparate treatment cases, while relegating the rest of the sexual harassment cases to the category of hostile environment, even though both types of cases involve behavior on the part of a supervisor that is not qualitatively different in terms of its severity or its structure. The cases at the boundary line—notably, the submission cases and the constructive discharge cases where plaintiffs give up rather than resist—simply defy easy categorization.

In sum, similar to the classification dilemma surrounding tangible employment actions versus hostile environment, constructive discharge cases do not seem to fall clearly within either the disparate treatment or

155. *Id.* at 98 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998)).

156. *Id.* at 101. The EEOC had taken a similar position, although it is unclear whether it would consider simple retention of a job (as opposed to a promotion or raise in pay) as a job benefit. See EEOC, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS § IVB (1999). Promotions or raises are clearly job benefits, while forced submission under the threat of firing may be argued to be a noneconomic loss that does not change the plaintiff’s job status.

157. See *Jin*, 310 F.3d at 96–97.

158. *Id.* at 96.

159. *Id.* at 95.

harassment category. The best argument for treating constructive discharge cases under the disparate treatment rubric stresses their similarity to other retaliation cases. However, there is no getting around the fact that, in contrast to retaliation cases, in constructive discharge cases, it is the employee herself who makes the crucial decision to quit, and, as a result, leaves us wondering whether the employer would indeed have taken the final step to discharge her. The difference is that, in the constructive discharge situation, the employee plays a role in translating the psychological harm of harassment into the economic harm of unemployment. Disparate treatment's alignment with economic loss and harassment's alignment with noneconomic loss do not tell us what to do with a hybrid case like constructive discharge, which is neither fish nor fowl.

Rather than attempt to classify constructive discharge as either disparate treatment or harassment, it might be useful to focus more directly on the unique features of the claim. The lower courts that have most recently grappled with the proper classification of constructive discharge cases have tended to fasten on one of two distinctive features of the claim that set it apart from typical disparate treatment or hostile-environment harassment claims—namely, that the termination is not the result of any official action on the part of the employer and that the effect is nonetheless the same economic harm that is felt by employees who have been fired by more official means. This suggests that another way to approach the classification dilemma is to expand the frame a bit and ask whether the focus in Title VII cases should be on the official decisionmaking process or should emphasize the effects that employer behavior has on employees.

C. PROCESS/EFFECTS

Behind the technical debate about whether constructive discharges are tangible employment actions lies a more fundamental question about the proper focus and perspective of Title VII law. One view, exemplified by the *Caridad* opinion,¹⁶⁰ is formalist in approach. It is concerned with identifying the formal decisions and policies of an organization and determining whether there is any disparity in treatment along those lines on grounds prohibited by Title VII (i.e., race, color, national origin, sex, or religion). The emphasis here is on the decisionmaking process, specifically the actions and perspectives of those supervisory employees who act on behalf of the employer. The contrasting view, reflected in the *Suders*

160. See *supra* text accompanying notes 103–11.

opinion,¹⁶¹ is more realist in approach. It is concerned with the actual effects of employer behavior (whether formal or informal) on employees and taking into account the perspectives of the targets of the behavior, as well as those who represent the enterprise. The emphasis on effects, rather than solely on formal process, is designed to capture more subtle or hidden forms of discrimination that may nonetheless constitute a significant barrier to an employee's security or advancement in the workplace.

Neither the history nor the contemporary doctrinal structure of Title VII provides a clear answer as to whether the primary focus should be on process or effects in the constructive discharge context. From nearly its inception, Title VII law has been characterized by a dual emphasis on both the decisionmaking process and the effects of employer practices and policies. In the early years, the effects approach was principally identified with claims of disparate impact,¹⁶² offering plaintiffs what looked like a considerable advantage to dispense with proof of discriminatory intent. Disparate treatment claims, on the other hand, centered on ferreting out discriminatory taints in the decisionmaking process, and the courts became preoccupied with developing models for proving discriminatory intent under this theory of liability.

For a variety of reasons, the disparate impact claim has all but vanished from the scene,¹⁶³ despite its codification in the 1991 Civil Rights Act.¹⁶⁴ But that does not mean that the focus on effects has disappeared; instead, when it arises, the emphasis on effects tends to be embedded in subsidiary points of doctrine that are nominally within a disparate treatment framework. In the last decade, a formalist, process-oriented model for interpreting Title VII has emerged as the dominant model of interpretation in the courts and commentary.¹⁶⁵ There is still room, however, for an

161. See *supra* text accompanying notes 112–24.

162. For early commentary on disparate impact theory, see generally Paulette M. Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation*, 46 U. PITT. L. REV. 555 (1985); Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305 (1983); Julia Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL. L. REV. 869 (1985).

163. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 989 (1991) (demonstrating that disparate impact cases accounted for less than two percent of the federal employment discrimination caseload in 1989).

164. 42 U.S.C. § 2000e-2(k)(1) (2000).

165. Under the dominant process-oriented model, any disparity in the terms, conditions, or privileges in employment potentially violates the Act, provided such disparity is attributable to the employer through the actions of its agents or supervisors. See generally White, *supra* note 78.

effects-oriented analysis in particular contexts, and courts continue to shape the details of Title VII doctrine to accomplish specific policy goals.

The doctrinal developments most pertinent to the resolution of the constructive discharge dilemma relate to the evolution of the hostile environment claim. The very first issue the Supreme Court confronted in a sexual harassment case was whether Title VII coverage was limited to quid pro quo cases of harassment in which supervisors imposed an economic penalty on employees who refused their sexual advances. The Court in *Meritor Savings Bank v. Vinson* rejected such a limitation and held that noneconomic injury as well as economic harm were encompassed within the broad language of Title VII's prohibition against discriminatory "compensation, terms, conditions, or privileges" of employment.¹⁶⁶ While recognizing the claim for hostile work environment, however, the Court imposed a threshold requirement that the harassment in such cases must be "sufficiently severe or pervasive," focusing on the level and nature of the harassing conduct and presumably its effect on the targeted employee.¹⁶⁷ In a subsequent hostile environment case, the Court made clear that the severity and pervasiveness of harassment would be judged in part on its effect on the targets, noting that courts should consider whether the harassment interferes with an employee's work performance or negatively affects the employee's psychological well-being.¹⁶⁸

This focus on effects embedded within the severe or pervasive requirement seems largely to favor defendants because it assures that federal courts will not intervene in employment disputes involving noneconomic harassment unless there is substantial harm, or at least the capacity for such harm, as judged by the degree of harassment. In some cases, this threshold requirement means that clearly provable harassment may not be actionable. For example, in *Burlington Industries, Inc. v. Ellerth*, the Court indicated that a supervisor's unfulfilled threats to retaliate against an employee for refusing to accede to sexual advances would not violate Title VII if the threats were judged not to be severe or pervasive.¹⁶⁹ As commentators have recognized,¹⁷⁰ this threshold harm requirement represents a departure from the strict disparate treatment model that would hold employers liable for any difference in treatment

166. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

167. *Id.* at 67.

168. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22–23 (1993).

169. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752–54 (1998).

170. See Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85, 90 (2003); White, *supra* note 78, at 1162.

based on race or sex. Similar threshold harm requirements have cropped up in retaliation cases where some courts have insisted that plaintiffs prove that an employer's discriminatory action resulted in a "materially adverse action" or constituted an "ultimate employment decision" before allowing a claim.¹⁷¹

The courts' recent propensity to use effects analysis to make it more difficult for plaintiffs to prove their case may seem strange to those who have followed the evolution of Title VII doctrine. Historically, effects analysis has been associated with an expansive interpretation of civil rights law, and judges who looked to the effects of an employer's action on employees were often plaintiff-oriented. The threshold requirement originally imposed in disparate impact litigation—namely, that a plaintiff prove that a policy or practice produced a substantial group adverse impact¹⁷²—was not regarded as unduly burdensome to plaintiffs, probably because it was thought to be a small price to pay in return for having unintentional discrimination recognized as actionable under federal law. In contrast, the newly created exceptions for "de minimis" discrimination¹⁷³ in the harassment and retaliation contexts are judicial inventions for limiting liability, without a corresponding benefit to plaintiffs.¹⁷⁴ Commentators arguing for greater protection for plaintiffs now sometimes urge courts to adopt a formalist approach that covers all forms of disparate treatment, without regard to the degree of injury.¹⁷⁵

171. See *Ray v. Henderson*, 217 F.3d 1234, 1240–44 (9th Cir. 2000) (discussing varying standards courts use to define "adverse employment action" in retaliation cases); Ann M. Henry, *Employer and Employee Reasonableness Regarding Retaliation Under the Ellerth/Faragher Affirmative Defense*, 1999 U. CHI. LEGAL FOUND. 553, 560–63 (1999); White, *supra* note 78, at 1164.

172. Early cases included *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Albenarle Paper Co. v. Moody*, 422 U.S. 405 (1975); and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Subsequently, the courts insisted on more compelling demonstrations of group adverse impact, often requiring sophisticated statistical demonstrations. See generally DAVID C. BALDUS & JAMES W.L. COLE, *STATISTICAL PROOF OF DISCRIMINATION* 19–24 (1980).

173. The term "de minimis discrimination" was first coined by Rebecca Hanner White. See White, *supra* note 78.

174. It could be argued, however, that proof of discriminatory intent is easier to establish in harassment cases. In *Ellerth*, the Court stated that "[s]exual harassment under Title VII presupposes intentional conduct," perhaps signaling that there need be no further showing of group-based hostility or animus in this category of cases. *Ellerth*, 524 U.S. at 756. Nevertheless, as demonstrated by the torrent of scholarship surrounding the Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), it is still far from clear whether courts will insist that plaintiffs present evidence of a hostile "state of mind," especially in same-sex harassment cases. See, e.g., Rebecca Hanner White, *There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 WM. & MARY BILL RTS. J. 725 (1999) (arguing that stringent proof of intent does and should apply to sexual harassment claims).

175. See Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination*, 34 GA. L. REV. 1591 (2000); White, *supra* note 78, at 1191.

The current split in the lower courts over the proper classification of constructive discharge cases resembles the old demarcation lines, with the pro-plaintiff opinion in *Suders* stressing the actual effects on employees and the pro-defendant opinion in *Caridad* emphasizing the formal decisionmaking process. Because in constructive discharge cases there is little doubt that the supervisor-caused injury is substantial and material, however, the inquiry tends to center on the legal significance of formal versus informal behavior on the part of supervisors. In *Caridad* and *Suders*, the process/effects debate subtly shades into a contest over whether employers should be held equally accountable for informal conduct on the part of supervisors that has the same effect as formal actions.

The precedents relevant to the question of whether the focus in Title VII constructive-discharge cases should be on formal or informal action are not particularly illuminating. In support of focusing on informal action, plaintiffs could cite to the Court's ruling in *Watson v. Fort Worth Bank & Trust*, which allowed plaintiffs to use disparate impact analysis to challenge subjective practices that had not been reduced to formal policies.¹⁷⁶ *Watson* rejected the argument that effects analysis should be limited to objective, formal policies, recognizing that discretionary practices could be equally as harmful.¹⁷⁷ The case seemed to recognize the need to scrutinize employer behavior that was not embodied in formal policies to make sure that employers did not use an "undisciplined system of subjective decisionmaking" to accomplish results substantially similar to intentional discrimination.¹⁷⁸ In this respect, *Watson* lends support to plaintiffs' argument that employers should be as responsible for constructive discharges caused by informal discrimination as they are for actual discharges that consist of formal action. In both contexts, plaintiffs would argue that the law should be mindful that discriminatory ends can be easily masked and that effects analysis is needed to guard against less obvious forms of discrimination that are expressed in informal supervisory behavior. Whether the question is the applicability of disparate impact analysis or the proper categorization of constructive discharge cases, a focus on effects is a tested method for capturing subtle, more contemporary forms of discrimination.

In response, employers can be expected to point out that the issue in *Watson* was whether to allow the plaintiff to invoke disparate impact theory to challenge the legality of an employer's subjective decisionmaking

176. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988).

177. *Id.*

178. *Id.* at 990-91.

process, and that it did not address the more precise issue of the employer's vicarious liability in a constructive discharge suit alleging disparate treatment. Since the Supreme Court first indicated in *Meritor Savings Bank v. Vinson* that common-law agency principles should serve as a guideline to determine the limits of employer responsibility,¹⁷⁹ courts have understandably been engaged in a process of sorting out supervisory behavior that the law attributes to the employer and behavior that is regarded as too personal in nature to be linked to the employer. It is at this point that the distinction between formal and informal supervisory conduct comes into play. Employers will argue that whatever role effects analysis may play in other Title VII contexts, the Supreme Court in *Ellerth* has mandated a focus on the formal acts of the enterprise in its interpretation of agency principles by describing a tangible employment action as "an official act of the enterprise, a company act."¹⁸⁰ Only in such cases, the argument goes, will it be clear that the supervisor was aided in accomplishing his discriminatory objective by his relationship with his employer. Rebecca Hanner White, for example, has taken such an approach, arguing that vicarious liability hinges not on the material or harmful effects of a supervisor's conduct, but on whether such conduct involves an official action that only supervisors can inflict on their subordinates.¹⁸¹ Under this reasoning, paralleling the approach in *Caridad*, a crucial distinction is that a supervisor elects to pressure a plaintiff to quit through the use of informal tactics rather than through a formal discharge because it is impossible in constructive discharge cases to pinpoint the moment when the supervisor exercises formal power on behalf of the employer.

If the outcome of Title VII vicarious-liability cases were dictated solely by agency principles, arguments such as these, that turn on the existence of formal, official acts, would be quite compelling. However, since its decision in *Meritor Savings Bank*, the Supreme Court has also been careful to note that agency principles are not the only guideposts in Title VII law¹⁸² and that other policy considerations may legitimately come into play in judicial determinations of the limits of employer liability. Indeed, in fashioning the affirmative defense in *Ellerth/Faragher*, the Court did not limit its analysis to agency principles. Instead, it explicitly relied

179. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986).

180. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998).

181. White, *supra* note 78, at 1158.

182. The Court cautioned in *Vinson* that "such common-law principles may not be transferable in all their particulars to Title VII . . ." *Vinson*, 477 U.S. at 72.

on other policy considerations underlying Title VII, namely, the policy in favor of conciliation rather than litigation, the policy of encouraging the development of internal grievance procedures, and the policy of deterring and preventing harassment by encouraging employees to report harassment before it becomes severe or pervasive.¹⁸³ Thus, in resolving difficult issues, such as the proper treatment of constructive discharge cases, the Supreme Court precedents indicate that courts are not bound by agency law, but may also consider the objectives and goals of Title VII as they craft the details of the doctrine. The resort to policy considerations authorized by *Ellerth/Faragher* means that the effects-oriented approach of *Suders* might hold up under Title VII, even if the court's treatment of constructive discharge departs from traditional agency principles.

So far, the policy analysis undertaken by the lower courts in constructive discharge cases has been thin and has not yet provided a convincing case for either position. As mentioned earlier,¹⁸⁴ the principal policy argument that has emerged for treating constructive discharge cases as ordinary hostile environment cases (with the affirmative defense) centers on encouraging potential plaintiffs to report harassment to their employer and to give the employer the opportunity to correct the problem. The concern is that if constructive discharges are treated as tangible employment actions, plaintiffs could convert a hostile environment case into a tangible employment action simply by resigning, without first seeking redress from the employer. This echoes the view of the Supreme Court in *Ellerth/Faragher* that allowing the affirmative defense fosters the development of internal grievance procedures.

The competing policy concern articulated by the court in *Suders* in favor of imposing vicarious liability (with no affirmative defense)¹⁸⁵ bears a strong resemblance to those expressed in disparate impact cases. Similar to the rationale of *Watson*, the court in *Suders* believed that a focus on effects was needed to prevent supervisors from masking their discriminatory conduct in order to accomplish indirectly what they could not do directly.¹⁸⁶ When the spotlight is on the supervisor, rather than the employee, the concern is that unless the law treats constructive discharges on a par with actual discharges, supervisors will have an incentive to engage in a course of conduct designed to force an employee to quit in order to retain the benefits of the affirmative defense.

183. See *Ellerth*, 524 U.S. at 764.

184. See *supra* text accompanying notes 105–11.

185. See *supra* discussion accompanying notes 123–24.

186. See *Suders v. Easton*, 325 F.3d 432, 460 (3d Cir. 2003).

Neither the case precedents of the lower courts nor the policy analyses provide a clear answer to the question of whether the legal treatment of constructive discharge should hinge on the formal versus informal nature of the supervisor's conduct. Although agency law may favor a focus on formal action, the policy of eradicating covert and subtle as well as overt discrimination counsels against giving employers a legal incentive to pressure employees to quit through informal tactics. Moreover, because even this rather abstract debate about the proper focus and perspective of Title VII law soon becomes enmeshed in questions of policy, it is perhaps best to confront the issue more directly and ask whether it is wise as a matter of law and policy to impose strict liability on employers in this particular kind of case.

D. STRICT LIABILITY/NEGLIGENCE

The doctrinal dispute over the characterization of the constructive discharge claim boils down to whether such cases should be governed by strict liability or negligence principles. This is because, in practice, the *Ellerth/Faragher* affirmative defense has proven to be a powerful defense for employers. Even though the burden of proof rests with the employer, recent empirical studies indicate that employers are having considerable success in establishing the defense, often at the summary judgment stage.¹⁸⁷ Moreover, although technically the availability of the affirmative defense should not negate the "strictness" of the employer's liability,¹⁸⁸ courts generally apply the affirmative defense to exonerate employers who act reasonably. Thus, for the most part, when the defense is available, the case is approached as a negligence case. Strict liability is reserved only for cases in which the defense is precluded.

Because the most common sexual harassment case is a hostile environment case and the most common constructive discharge case is one caused by a sexually hostile environment, it would not be surprising if the same set of rules were held to govern each type of case. Put another way,

187. See Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 285–91 (2001); Sherwyn et al., *supra* note 90, at 1268–69, 1288.

188. Read literally, the affirmative defense should not shield an employer who responds reasonably to a plaintiff's complaint of harassment, unless the employee also acted unreasonably. In this respect, the liability framework of *Ellerth/Faragher* is strict, holding non-negligent employers liable to plaintiffs who take reasonable measures to prevent their own injuries. However, there is evidence that in such cases—where both the employer and the employee act reasonably—courts stretch to avoid holding the employer liable, labeling the conduct of even the employee who reports as unreasonable as a matter of law. See Sherwyn et al., *supra* note 90, at 1294–95.

the crucial question becomes whether the law of sexual harassment will subsume constructive discharge cases, except perhaps for those non-prototype constructive discharge cases, such as discriminatory demotion cases, that do not involve sexualized conduct. It thus becomes important to explain why cases of sexual harassment are often treated differently from other discrimination cases and to articulate the reasons why courts are more willing to insulate employers from liability in the harassment context.

Commentators have long noted the disfavored status of sexual harassment as a cause of action.¹⁸⁹ From its inception in the mid-1970s, courts have been reluctant to view sexual harassment as a bona fide form of sex discrimination. Early cases dismissed sexual harassment claims as involving essentially private disputes that bore little relation to employment-related injuries, such as unequal pay or failure to promote.¹⁹⁰ The negative response of courts likely stemmed from a belief that harassers were motivated to act out of sexual desire for a particular woman (i.e., it was personal) and that their conduct was about sex, not about work.

The feminist campaign to recognize sexual harassment as a form of sex discrimination has vigorously contested each of these beliefs, but they tend to die very slowly. Most recently, the image of sexual harassment as a private, non-job-related injury has reemerged in a more subtle, updated fashion in the new elaborate doctrine that specifically governs hostile-environment harassment claims. The end result is that sexual harassment is rapidly becoming a disfavored cause of action, encumbered by special requirements and onerous burdens of proof. For example, to establish a claim for hostile environment harassment, plaintiffs must show a pattern of severe or pervasive harassment that alters the victim's working environment; mere isolated incidents that cannot be said to poison the environment will not suffice. Some courts have interpreted this threshold requirement in a categorical fashion to allow employers a "safe harbor" for harassment that does not appear egregious to the court.¹⁹¹ In the Seventh Circuit in particular, prompted by an influential opinion by Judge Richard

189. See, e.g., Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 818 (1991); B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 3 (1993); Johnson, *supra* note 170, at 93-95.

190. For an analysis of these early cases, see Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 698-701 (1997).

191. For discussions of the safe harbor doctrine, see Anderson, *supra* note 10, at 125, 145-50; Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL FOUND. 277, 286-94.

Posner,¹⁹² the safe harbor doctrine has meant that employees will lose their case—as a matter of law—unless they can point to numerous incidents of sexual touchings, threats, or sexual propositions that qualify as something more than “low level harassment” that has been given immunity under this pro-employer interpretation of the law. It is noteworthy that the courts have not seen fit to allow employers a safe harbor for other forms of discriminatory behavior, at least not as a matter of formal legal doctrine. A decrease in pay, no matter how small, for example, is actionable disparate treatment if traceable to an employee’s sex or race. A discriminatory denial of promotion constitutes a Title VII violation, even if the position desired does not carry a significantly higher salary. For sexual harassment cases, however, courts are often not satisfied with a demonstration of disparity in treatment between the sexes and, in addition, insist on further proof of serious harm and the connection between the harm sustained and the plaintiff’s employment status.

Another prime example of the special, disfavored status of sexual harassment claims is the *Ellerth/Faragher* affirmative defense itself, for it is the only defense to vicarious liability permitted for supervisory behavior under Title VII.¹⁹³ In grappling with the proper treatment of constructive discharge claims, the courts are in effect being called on to decide whether constructive discharge will remain a first-class claim treated like other forms of disparate treatment or will be tainted by the second-class status of sexual harassment claims.

It is revealing that prior to its association with the claim of sexual harassment, the courts had little difficulty imposing vicarious liability for constructive discharge. The shift that may now be taking place from strict liability to negligence has occurred only since the claim of constructive discharge has become linked in people’s mind to sexual harassment. In a kind of guilt by association—specifically, cognitive association with sexual

192. *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 430–31 (7th Cir. 1995). Later, Judge Posner explained that *Baskerville* “created a safe harbor for employers in cases in which the alleged harassing conduct is too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of her sex.” *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996).

193. Because the Court uses the same standard for sexual and racial harassment claims, the disfavored status of sexual harassment claims—the largest class of harassment claims—spills over to affect racial harassment cases. See *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 n.10 (2002) (“Hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment.”). See also L. Camille Hebert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819, 878–79 (1997) (discussing the potential for racial harassment claims to be disadvantaged by the heightened proof requirement in sexual harassment cases).

harassment—more onerous requirements related to employer liability are now being imposed as constructive discharge becomes assimilated to hostile work environment claims.¹⁹⁴ Simply put, constructive discharge is becoming more difficult to prove now that the prototypical case involves sexual harassment and the prototypical plaintiff is a woman.

The claim of constructive discharge has its origins in labor law.¹⁹⁵ In cases starting in the late 1930s, union organizers and supporters were intimidated and harassed by managers in an effort to pressure employees to give up their support for unions and to retaliate against them for supporting the union.¹⁹⁶ The National Labor Relations Board (“NLRB”) first employed the theory of constructive discharge to assure that employers could not accomplish directly what they could not do indirectly, namely, fire an employee for supporting the union.¹⁹⁷ The federal courts embraced the new cause of action for constructive discharge and imposed vicarious liability on employers, without questioning its applicability or expressing concern that managers and supervisors who pressured union-affiliated employees to quit might not be following company policy. Significantly, when the prototypical victim of a constructive discharge was a union supporter, the employer was not given the opportunity to prove that it had acted reasonably or that the supervisor acted against its wishes.

One early leading case is *NLRB v. East Texas Motor Freight Lines*, in which the president of the company instructed a manager to find out whether four truck drivers had become union members, but cautioned the manager not to criticize them if they had.¹⁹⁸ The manager instead “went entirely beyond the instructions,” and when the drivers admitted that they had joined the union, the manager told them he had lost confidence in them and advised them to resign. The NLRB determined that the employees had been forced to resign.¹⁹⁹ In affirming the Labor Board, the Fifth Circuit brushed aside the employer’s contention that it should not be held responsible for the acts of the manager. The court stated that even though

194. See *infra* text accompanying notes 204–14.

195. For a discussion of the evolution of constructive discharge law under the National Labor Relations Act, see Shuck, *supra* note 49.

196. The first NLRB case to use the term “constructive discharge” was *In re Sterling Corset Co.*, 9 N.L.R.B. 858 (1938). See Shuck, *supra* note 49, at 406.

197. *NLRB v. Holly Bra of Cal., Inc.*, 405 F.2d 870, 872 (9th Cir. 1969) (“An employer cannot do constructively what the act prohibits his doing directly . . .”).

198. *NLRB v. E. Tex. Motor Freight Lines*, 140 F.2d 404, 405 (5th Cir. 1944).

199. *Id.* at 404. Because the plaintiffs made no claim for reinstatement or backpay, however, the classic remedies for constructive discharge were not before the court. *Id.* The first federal appellate court case to allow a backpay award in a constructive discharge case was *NLRB v. Saxe-Glassman Shoe Corp.*, 201 F.2d 238, 244 (1st Cir. 1953), which is discussed in Shuck, *supra* note 49, at 408.

the manager “went beyond and contrary to the orders of its president, this cannot absolve it from the rigors of this Act. He was the representative of Motors Lines, and while acting directly within the line and scope of his employment clearly violated the inhibitions of the National Labor Relations Act.”²⁰⁰

Subsequent labor cases simply assumed that vicarious liability would follow a finding of constructive discharge in those instances in which a supervisor’s actions compelled an employee to quit.²⁰¹ One pattern that emerged in these labor cases typically involved a supervisor who interrogated union organizers around the time of an upcoming election.²⁰² Such interrogations had the effect of intimidating the targeted employees, often because they were accompanied by explicit or implicit threats of retaliation or a promise of benefits if the employees agreed to give up their support of the union. The key issue in these cases was *not* whether top management had ratified the supervisors’ actions, for the simple reason that ratification was not necessary to implement remedies for constructive discharge; instead, the focus was solely on whether the supervisor’s conduct interfered with the employees’ right to support the union. Vicarious liability was assumed.²⁰³

When constructive discharge law was imported into Title VII in the 1970s, the automatic imposition of vicarious liability continued to be part and parcel of the doctrine. One early case, for example, dealt with an employee’s claim of religious discrimination.²⁰⁴ The employee objected to being required to attend monthly staff meetings that began with a short religious talk and a prayer delivered by a Baptist minister. When she disclosed her objections to her supervisor, he told her simply to “close her ears”²⁰⁵ and led her to believe that she would not be granted an exemption from attending the religious portion of the meeting. She then decided to quit without seeking further review of her supervisor’s decision. The Fifth

200. *E. Tex. Motor Freight Lines*, 140 F.2d at 405 (internal citation omitted).

201. *See, e.g., J.P. Stevens & Co. v. NLRB*, 461 F.2d 490 (4th Cir. 1972); *NLRB v. Cavalier Olds, Inc.*, 421 F.2d 1234 (6th Cir. 1970); *Retail Store Employees Union Local 880 v. NLRB*, 419 F.2d 329 (D.C. Cir. 1969); *Holly Bra of Cal.*, 405 F.2d at 870; *NLRB v. Vacuum Platers, Inc.*, 374 F.2d 866 (7th Cir. 1967); *NLRB v. Tenn. Packers, Inc.*, 339 F.2d 203 (6th Cir. 1964); *Saxe-Glassman Shoe Corp.*, 201 F.2d at 238.

202. *See, e.g., Retail Store Employees Union Local 880*, 419 F.2d at 329; *Tenn. Packers*, 339 F.2d at 203; *Saxe-Glassman Shoe Corp.*, 201 F.2d at 238.

203. Recent labor cases employ the same approach. *See, e.g., L.S.F. Transp. Inc. v. NLRB*, 282 F.3d 972 (7th Cir. 2002); *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039 (4th Cir. 1997); *NLRB v. Bestway Trucking, Inc.*, 22 F.3d 177 (7th Cir. 1994).

204. *See Young v. S.W. Sav. & Loan Ass’n*, 509 F.2d 140 (5th Cir. 1975).

205. *Id.* at 142.

Circuit found a constructive discharge even though it also concluded that the company had an unpublicized policy of granting exceptions to the mandatory attendance rule, and that the plaintiff's supervisor probably did not have the authority to fire her because she refused to attend. The court reasoned that as long as the supervisor had the apparent authority to interpret company policy, "it would be too nice a distinction to say that Mrs. Young should have borne the considerable emotional discomfort of waiting to be fired instead of immediately terminating her association with Southwestern."²⁰⁶ Similarly, in a race discrimination case,²⁰⁷ the Fifth Circuit imposed vicarious liability for constructive discharge when an employee was harassed by a supervisor and denied equal pay, even though the employee had been urged by a personnel director to complain to the Equal Employment Opportunity Commission rather than resign. Decisions such as these underscore that before the advent of the sexual harassment claim, courts regarded a finding of constructive discharge as carrying with it the consequences of an actual discharge, including the imposition of vicarious employer liability.

It should be noted that the turning point with respect to vicarious liability did not come with the arrival of sex discrimination/constructive discharge cases. To the contrary, some female plaintiffs in the early 1980s were successful in proving constructive discharge and having vicarious liability imposed in sex discrimination cases under Title VII. These cases, however, tended to involve claims of gender-based discrimination other than (or in addition to) sexual harassment and were litigated well before the courts developed distinctive elements of proof to govern sexual harassment claims. Thus, in a 1982 decision in the Ninth Circuit,²⁰⁸ a woman employee established constructive discharge by showing that, when she got married, she was stereotyped as "geographically immobile" and denied entry into a special program. Similarly, a saleswoman proved a constructive discharge by coming forward with evidence showing that upon returning from a six day medical leave following a miscarriage, she discovered that her territory had been given to a new salesman.²⁰⁹

Given these precedents, it is not surprising that in the landmark sexual harassment case, *Henson v. Dundee*,²¹⁰ decided by the Eleventh Circuit in 1982, the court simply assumed that constructive discharge would entail

206. *Id.* at 144.

207. *Calcote v. Tex. Educ. Found., Inc.*, 578 F.2d 95, 96-97 (5th Cir. 1978).

208. *Nolan v. Cleland*, 686 F.2d 806, 807-08 (9th Cir. 1982).

209. *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 888 (3d Cir. 1984).

210. *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982).

vicarious liability and viewed the claim as one alleging a “tangible job detriment,” distinguishable from the ordinary hostile environment case.²¹¹ *Henson* is well known to Title VII lawyers as the case that recognized the hostile environment claim and held that a plaintiff need not prove a tangible job detriment in every sexual harassment case. The U.S. Supreme Court cited *Henson* favorably four years later when it decided *Meritor Savings Bank*²¹² and authorized hostile environment claims. What is significant for our purposes, however, is the aspect of *Henson* specifically relating to constructive discharge. Although *Henson* was never able to convince the courts that she had been constructively discharged, the appellate opinion made it clear that constructive discharge, like claims for quid pro quo harassment, was appropriately decided under a disparate treatment framework that carried strict liability.²¹³ After *Henson*, the conventional wisdom was that strict liability governed quid pro quo cases, while negligence liability governed hostile environment cases. Few took notice, however, that constructive discharge fell on the quid pro quo side of the divide as a case involving a tangible job detriment.

The current dilemma about how to categorize constructive discharge claims and the consequent reluctance of courts to impose vicarious liability is thus a relatively new problem traceable to the cognitive association of constructive discharge with sexual harassment claims. Prior to the development of the hostile environment claim, the courts did not seem concerned that employers might be held responsible for the actions of a wayward supervisor who forced an employee to resign as part of an anti-union or otherwise discriminatory course of action, even when the company professed not to have endorsed such conduct. Particularly in the labor cases, the courts seemed simply to equate supervisor action with employer action, possibly because the judges assumed that employers invariably wished to defeat the union and that there was no real conflict between the supervisor’s action and company policy.²¹⁴ However, when constructive discharge was imported into Title VII and employers began to be held vicariously liable for sex and race discrimination, it was no longer reasonable to assume that supervisors were acting in accord with the

211. *Id.* at 906-07.

212. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67 (1986).

213. *See Henson*, 682 F.2d at 905 n.11, 909-10.

214. Even if this assumption were accurate in most cases, certainly some employers did not intend for their supervisors to violate the law in attempting to defeat the union and thus may not have endorsed the illegal course of action, even if they hoped that the union campaign would be unsuccessful. Even in the union context, therefore, it cannot be said that supervisors who constructively discharged union activists were always acting in the company’s interest or with the approval of management.

company's wishes or policies. Instead, in most cases, employers insisted that the discriminatory acts of supervisors violated company policy. In these Title VII constructive-discharge cases, as in actual discharge cases, it is fair to suppose that vicarious liability was imposed because the supervisor had inflicted economic harm on the employee and had been empowered to do so because of his position in the organization. It is only when the harm inflicted no longer appeared to be economic and job-related that qualms about imposing vicarious liability arose.

Now that the contested terrain is the constructive discharge/sexual harassment case, the legitimacy of imposing vicarious liability on employers has been called into question. Beneath the doctrinal debate surrounding the proper classification of the constructive discharge claim lies a more basic question related to fairness. Although the courts rarely get down to this basic level, it is useful to ask, for example, why an employer should be held vicariously liable for the discriminatory actions of a supervisor who fires an employee against company policy, but not vicariously liable for the actions of a supervisor who sexually harasses, intimidates, and humiliates an employee so that she feels compelled to quit her job.

I suspect that some would see the two cases quite differently and would respond that, in the firing case, the discrimination is job-related and tangible, while in the harassment situation, the supervisor's behavior is personal and the injury is psychological and intangible. What is most striking about this intuitive characterization of the two cases is that it tracks old-fashioned attitudes about sexual harassment and resembles the early reluctance of courts to recognize sexual harassment as a form of discrimination under Title VII.²¹⁵ With the issue so exposed and no longer hidden under layers of Title VII doctrine, it becomes necessary to restate the case for treating sexual harassment as a job-related harm that should not be viewed as private or intimate behavior. Additionally, it is useful to uncover the reasons why harassment that leads to unemployment might be recast as psychological, intangible harm and discuss why such characterization is potentially unfair to plaintiffs.

Much of the campaign to make sexual harassment unlawful has centered on de-privatizing the harm and linking it to other forms of job-related discrimination, such as unequal pay or refusals to promote. Until the mid-1970s, there was no word to describe sexual harassment. It was not in our vocabulary because it had not yet been named as a discrete injury

215. See *supra* text accompanying notes 187–89.

connected to employment.²¹⁶ Employees, of course, had long experienced sexual harassment. When they did, however, it was regarded as a personal problem and a private matter. The most common response of sexual harassment victims was to suffer in silence or quit their job to try to escape the harassment. The disruption of careers, the loss of seniority, and the depression of ambition were some of the invisible consequences of harassment.

As a result of a grassroots movement beginning in the mid-1970s, a new consciousness developed about the way sexual harassment functioned in the workplace, and there was a reassessment of the causes of sexual harassment. Employees, legal advocates, and social activists began to document that sexual harassment had much the same effect as other forms of gender discrimination against women in the workplace—namely, to retard women's advancement on the job and to reinforce gender segregation. They argued that women were understandably reluctant to integrate into all-male jobs because they feared that they would face reprisals in the form of harassment for doing so.²¹⁷ Additionally, victims explained how costly it was to quit a job because of harassment, particularly when there was no guarantee of receiving unemployment compensation²¹⁸ or convincing a prospective employer that you had quit your prior job for a good reason. By the early 1980s, it was clear that sexual harassment was not just a personal problem faced by individual women, but a systemic harm that a high percentage of women would confront over the course of their working lives. A much-cited federal survey of federal workers done in 1981, for example, found that forty-two percent of female employees had experienced some form of harassment during the previous two-year period.²¹⁹

By the mid-1980s, there was a paradigm shift in our cultural and legal approach to sexual harassment. Catharine MacKinnon has recently

216. For discussions of the origin of the term "sexual harassment" and its historical foundation, see Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 *UCLA WOMEN'S L.J.* 37, 38–43 (1993); Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 *GEO. L.J.* 813, 818–26 (2002).

217. See Brigid O'Farrell & Sharon L. Harlan, *Craftworkers and Clerks: The Effect of Male Co-Worker Hostility on Women's Satisfaction with Non-Traditional Jobs*, 29 *SOC. PROBS.* 252, 259 (1982).

218. See Diana M. Pearce & Monica Phillips, *When Sexual Harassment Happens: State Unemployment Insurance Coverage of Workers Who Leave Their Jobs Because of Sexual Harassment*, 5 *STAN. L. & POL'Y REV.* 75, 76 (1994).

219. See UNITED STATES MERIT SYS. PROT. BD., *SEXUAL HARASSMENT OF FEDERAL WORKERS: IS IT A PROBLEM?* 33 (1981). A 1988 update of the survey found the same figure: forty-two percent of women reported that they had been harassed. See UNITED STATES MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE* 11 (1988).

described the change that took place in sexual harassment law as a “transformation from private joke to public weapon.”²²⁰ By uncovering the effects of sexual harassment over the course of women’s working lives, a convincing case was made for treating sexual harassment as a civil rights violation—as a form of gender discrimination that operated in the public sphere of the workplace. When the U.S. Supreme Court decided *Meritor Savings Bank v. Vinson* in 1986, a unanimous Court simply declared that sexual harassment violated Title VII.²²¹ Importantly, the Court did not suggest that because the supervisor’s actions in *Meritor Savings Bank* took the form of sexual propositioning and sexual coercion, his actions should be viewed as private, inspired by sexual attraction to the particular plaintiff and therefore unrelated to the business of the defendant. Instead, by recognizing the claim for hostile work environment, the Court focused on the effects of the harasser’s action on the plaintiff and her co-workers and located the injury squarely in the realm of the workplace.²²²

Supporting the judicial recognition of the claim, the academic literature has supplied an account of the nature and causes of sexual harassment that provides solid justification for de-privatizing the harm.²²³ Although commentators offer varying views of the contours of the injury occasioned by sexual harassment,²²⁴ a common theme throughout the

220. See MacKinnon, *supra* note 216, at 831.

221. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986). The Court categorically stated that “[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.” *Id.*

222. *Id.* at 69–70. As commentators have noted, the Supreme Court has not provided an account of why sexual harassment is actionable, focusing instead on describing what constitutes sexual harassment. See, e.g., Franke, *supra* note 190, at 692. In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Court did, however, discuss Title VII’s based-on-sex requirement in the context of a same-sex sexual harassment case. In an oft-cited passage, the Court indicated that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.” *Id.* at 80. It went on to give two examples of actionable sexual harassment presumably not prompted by the harasser’s sexual desire. The first example involved harassment “motivated by general hostility to the presence of women in the workplace.” *Id.* The second involved “direct comparative evidence” of how the harasser treated both sexes in a mixed-sex workplace, presumably to show disparate treatment in a same-sex harassment case. *Id.* at 81. *Oncale* neither rejected nor endorsed feminist accounts of harassment as a means of perpetuating gender segregation in the workplace and retarding women’s advancement into more desirable lines of work.

223. Most commentators do not believe that sexual harassment is produced by a single cause, but regard it as a multifaceted phenomenon with multiple causes. See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998).

224. Compare Franke, *supra* note 190, at 725–29, with Abrams, *supra* note 223, at 1193–1205. Franke’s gender norm approach emphasizes the role of harassment in policing gender roles and promoting gender conformity, while Abrams places more emphasis on harassment’s effect on women’s status in the workplace. See also MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 252–55 (2d ed. 2003) (discussing various feminist explanations of the harm of sexual harassment).

literature is that sexual harassment is not principally about sexual attraction or sexual desire. In the view of scholars such as Catharine MacKinnon²²⁵ and, more recently, Vicki Schultz²²⁶ and Kathryn Abrams,²²⁷ sexual harassment is not simply the byproduct of a particularized sexual desire, but often stems from abuse of power, including that of supervisors who are able to misuse their position to reinforce their authority over subordinates in the workplace. Early on, MacKinnon argued that tort law was inadequate to handle the problem of sexual harassment because it did not focus on the social dimensions of the problem that went beyond disrespectful or uncivil treatment of a woman by a particular supervisor or co-worker.²²⁸ Schultz has taken the position that harassment functions to perpetuate gender segregation in the workplace and to reserve the most highly rewarded lines of work for men.²²⁹ Likewise, Abrams argues that sexual harassment sometimes functions to preserve male control over the workplace, particularly in newly integrated fields where male control has been called into question.²³⁰ Studies demonstrate that the incidence of sexual harassment is greater in male-dominated workplaces²³¹ and that the most virulent forms of sexual harassment often occur in such settings.²³² In such settings, male workers often harass their female co-workers not principally because they want to have sex with them, but to intimidate the women and make them feel like intruders. Schultz has argued that sexual harassment functions principally to question and to undermine the competency of women to engage in certain kinds of work.²³³

Feminist accounts such as these that downplay the role of individual sexual desire and sexual attraction and link sexual harassment to the maintenance of gender hierarchies in the workplace reinforce the decision to treat sexual harassment as a Title VII violation on a par with other forms

225. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 172–73 (1979).

226. See Schultz, *supra* note 9, at 1686–87.

227. See Abrams, *supra* note 223, at 1206–09.

228. See MACKINNON, *supra* note 225, at 164–74. MacKinnon argued that the highly individualistic character of tort law makes it ill-suited to address the social harm of sexual harassment, claiming that “[t]he essential purpose of tort law . . . is to compensate individuals one at a time for mischief which befalls them as a consequence of the one-time ineptitude or nastiness of other individuals.” *Id.* at 172.

229. See Schultz, *supra* note 9, at 1756–61.

230. See Abrams, *supra* note 223, at 1206–07.

231. See Murrell et al., *supra* note 14 (noting that women working in a male-dominated setting experience higher levels of unwelcome sexual overtures than women working in a more gender-integrated workplace).

232. See Schultz, *supra* note 9, at 1750, 1832–39.

233. *Id.* at 1762–69.

of disparate treatment. Once we connect sexual harassment, gender segregation, and the lack of advancement of women in the workplace, holding employers strictly liable for harassment by supervisors seems less controversial and not so different from imposing liability for other work-related harms inflicted by supervisors. Additionally, when Congress in 1991 expanded remedies for Title VII violations to include compensatory and punitive damages and the right to a jury trial,²³⁴ one of its chief objectives was to provide fuller relief for harassment victims,²³⁵ thus affirming the view of sexual harassment as a serious form of employment discrimination that warrants federal intervention.

The de-privatization of sexual harassment, however, has been an uneven and contested process. There continues to be a vein of scholarship that insists that sexualized behavior is unique and should not be treated as a form of sex discrimination.²³⁶ More common, however, is an attitude that regards sexual harassment skeptically, without going so far as to suggest that it cannot constitute sex discrimination. As discussed earlier,²³⁷ this skepticism has manifested itself in the creation of judicial doctrines that impose more stringent requirements on sexual harassment victims than other discrimination claimants and has resulted in the disfavored status of the claim. In many opinions, courts require plaintiffs to prove with specificity and concreteness exactly how sexual harassment negatively affected their job status, and they are reluctant to impose liability unless they are convinced that upper management knew of the harassment and consciously decided not to act to correct it.²³⁸ Absent such proof, these courts seem to resort to a default position, namely, that sexual harassment, even when carried out by a supervisor against a subordinate, is essentially a private matter that need not concern employers.

Thus, the hesitancy to impose vicarious liability in constructive discharge cases may reflect the larger skepticism toward sexual harassment claims and the hard-to-shake belief of some courts that sexual harassment is private behavior. Moreover, the cognitive link that has been forged between constructive discharge and sexual harassment also likely affects the way in which some courts categorize the nature of the harm. As

234. See 42 U.S.C. § 1981a (1994).

235. See Beiner, *supra* note 187, at 334–38 (discussing the statute's legislative history).

236. See Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 349–50 (1990).

237. See *supra* text accompanying notes 189–94.

238. See, e.g., *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 437 (7th Cir. 2000); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826–27 (6th Cir. 1997); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir. 1995).

mentioned earlier,²³⁹ as a practical matter, it is impossible to separate the psychological from the economic effects of constructive discharge. By definition, when an employee is constructively discharged, it is the psychological impact of the supervisor's actions that compels the employee to quit and to suffer the economic loss of unemployment. Because the harm inflicted clearly includes economic harm, it is odd to view constructive discharge as an intangible injury (i.e., not a tangible employment action) and to treat these cases as if the employee had stayed on the job and continued to receive a paycheck.

The tendency of some courts to erase the economic harm and to approach the case as if it involves only psychological harm fits with a more general phenomenon that pairs the nature of the injury to the image of the prototypical plaintiff. There is a tendency—apparent most readily in the law of torts—to categorize injuries cognitively linked to women as intangible and psychological, while injuries associated with men are more likely to be regarded as tangible, material, and economic.²⁴⁰ Particularly in cases in which the injury defies easy categorization, we may decide how to categorize a loss by looking at who suffers the loss, rather than simply at the objective effects of the activity or conduct. Consistent with prevailing stereotypes related to femininity and masculinity, this perceptual process categorizes injury sustained by women as psychological and noneconomic, even though the same injury could, as a matter of logic, be characterized as material and economic. The categorization, moreover, has significance in the law since economic injuries are often more fully protected than noneconomic losses. Thus, claims cognitively associated with women have a lower value than claims associated with men and their injuries. Although the devaluation persists whether the individual plaintiff is a man or a woman, overall it has a negative effect on women as a group since they are more likely to assert claims cognitively associated with women.²⁴¹ This hierarchy of claims privileging economic over noneconomic claims thus serves to limit recovery for female plaintiffs and constitutes a subtle but injurious form of gender bias.

239. See *supra* text accompanying notes 141–43.

240. For more in-depth development of this thesis, see generally CHAMALLAS, *supra* note 224, at 199–206; Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 491–530 (1998); Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 816–19 (1990).

241. For more extensive discussion of the general features and dynamics of devaluation, see Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 772–77 (2001).

Now that constructive discharge is linked to sexual harassment, courts may be more inclined to regard constructive discharge as a claim for intangible or psychological loss because the prototypical victim is a woman. Support for this hypothesis can be found in the history of the claim: When the prototypical victim was a union organizer (most often imagined to be a man), the courts readily imposed vicarious liability and treated constructive discharge as a tangible injury;²⁴² when the claim shifted and the prototypical victim became a woman, the courts balked at imposing vicarious liability and were more likely to recast the injury as psychological in nature.

In the final analysis, the choice of strict liability versus negligence in constructive discharge cases may have less to do with the nature of the claim than with more general attitudes toward sexual harassment and injuries linked to women. The danger is that courts will approach the categorization of constructive discharge claims formalistically without an appreciation of the history of the claim and the potential for gender bias in the categorization process. When constructive discharge is treated as a separate cause of action, there is a tendency simply to place the claim in one of two boxes—disparate treatment or harassment—and to try to match the liability rules to the frameworks already established (i.e., negligence for harassment and vicarious liability for disparate treatment). To avoid this difficult choice, it is possible to reorient the debate away from constructive discharge as a separate cause of action requiring proper classification. The final way to approach the categorization dilemma involves treating constructive discharge solely as a right to receive backpay and frontpay—that is, as a matter of remedial rather than substantive law.

E. SUBSTANTIVE LAW/REMEDY

Part of the complexity associated with constructive discharge stems from treating it as a separate cause of action when it could just as readily be viewed as designating a plaintiff's right to receive backpay after proving that her unemployment was caused by discriminatory action on the part of her employer. Viewed solely as a remedy, constructive discharge can be seen as flowing from either a hostile environment or a discrete discriminatory action, such as a demotion or refusal to promote. Additionally, when constructive discharge is viewed as a remedy, the plaintiff's right to recover would seem principally to depend on proof of causation. The critical question would be whether the hostile environment,

242. See *supra* text accompanying notes 195–99.

demotion, or other discriminatory act caused the plaintiff to quit and suffer the economic loss associated with unemployment.

What makes constructive discharge appear to be a separate cause of action rather than a remedy, however, is the requirement that, as an initial matter, the plaintiff must prove that her working conditions are intolerable.²⁴³ By specifying this requisite threshold of proof before the plaintiff is entitled to relief, the rules governing constructive discharge look more like the elements of a distinctive claim, rather than simply a label for economic loss stemming from unemployment. Indeed, before recognition of the hostile environment claim and the 1991 Act's addition of compensatory and punitive damages,²⁴⁴ the intolerability requirement functioned as an absolute limitation on monetary recovery for plaintiffs who quit in response to a hostile environment. Now that a plaintiff may recover monetary damages for psychological losses traceable to a hostile environment, however, the hybrid quality of constructive discharge as part remedy/part cause of action is more apparent.

To get at this aspect of the classification dilemma surrounding constructive discharge, it is necessary to take a closer look at the intolerability requirement. On closer inspection, the intolerability requirement turns out to be shorthand for the standard definition of constructive discharge. Specifically, courts look to see whether the supervisor has made working conditions so intolerable that a reasonable person would have felt compelled to resign.²⁴⁵ As interpreted by the courts, intolerability has two main components: (1) an objective showing of aggravated discrimination or harassment, often described as more than a mere violation of law, and (2) efforts on the part of the plaintiff to mitigate harm by giving the employer an opportunity to correct the situation.²⁴⁶ The reasonableness inquiry embedded in the two prongs of the intolerability requirement thus focuses simultaneously on the quality of the defendant's behavior and on an assessment about whether the plaintiff's response was justified under the circumstances. Some critics have argued, moreover, that in practice, the spotlight tends to be on evaluating the plaintiff's response, eclipsing the pivotal causal role played by the discriminatory conduct of the

243. For a discussion of the intolerability requirement, see *supra* text accompanying notes 47–50.

244. See *supra* text accompanying notes 67–71.

245. The specific formulations of the intolerability requirement vary. Some courts describe the standard as requiring proof that “working conditions are so difficult or unpleasant that a reasonable person in the employee’s shoes would resign.” *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 887–88 (3d Cir. 1984).

246. See *Shuck*, *supra* note 49, at 416–30.

employer.²⁴⁷ Calls for eliminating or modifying the intolerability requirement thus tend to converge with the view that constructive discharge should be treated as a remedy, rather than an independent cause of action, and that recovery should be allowed once the plaintiff proves that the employer's unlawful action caused her to resign.

For our purposes, what is striking about the intolerability requirement is how closely it maps the requirements for recovery under the hostile environment framework. Under each framework, the plaintiff has both a heightened proof requirement—severe or pervasive for hostile environment and intolerable for constructive discharge—and a special mitigation duty. Notably, however, there are important differences in detail. As discussed earlier,²⁴⁸ the courts have interpreted the threshold requirement of proof in hostile environment cases as less demanding than in constructive discharge cases, and the notice requirement built into the intolerability requirement is less structured than that specified in the *Ellerth/Faragher* affirmative defense.²⁴⁹ Finally, under the intolerability requirement, the plaintiff bears the burden of showing that she explored alternatives before quitting, while under *Ellerth/Faragher*, it is the employer who must prove each prong of the affirmative defense, including the plaintiff's unreasonable failure to mitigate the harm by reporting.²⁵⁰

The problems of coordinating the requirements for proving intolerability under the law of constructive discharge with the new hostile environment framework suggest that it may be time to reconsider the wisdom of retaining the intolerability requirement in the context of Title VII. The debate over whether constructive discharge should be treated as an independent cause of action or as a remedy is thus intertwined with the question of whether courts should continue to require plaintiffs to prove more than an employer's violation of the law before they are allowed to quit their job in response.

The fate of the intolerability requirement should ultimately rest on the strength of the policy reasons behind its adoption in the first place. As

247. See Lieb, *supra* note 49, at 176 (arguing that the focus of inquiry should be on “the conduct of the employer and not the response of the employee”). See also Shuck, *supra* note 49, at 443.

248. See *supra* text accompanying notes 44–48.

249. Under *Ellerth/Faragher*, the inquiry is narrowed to whether “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). The notice requirement embedded in the intolerability requirement is more generally addressed to the question of whether, under the circumstances, working conditions are so oppressive that there is effectively no recourse within the organization. See *supra* text accompanying notes 93–96.

250. See *supra* discussion accompanying notes 84–85.

elaborated in the early Title VII cases, the principal function of the intolerability requirement was to encourage plaintiffs to mitigate their damages by staying on the job and complaining about the objectionable conditions rather than quitting. In the landmark case of *Bourque v. Powell Electrical Manufacturing Co.*, discussed earlier,²⁵¹ the court explained the rationale behind requiring the plaintiff to stay on the job, rejecting the plaintiff's contention that only the "foolhardy" would seek legal redress from their current employer:

She [plaintiff] contends, however, that to require employees suffering illegal discrimination to seek legal redress while remaining in their jobs would contravene the policies served by Title VII because then only "foolhardy" victims would seek relief from discrimination. We disagree. Title VII itself accords legal protection to employees who oppose unlawful discrimination. Moreover, we believe that society and the policies underlying Title VII will be best served if, whenever possible, unlawful discrimination is attacked within the context of existing employment relationships.²⁵²

The *Bourque* court believed that it was reasonable to require the plaintiff to stay on the job and complain because the anti-retaliation provisions of Title VII served to protect the employee who lodged a complaint or otherwise opposed discrimination. However, the anti-retaliation protection afforded under Title VII may not be as potent as the *Bourque* court suggested.²⁵³ Recently, the Supreme Court has held that plaintiffs who complain about allegedly discriminatory incidents that could not reasonably be regarded as rising to the level of a hostile environment (i.e., harassment that is clearly not severe or pervasive) are not entitled to protection against retaliation based on those complaints.²⁵⁴ The Court also expressly left open the question of whether there is protection against retaliation for employees who reasonably and in good faith believe that they are the victims of actionable discrimination when it is later determined

251. See *supra* text accompanying notes 56–58.

252. *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65–66 (5th Cir. 1980) (internal citation omitted). This passage has been influential and cited by numerous courts. See, e.g., *West v. Marion Merrell Dow, Inc.*, 54 F.3d 493, 498 (8th Cir. 1995); *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 342–43 (10th Cir. 1986); *Clark v. Marsh*, 665 F.2d 1168, 1173 (D.C. Cir. 1981).

253. In addition to the impact of *Clark County School District v. Breeden*, 532 U.S. 268, 269–71 (2001), a few circuits do not allow a plaintiff to sue for retaliation unless the employee proves that the retaliation affects an "ultimate employment action." See *Henry*, *supra* note 171, at 553, 560 (discussing the standard for proving retaliation in the Fourth, Fifth, and Eighth Circuits). In these jurisdictions, an employee who is assigned more adverse job duties or receives a negative evaluation because she filed a complaint receives no legal protection from retaliation. *Id.* at 554.

254. See *Breeden*, 532 U.S. at 269–71.

that the employer is not in fact liable for discrimination.²⁵⁵ Although *Breeden* may ultimately prove not to be a significant precedent—it is a short per curiam opinion in which the plaintiff alleged only a very weak case of discrimination—it does suggest that employees must exercise some caution before they complain about discrimination to their employer. In addition to the very real possibility that the employer might nonetheless decide to violate Title VII and retaliate against the complaining employee,²⁵⁶ *Breeden* now allows employers in some cases to retaliate without running afoul of the law. Thus, the confidence that the *Bourque* court expressed that an employee had nothing to lose by complaining now seems misplaced.

More importantly, it is questionable whether the imposition of *Bourque*'s duty to mitigate by staying on the job is consistent with Title VII's statutory scheme. As mentioned earlier,²⁵⁷ Title VII has a special duty-to-mitigate provision that requires that any backpay award be reduced by any amount that the plaintiff earned or with reasonable diligence could have earned after she left her job.²⁵⁸ The statutory duty-to-mitigate requirement is well designed to prevent employees from quitting their job precipitously because they must make an effort to secure comparable employment and will be denied recovery if they do not make a sufficient effort. Coupled with the fact that plaintiffs do not know whether they will ultimately prevail in litigation, the duty to mitigate makes quitting a risky proposition.

Significantly, courts have imposed the burden of proving the amount to be deducted under the statutory duty to mitigate on the employer.²⁵⁹ The policy behind the Act appears to be that, while plaintiffs must take steps to limit their losses, it is the employer who should bear the risk that its illegal conduct might cause economic losses. When in doubt, it is the employer who has violated the Act who should shoulder the loss.

In contrast, *Bourque* holds that an employee must mitigate her loss by staying on the job even when the employer has violated the Act. It further places the burden on the employee via the intolerability requirement to

255. *Id.* at 270.

256. *See infra* text accompanying notes 279–81 (discussing the threat of retaliation against employees who complain).

257. *See supra* text accompanying notes 64–66.

258. 42 U.S.C. § 2000e-5(g)(1) (1994).

259. *See Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 591 (5th Cir. 1998), *vacated on grant of reh'g en banc*, 169 F.3d 215 (5th Cir. 1999), *reinstated in relevant part*, 182 F.3d 333 (5th Cir. 1999); BARBARA LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 615 (1992).

prove that she gave the employer an opportunity to correct the discriminatory conditions. Beyond simply declaring that society is better served when discrimination is attacked within the context of existing relationships, *Bourque* did not explore the question of whether it made sense to require a victim of discrimination to stay and fight when it is likely that the employment relationship has already been damaged to a significant extent by the very discrimination experienced by the plaintiff. In this respect, the *Bourque* rule is reminiscent of the now generally discredited spousal immunity provisions that attempted to preserve the harmony of a marriage by denying an abused or wronged spouse the right to sue the other spouse in court.²⁶⁰ Critics of the immunity provisions pointed out that there was often little harmony to preserve when the couple had reached a point where suing seemed a viable option.²⁶¹

It seems overly optimistic to assume that a complaint from within will succeed in transforming an environment for the original victim. Often, both the employee and the employer would prefer to sever the relationship, and the best that can happen is that the environment will be reformed for the next woman or member of a racial minority who thereby becomes the beneficiary of the prior dispute. A plaintiff need not stay on the job to secure this improvement for the next wave of workers, however. Indeed, management may feel more inclined to institute changes when it can do so without the reforms being traced to a prior complaint of discrimination by an existing employee. *Bourque*'s duty to mitigate, above and beyond the statutory duty to mitigate, seems like overkill.

Whether proof of intolerability ought to be retained as a prerequisite to recovery for constructive discharge thus largely turns on whether the law should impose a duty on plaintiffs to stay on the job and attempt to mitigate their harm by utilizing the employer's internal grievance procedures. Significantly, this is basically the same policy question underlying the debate over whether constructive discharge should be classified as a tangible employment action, insofar as the debate turns on whether employers should be allowed to escape liability by proving the *Ellerth/Faragher* affirmative defense. Ultimately, whether the employee's duty to report ought to be extended to cover cases of constructive discharge is the most critical policy question that the courts must confront when they finally decide on a doctrinal approach.

260. For a discussion of the evolution of the spousal immunity doctrine, see DOBBS, *supra* note 142, § 279, at 751–53 (2000).

261. See Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 445–48 (1989).

IV. THE REPORTING REQUIREMENT

As the foregoing analysis suggests, the current debate over the proper classification of constructive discharge masks an important difference of opinion over the legal significance of a plaintiff's use, or failure to use, an employer's internal grievance procedure. Crucial to deciding whether constructive discharge/hostile environment cases should be treated like other hostile environment cases is the policy question of whether employers should be able to assert the *Ellerth/Faragher* affirmative defense in this type of case. Recently, the *Ellerth/Faragher* defense has been the subject of criticism by commentators who have disagreed with the prevailing interpretation of the defense by the lower courts.²⁶² The thrust of the criticism is that, although the burden of proof is technically on the employer, many courts merely require the employer to have a written antidiscrimination policy in place and have imposed "an implicit burden" on the plaintiff to "disprove the second element of the affirmative defense"²⁶³ and establish that she acted reasonably in not utilizing the internal grievance process. The case then turns on the reasonableness of the plaintiff's response to harassment, with many courts faulting the plaintiff for delaying in reporting, not reporting to the proper person, or otherwise not precisely following the prescribed procedure.²⁶⁴ Although the *Ellerth/Faragher* defense would permit the factfinder simply to reduce damages to reflect the plaintiff's failure to mitigate her injury,²⁶⁵ the courts have generally treated it as a complete defense and have fully insulated employers who prevail on this issue.

What is most notable about the contemporary doctrine reflected in the lower court rulings interpreting *Ellerth/Faragher* is the high degree of importance placed on reporting harassment to employers. Although it has long been established that Title VII imposes no exhaustion-of-remedies requirement on plaintiffs prior to filing suit,²⁶⁶ many courts seem to start from the proposition that it is only fair to require an employee to report

262. See, e.g., B. Glenn George, *If You're Not Part of the Solution, You're Part of the Problem: Employer Liability for Sexual Harassment*, 13 YALE J.L. & FEMINISM 133, 134-35 (2001); Grossman, *supra* note 89, at 708; Marks, *supra* note 90, at 1422-23.

263. See Beiner, *supra* note 187, at 280-81, 289.

264. See Beiner, *supra* note 15, at 126-31; Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 21 (2003) ("[C]ourts have strictly enforced the victim's duty to complain.").

265. The Supreme Court explicitly stated that the affirmative defense could be raised as a defense "to liability or damages." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

266. See *Patsy v. Bd. of Regents*, 457 U.S. 496, 498 (1982).

harassment and give the employer an opportunity to correct it.²⁶⁷ Moreover, courts may expect employees to report harassment regardless of whether the harasser is the highest person in authority at that establishment²⁶⁸ and regardless of whether the harassment is so pervasive that it appears to be part of the everyday culture of that workplace.²⁶⁹

In marked contrast to the expectations reflected in the legal doctrine, the social science research on employees' responses to harassment has consistently found that very few victims pursue complaints through official grievance procedures. In the most recent survey of federal workers, for example, only 12% of harassed workers reported their harassment.²⁷⁰ An earlier study of federal workers yielded similar results, with only 11% of workers reporting their harassment to a higher authority and only about 2.5% using formal complaint channels.²⁷¹ The figures are no higher in the academic world: Despite surveys indicating that 20% to 30% of college women experience sexual harassment,²⁷² academic institutions often process only a handful of formal complaints each year. Perhaps most telling is a recent study that showed that, even among employees who ultimately sue their employer for liability for workplace harassment, nearly half (42%) did not report the harassment and only 15% did so in a timely manner.²⁷³ There is thus a considerable gulf between the legal expectations of courts and the actual behavior of employees.²⁷⁴ It is noteworthy that it is atypical for victims to file an internal complaint even when their complaint is grievous enough to make them willing subsequently to embark on legal action.

267. In some notable instances, however, when courts have admitted expert testimony on the reasons behind victims' reluctance to report, they have excused the plaintiff's behavior and allowed recovery. See Donna Shestowsky, Note, *Where Is the Common Knowledge? Empirical Support for Requiring Expert Testimony in Sexual Harassment Trials*, 51 STAN. L. REV. 357, 380-84 (1999).

268. See, e.g., *Elmasry v. Veith*, No. 98-696-JD, 2000 U.S. Dist. LEXIS 340, at *22 (D.N.H. Jan. 7, 2000) (unpublished opinion); *Reynolds v. Golden Corral Corp.*, 106 F. Supp. 2d 1243, 1251-52 (M.D. Ala. 1999); *Lintz v. Am. Gen. Fin., Inc.*, 50 F. Supp. 2d 1074, 1082-83 (D. Kan. 1999); *Jones v. USA Petroleum*, 20 F. Supp. 2d 1379, 1384 (S.D. Ga. 1998).

269. See *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 809-10 (7th Cir. 1999).

270. See UNITED STATES MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES* 30 (1994).

271. See Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 AM. P.SYCHOLOGIST 497, 498 (1991).

272. *Id.* at 497-98; Louise Fitzgerald, Sandra L. Shullman, Nancy Bailey, Margaret Richards, Janice Swecker, Yael Gold, Mimi Ormerod & Lauren Weitzman, *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152, 155, 170 (1988).

273. Sherwyn et al., *supra* note 90, at 1280.

274. See Grossman, *supra* note 264, at 8.

The question boils down to whether courts should regard behavior that is typical as nonetheless unreasonable. Should courts continue to insist that employees who do not file internal reports of harassment forfeit their right to legal recovery? So structured, it is hard to avoid framing the key question as, “Why don’t victims complain?” The question bears an eerie similarity to the question often asked of domestic victims—“Why didn’t she leave?”²⁷⁵—because beneath the question lies the suspicion that, if the abuse was real or really serious, surely the victim’s response would have been more assertive. In the harassment context, employers and courts may be lulled into believing that because there are few internal complaints, there are no systemic problems.

The empirical research that has been conducted on the issue of reporting reveals two clusters of reasons to explain victims’ reluctance to report. The first cluster involves fear. The leading researchers cite multiple aspects of fear: “fear of retaliation, of not being believed, of hurting one’s career, or of being shamed and humiliated.”²⁷⁶ Anita Hill, at the center of perhaps the most famous sexual harassment controversy, explained that she did not report Clarence Thomas’s harassment because she wanted to continue to be able to do the legal work she had been doing and worried that challenging Thomas would hurt her career.²⁷⁷ The cases are legion with employees who assert that they are afraid to come forward because they believe that the harasser will find a way to make things worse for them, and they doubt whether management will take their side against a more powerful or influential opponent.²⁷⁸

When an employee fails to file a complaint, we can never know whether complaining would have made things worse in the individual case. Many studies indicate, however, that reporting harassment may indeed provoke retaliation. One-third of employees who filed formal complaints in the 1981 federal study said that they had experienced retaliation. In one study of state employees, the figure was as high as sixty-two percent.²⁷⁹

275. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5–7 (1991).

276. Louise F. Fitzgerald, Suzanne Swan & Karla Fischer, *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).

277. *Clarence Thomas Confirmation: Hearing Before the S. Comm. on the Judiciary*, 102d Cong. **15–16 (1991) (testimony of Prof. Anita Hill), available at LEXIS Federal News Service [hereinafter *Clarence Thomas Confirmation*].

278. See *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267–68 (4th Cir. 2001); *Young v. R.R. Morrison & Son, Inc.*, 159 F. Supp. 2d 921, 926–27 (N.D. Miss. 2000); *Pollack v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 761 (Mo. App. 1999).

279. Fitzgerald et al., *supra* note 276, at 122.

That retaliation often accompanies harassment can also be inferred from the fact that sexual harassment victims frequently add a charge of retaliation to their complaint. Nor, as an intuitive matter, is it surprising that retaliation would often follow from a complaint. It is no secret that complaints generate bad feelings, negative responses, and defensive reactions. The complainant is often the person viewed as the troublemaker.²⁸⁰ Even when the offending supervisor does not directly retaliate against the complaining employee, co-workers may decide to show their support for the supervisor by shunning, ostracizing, or otherwise punishing the employee. This scenario recurs so often that some courts have simply declared as a matter of law that a campaign of ostracism by co-workers does not amount to actionable retaliation.²⁸¹

The other cluster of reasons given for victims' failure to file formal reports centers on the preference that many women employees have for approaching problems through informal and nonconfrontational means rather than formal procedures. Researchers theorize that because women typically have less power than men in an organization, they are reluctant to invoke the formal procedures that were put in place by others and are predisposed to use informal means to resolve disputes.²⁸² Sexual harassment victims often report that they merely wish to put an end to the harassment and have little interest in punishing the harasser.²⁸³ This preference for peace over justice may mean that they are more inclined to seek out solutions to the problem short of filing a formal report. For this reason, many sexual harassment victims find grievance procedures alien and use coping mechanisms, such as avoidance and appeasement. Victims also tend to seek social support as a substitute for filing a formal

280. See Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 LAW & SOC. INQUIRY 69, 80 (2000) ("Although the university attempts to encourage reporting by making an accessible user friendly policy . . . the complainant is still viewed as a threat to the institution."):

281. See *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 969 (8th Cir. 1999) (holding that ostracism by co-workers cannot form the basis of a retaliation claim); *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997) (holding that disrespect and ostracism by a supervisor are insufficient adverse actions to support a retaliation complaint); *Munday v. Waste Mgmt. of N. Am., Inc.*, 126 F.3d 239, 243 (4th Cir. 1997) (finding no actionable claim where management told co-workers to spy on the plaintiff and not to socialize with her).

282. See James E. Gruber & Lars Bjorn, *Women's Responses to Sexual Harassment: An Analysis of Sociocultural, Organizational, and Personal Resource Models*, 67 SOC. SCI. Q. 814, 821 (1986) (noting that persons with low power in the organization tend to respond passively to harassment); Kihnley, *supra* note 280, at 86 (describing the formal complaint process as the "most intimidating" process for employees to pursue); Riger, *supra* note 271, at 500-01.

283. See Fitzgerald et al., *supra* note 276, at 122; Riger, *supra* note 271, at 500.

complaint.²⁸⁴ Like Anita Hill, sexual harassment victims may indeed complain about their harassment to a friend²⁸⁵ or to a trusted colleague at work,²⁸⁶ even though they do not go through proper channels to report the incident.

Thus, the common sense requirement that victims should report harassment and give the employer a chance to respond is very much at odds with the social reality that workers, especially women workers, are reluctant to lodge formal complaints. Despite the incentive provided by legal reporting requirements, these patterns are unlikely to change because the social science evidence on lack of reporting has been so consistent and the pressures not to report are still present in the workplace. Thus, when a court regards a victim's failure to report as presumptively unreasonable, it is making a negative judgment that applies to a large majority of sexual harassment victims.

In addition to the gulf between the expectation of reporting and the actual practice of victims, it is also striking that courts place such a high importance on the existence of formal procedures when employees and social scientists recognize that informal structures and the informal culture of an organization are often more significant.²⁸⁷ The first prong of the *Ellerth/Faragher* defense requires that employers demonstrate that they have acted reasonably to prevent harassment. Although this "reasonable care" requirement could be interpreted to require employers to take fairly aggressive action to cut down on the incidence of harassment, a recent review of the cases indicates that a large majority of courts hold that an employer exercises reasonable care when it has a formal policy that is disseminated to all employees and provides employees with an opportunity to report the harassment to someone other than a harassing supervisor.²⁸⁸ Many courts thus equate having a formal policy with reasonable care.

284. See Fitzgerald et al., *supra* note 276, at 120.

285. See *Clarence Thomas Confirmation*, *supra* note 277.

286. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 782–83 (1998) (noting that the plaintiff complained to a supervisor she held in high esteem, but did not report harassment through the designated channels).

287. Lauren Edelman, a leading organizational theorist, uses the term "formal structures" to refer to "the configuration of offices and positions and the formal linkages between them (the 'organization chart') as well as to formal rules, programs, positions, and procedures." Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1542 (1992). She contrasts these with "informal structures," defined as "actual communication channels between offices and positions, the actual behavior of individuals who occupy them, and informal norms and practices." *Id.*

288. See Sherwyn et al., *supra* note 90, at 1290. Notably, a 1999 study indicated that ninety-seven percent of respondent employers had written policies against sexual harassment, thus easily meeting the

In contrast, sociologists of law have long noted that there is a large gap between the formal and the informal organization and that, in the business world, rules are routinely violated.²⁸⁹ In other words, there is a vast difference between having a formal policy against discrimination and harassment and actual compliance with Title VII. For this reason, interdisciplinary legal scholars have also begun to analyze the workplace as a cultural institution and have focused on informal structures and practices.²⁹⁰

Organizational theorists often start from the premise that power in an organization is not always visible. The rankings denominated in the formal organizational chart may be far less important than the opinion of persons who have real clout in the organization. Whether an organization discourages or tolerates harassment may have more to do with the personal style and commitments of top managers than the formal policies in the employee handbook. Although it is often hard to express or describe, the informal working culture of an organization is of paramount importance.²⁹¹ The fact that a manager who engages in harassment can easily enlist a victim's co-workers to ostracize her for not acceding to his sexual advances is thus likely to speak volumes about the organization's willingness to tolerate and support harassment, despite its formal policies, and signals to employees that resistance would be futile or very costly.²⁹²

minimum requirements of *Ellerth/Faragher*. See SOC'Y FOR HUMAN RES. MGMT., SEXUAL HARASSMENT SURVEY 6 (1999).

289. See Edelman, *supra* note 287, at 1542 (“[I]nformal practices and norms often deviate from formal procedures and rules.”) (internal citation omitted); John Meyer & Brian Rowan, *Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 342–43 (1977).

290. Devon W. Carbado and Mitu Gulati have written extensively in this vein. See Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 70 ORE. L. REV. 103 (2000); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL. L. REV. 1259 (2000). See also Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370 (1994); Schultz, *supra* note 9; Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003).

291. See Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1724 (2000). According to Lopez,

[T]he most decisive aspects of any particular organization lie not in its formal features, but rather in the way they more generally reflect received templates. The general form adopted by organizations engaged in particular tasks, the means that are regularly chosen and those that are not, the expected goals, the accepted measures of success or failure—all of these reflect unexamined understandings of what is organizationally appropriate.

Id.

292. See *Pollack v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 761 (Mo. App. 1999).

One other reason we should be hesitant to equate the existence of internal grievance procedures with legal compliance is that internal processes, although they may mimic judicial procedures,²⁹³ are very different from court proceedings. Internal grievance procedures and the apparatus and personnel associated with them often serve functions other than enforcement of legal requirements: They have symbolic importance as visible markers of the company's compliance, but, at the same time, they allow the employer to control the process and assure that compliance does not interfere with the employer's other more pressing interests.²⁹⁴ The decisionmaker is not neutral in the sense of not being accountable to either side; rather, the person assigned to resolve the dispute is an employee of the potential defendant who has an interest in minimizing the extent of the conflict, saving the image of the employer, and maintaining smooth relationships.²⁹⁵ His or her main job is to insulate the employer from legal liability, a goal that may not always coincide with cutting down on the incidence of sexual harassment.²⁹⁶

Researchers who have studied internal grievance procedures have noted the tendency of such processes to treat complaints in an individualized manner and approach the cases as if they involved personality clashes.²⁹⁷ The confidentiality of the process often reinforces this perception, given that there is rarely an opportunity publicly to discuss whether the grievance is part of a larger pattern.²⁹⁸ Finally, the decisionmakers often have little knowledge of substantive Title VII law or the policies underlying them and tend to equate fairness with procedural regularity. As one researcher put it, the focus is on "good organizational governance, deemphasizing the specific legal goals of racial and gender

293. See Lauren B. Edelman, Christopher Uggen & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999) (discussing how courts legitimate organizational structures that mimic the legal form).

294. See Edelman, *supra* note 287, at 1531, 1535, 1541, 1567.

295. Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 506 (1993).

296. In fact, affirmative action officers who stress substantive compliance with Title VII law run the risk of being terminated or having their power and autonomy curtailed. See Lauren Edelman, Stephen Petterson, Elizabeth Chambliss & Howard S. Erlanger, *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma*, 13 LAW & POL'Y 73, 84 (1991).

297. See Edelman et al., *supra* note 295, at 515 (stating that there is a tendency to recast legal issues as interpersonal issues). See also Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 1, 12-13 (1999).

298. See Kihnley, *supra* note 280, at 81 (discussing a university's concern with disseminating too much information about discrimination complaints).

equality.”²⁹⁹ In short, employers look for ways of resolving a particular dispute rather than remedying a civil rights violation.

The irony of the current trend toward steering sexual harassment victims to use internal grievance procedures is that we may subtly be moving back to the approach of the 1970s when sexual harassment was considered to be a personal problem for individual women, rather than a systemic injury.³⁰⁰ The danger is that the privatization of enforcement of Title VII laws, given a considerable boost by the adoption of the *Ellerth/Faragher* affirmative defense, may have the effect of discouraging victims to come forward if they sense that their complaint will not be treated as serious violations of the law and will reflect poorly on their ability to manage personality conflicts.³⁰¹ As in the 1970s, moreover, the most common response of victims may be to suffer in silence and to quit when conditions get too bad.

These concerns about increasing formalism and the privatization of Title VII enforcement counsel against simply grafting the *Ellerth/Faragher* defense onto constructive discharge cases that arise from sexually harassing environments. The gap between the vision courts have of the way victims should respond to harassment and the actual behavior of harassed employees suggests that the law is out of synch with social reality and threatens to render Title VII ineffectual as a means to dismantle entrenched gender hierarchies in the workplace. Before settling on an approach to constructive discharge, courts should consider whether there are countervailing principles and policies that militate in favor of imposing strict liability in this important type of case, where plaintiffs have already severed their connection to their employer and are seeking protection against economic losses stemming from unemployment.

V. FOUR GUIDING PRINCIPLES

In addition to the considerations of doctrine and policy already articulated by the lower courts,³⁰² I would advocate that courts consider the following four principles in their struggle to categorize constructive discharge. I regard these as feminist principles, primarily because they presuppose that harassment is widespread and are consciously designed to

299. Edelman et al., *supra* note 295, at 515.

300. See Chamallas, *supra* note 216, at 37.

301. See Edelman et al., *supra* note 293, at 449 (“[W]hen courts adopt forms of compliance created within organizational fields, they run the risk of institutionalizing the very forms of discrimination that laws were originally designed to alleviate.”).

302. See *supra* text accompanying notes 103–91.

stimulate cultural changes in the workplace. They are derived from the insights of organizational theory discussed above in connection with the social science data on reporting³⁰³ and informed by feminist theoretical accounts of the nature and causes of sexual harassment.³⁰⁴ At base, however, they are simple statements of policy that could readily be incorporated into current doctrine. The four principles are also fully compatible with the twin objectives of Title VII (i.e., the deterrence of Title VII violations and the compensation of victims of discrimination).³⁰⁵

The first two principles relate to how courts conceive of business organizations. They seek to reorient courts away from formalism in their analysis of the employer's duty to prevent and correct harassment. The first principle is that *informal structures are as important as formal structures*. Courts should recognize that the informal culture of an organization is as important as the formal policies in the employee handbook and should make their assessments of whether employers and employees act reasonably against this backdrop. This principle has implications in both pure hostile environment cases and constructive discharge/hostile environment cases. In the former, it would militate against formalist interpretations of the *Ellerth/Faragher* defense that insulate employers who have a formal grievance procedure in cases where the culture of the organization inhibits employees from protesting harassment and discrimination.³⁰⁶ In the constructive discharge context, it would counsel against insisting that employees utilize their employer's internal grievance procedures before having the legal right to quit their job.

The second principle mirrors the first: *The informal power of supervisors is as important as formal power*. Because of their position in the organization, supervisors can exert their influence and affect the climate of the workplace even when they do not exercise their formal powers to fire, demote, or decrease an employee's compensation. The supervisor who, for example, is able to enlist workers to ostracize or shun an employee who complains of discrimination can have a substantial effect on the daily life of the targeted employee and can shape the norms of the workplace in a way that goes beyond his delegated powers.³⁰⁷

303. See *supra* text accompanying notes 270–301.

304. See *supra* text accompanying notes 216–35.

305. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–21 (1975).

306. See, e.g., Joanna Grossman, Legal Commentary, *What Should Happen When Sexual Harassment Victims Don't File Prompt Complaints*, FINDLAW, Apr. 8, 2003, at <http://writ.news.findlaw.com/grossman/20030408.html> (arguing that courts should ask whether the employer has created an environment that is affirmatively conducive to complaints).

307. See *supra* note 281 (discussing the ostracism cases).

The second principle has special relevance for the constructive discharge situation. It would militate in favor of treating constructive discharge on a par with actual discharge. In line with the teachings of organizational theory, the fact that the supervisor did not act formally and took no official action would not be dispositive. Once a court concluded that a constructive discharge took place, it would be inclined to regard it as a tangible employment action because it had the same effect as a firing. Recognizing the significance of the informal power of supervisors would also support taking a flexible approach to determining whether working conditions had become intolerable. The fact that a plaintiff did not make a formal complaint would not necessarily defeat liability.

The above two principles can be seen as furthering the deterrence objective of Title VII because of their potential to decrease the actual incidence of sexual harassment. Social science research into the workings of organizations indicates that informal structures and culture are a better barometer of the actual behavior of individuals within an organization than are formal policies and procedure.³⁰⁸ While formal structures may confer legitimacy on an organization and perform the symbolic function of signaling compliance with the law, they often bear little relationship to substantive results. If the law does not respond to the informal organization, it is unlikely to induce significant changes in the status quo.

The third principle relates to how courts judge the actions of employees who assert claims of discrimination. It principally relates to the need to compensate victims of employment discrimination, although it may also further the objective of deterrence insofar as legal liability creates an incentive for employers to take steps to decrease harassment. The third principle is that *the typical response of employees should be regarded as reasonable*. The principle has two important corollaries for current doctrine relating to claims of constructive discharge and hostile environment harassment. The first corollary is that if most employees do not report harassment, courts should not routinely regard an employee who fails to report harassment as having acted unreasonably. The objective of providing compensation for Title VII victims will not be accomplished if the law provides relief only for extraordinary persons who resist against the odds. Under this principle, compensation should be available to the average person who is not used to confrontation and is unwilling to risk the

308. See THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 6–15 (Walter W. Powell & Paul J. DiMaggio eds., 1991).

humiliation and retaliation that frequently accompanies a challenge to authority in the workplace.³⁰⁹

The second corollary is that if the response of most employees is to quit when faced with a hostile environment, courts should regard such a response as reasonable and justified. This would require courts to reconsider what is meant by intolerable working conditions when faced with claims of constructive discharge. If most employees quit their job when the harassment becomes severe or pervasive, it suggests that hostile environments are often in fact intolerable. Courts could then discard the calibrated distinction between severe or pervasive harassment and intolerable working conditions and afford employees a right to quit when they are faced with a sexually hostile environment.

Shaping Title VII doctrine to reflect the responses of the average employee subjected to harassment has considerable advantages in the context of constructive discharge.³¹⁰ It assures that courts will not require employees to act either imprudently or heroically and implicitly respects the choices that most employees actually make. It also discourages courts from making assumptions about how women should respond to sexual harassment and concluding that victims who do not report could not have suffered serious harm. Perhaps most importantly, regarding the typical employee's response as reasonable implicitly incorporates the worker's perspective into legal doctrine and supports the notion that most workers want to keep their job and are not likely to quit for trivial reasons. Particularly when the law requires employees to mitigate their damages by

309. See Grossman, *supra* note 306 (“Many women choose costly consequences—such as quitting their jobs—to avoid dealing with harassment directly . . .”).

310. Reliance on a “typicality” principle in the specific context of constructive discharge raises fewer problems than it does in other contexts—for example, in selecting the appropriate perspective to determine whether harassment is sufficiently harmful to warrant recovery. See Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, DISSENT 50–51 (1995); Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 135 (1992). The debates over whether the severity of harassment should be judged from a reasonable person, a reasonable woman, or a reasonable victim standard can be avoided because, in the constructive discharge context, the question is narrowed to whether inaction or the failure to report should be regarded as reasonable, and the empirical evidence demonstrates that only a small minority of victims report their harassment through internal channels. This is not a context in which differing perceptions of what is offensive or sexist come into play and in which the gender of the target is likely to make a difference. Nevertheless, if the typicality principle were used to predict whether the typical employee would quit when faced with a hostile environment, the same debates over perspective would likely surface. For this reason, I propose a causation-based model that gives victims the right to quit if subjected to a hostile environment, without presenting proof that the typical employee would do so or that a reasonable employee would so respond. See *infra* text accompanying notes 346–47.

finding comparable work once they leave their job,³¹¹ there is reason to believe that the decision to quit will not be made lightly.

The body of social science research published in the last decade clearly establishes that most victims of sexual harassment do not report harassing incidents.³¹² It thus provides a reliable guide to the behavior of the typical employee on that point. There is no comparable data disclosing the typical response of employees who face a hostile environment. Although it is clear that many employees quit because of sexual harassment, the studies are not refined enough to tell us whether this response is typical.³¹³ One difficulty is that to provide a reliable answer to the question of whether most employees would quit in response to hostile environments (defined as environments characterized by severe or pervasive harassment), a study must separate the situation of employees who have been exposed to any harassment from those who face severe or pervasive harassment and thus are subjected to a hostile environment. In the absence of more refined studies on the point, courts inclined to accept the typicality principle may resort to intuitive judgments about the typical employee based on their own assessment of the impact that hostile working conditions would likely have on most workers.

The fourth and final principle that I would offer to guide courts in their approach to constructive discharge relates to the categorization of harm stemming from discrimination in the workplace. It is that *economic and psychological harm are interrelated and should both be recognized as job-related injuries*. In the workplace context, economic injury often leads to, or is accompanied by, psychological distress, as in the case of a discriminatory discharge in which an employee suffers mental distress as a result of the circumstances surrounding the firing and the subsequent stress of unemployment. The converse also holds true: Psychological stress in the workplace context often leads to economic loss. Thus, employees who suffer psychological distress as a result of a hostile working environment may become less productive or have their interest in advancement dampened, eventually producing economic loss.³¹⁴ Such is the case with constructive discharge when the psychological stress produced from

311. See *supra* text accompanying notes 64–66.

312. See *supra* text accompanying notes 270–74.

313. See *supra* text accompanying note 14.

314. If the plaintiff can trace her decreased performance to sexual harassment, the employer may not rely on such performance as a legitimate basis for discharge. See, e.g., *Broderick v. Ruder*, 685 F. Supp. 1269, 1280 n.10 (D.D.C. 1988); *Weiss v. United States*, 595 F. Supp. 1050 (E.D. Va. 1984); LINDEMANN & KADUE, *supra* note 259, at 197–98.

working in a hostile environment induces a plaintiff to quit her job and suffer the economic injury associated with unemployment.

Courts and commentators do not always recognize the interrelationship between the two types of injuries, and they have a more difficult time categorizing psychological harm as a job-related injury.³¹⁵ There is a tendency to regard economic harm as the more important or more legitimate type of job-related injury, as evidenced by the disfavored status of hostile environment cases under Title VII.³¹⁶ There is also a tendency to dichotomize the harms and to label an injury as either economic or psychological, when it might be better characterized as a blend or mixture of the two.³¹⁷ Thus, some of the difficulty that the courts have experienced in handling constructive discharge cases stems from a futile attempt to pinpoint the nature of the harm as either psychological/intangible or economic/tangible and then to treat it accordingly. The blended nature of the harm of constructive discharge, however, defies such categorization and requires the courts to resort to policy to find a way out of the classification dilemma.

A danger associated with the judicial tendency to classify constructive discharge as either an economic injury or a psychological harm (but not both) is that in making their classification decision, the courts will simply match the nature of the injury to the prototypical plaintiff. The history of the constructive discharge claim indicates that the current cognitive association of constructive discharge with sexual harassment cases and women's injuries has led some courts to treat it as an intangible injury akin to other hostile environment claims.³¹⁸ In the past, when the constructive discharge claim was not so linked to sexual harassment, courts had no difficulty viewing it as economic harm and imposing vicarious liability.

315. Catharine MacKinnon first identified this tendency when she argued that tort law, with its emphasis on dignitary harm, did not capture the full dimensions of sexual harassment as an injury and missed the job-related harm.

The [tort] approach tends to pose the necessity to decide whether sexual harassment is essentially an injury to the person, to sexual integrity and feelings, with pendent damages to the job, or whether it is essentially an injury to the job, with damages extending to the person. Since it is both, either one omits the social dynamics that systematically place women in these positions, that may coerce consent, that interpenetrate sexuality and employment to women's detriment because they are women.

MACKINNON, *supra* note 225, at 171.

316. *See supra* text accompanying notes 189–94.

317. For a discussion of the judicial tendency to dichotomize in bias cases, see Chamallas, *supra* note 241, at 782, 800.

318. *See supra* text accompanying notes 234–42.

The fourth principle seeks to curb the tendency to create a hierarchy of harms under Title VII by placing economic injury above psychological harm. Because the statute authorizes recovery for both types of harm and does not require courts to separate the two, the objective of compensating discrimination victims can best be accomplished by treating each type of injury equally. Recognizing the interdependency of the two harms is practical and assures that harms cognitively associated with women will not be subtly devalued or ruled out as non-job-related injuries.

The four principles discussed above do not by themselves dictate an approach to constructive discharge. As the prior dissection of the constructive discharge claim revealed,³¹⁹ this corner of the law is fraught with complexity, and courts are in fact free to devise a variety of approaches with an even larger number of variations in detail. In the final part, I list three models or approaches that the courts might consider in creating a doctrinal framework to handle constructive discharge cases. The last model, which I term the causation-based model, most closely tracks and implements the four principles discussed above.

VI. THREE MODELS FOR CONSTRUCTIVE DISCHARGE

Since the Supreme Court's decision in *Ellerth/Faragher*, two major models have emerged in the lower courts for treating constructive discharge claims.³²⁰ The first (the pro-defendant model) treats constructive discharge like other hostile environment cases.³²¹ The second (the pro-plaintiff model) regards constructive discharge as a tangible employment action and treats it like other disparate treatment cases.³²²

In my view, however, each model has its drawbacks. The pro-defendant model does not adequately harmonize the *Ellerth/Faragher* framework with the elements of the constructive discharge case. The pro-plaintiff model fails to consider whether the intolerability requirement should be revised now that most constructive discharge cases arise from sexually hostile environments. For these reasons, I offer an additional model for consideration that allows plaintiffs to recover upon proof that an employer's discriminatory conduct caused her to resign. This causation-based model would greatly simplify the law by eliminating the need to

319. See *supra* Part III.

320. See *supra* discussion accompanying notes 125–35. In addition to the two basic approaches, some courts have yet to commit themselves and have taken a middle-ground position that treats some, but not all, constructive discharges as tangible employment actions.

321. See *supra* Part II.C.1.

322. See *supra* Part II.C.2.

prove intolerability and by allowing recovery of economic and noneconomic damages on an equal basis. Most importantly, it has the advantage of reflecting and tracking the actual behavior of employees and offers the most promise for preventing and lowering the incidence of harassment.

A. PRO-DEFENDANT MODEL

- Not a tangible employment action
- Allows affirmative defense
- Retains intolerability requirement

The model that up to very recently³²³ had the edge in the lower courts is a pro-defendant model that declares that a constructive discharge is not a tangible employment action because it is not traceable to an official act on the part of the company. The model emerges from the line of cases following *Caridad*,³²⁴ the influential 1999 Second Circuit decision. Under this categorization, constructive discharge is assimilated to other hostile environment cases: The *Ellerth/Faragher* affirmative defense may be invoked and, for all practical purposes, negligence principles apply to determine liability. In particular, a plaintiff who fails to report her harassment through the internal process set up by the employer may find that she has forfeited her right to recover.

So far, courts favoring the pro-defendant model seem content to retain the traditional elements of the constructive discharge claim. Thus, to prove constructive discharge, a plaintiff must show that her working conditions were intolerable and not simply severe or pervasive.³²⁵ Even though the pro-defendant model adopts the hostile environment framework for constructive discharge cases, it still requires that juries make the finely calibrated distinction between severe or pervasive and intolerable levels of harassment, a judgment that is highly subjective and not likely to yield consistent results from case to case. Additionally, as part of this intolerability showing, most courts also require the plaintiff to prove that she afforded the employer an opportunity to correct the offending conditions, a requirement that often translates into a duty to report harassment to the employer through internal channels.³²⁶

323. The edge that *Caridad* had in the lower courts may have stemmed largely from the fact that it was the first appellate court to treat the issue.

324. See *supra* Part II.C.1.

325. See *supra* text accompanying notes 44–48, 245.

326. See *supra* text accompanying notes 93–97, 246–47.

As is the case with respect to all three models, there is the statutory duty to mitigate damages under the pro-defendant model. After quitting, the plaintiff has a duty to seek comparable employment. Any amount that the plaintiff earned or with reasonable diligence could have earned will be deducted from the backpay or frontpay award of the plaintiff who successfully proves constructive discharge.³²⁷

As described, the pro-defendant model leaves open important issues and is hard to coordinate with the *Ellerth/Faragher* framework. The first complexity deals with cases of constructive discharge that do not arise from a hostile environment, but instead stem from a discrete discriminatory act, such as a demotion. Traditionally, such cases have been decided under a disparate treatment framework, imposing vicarious liability with no affirmative defense. However, because even in a demotion case there is no official action accompanying the constructive discharge itself,³²⁸ the pro-defendant model would suggest that the hostile environment framework should somehow control. Aside from introducing the affirmative defense, however, it is not apparent how to fit cases of discrete discriminatory action into a hostile environment framework.

The most difficult coordination problem associated with the pro-defendant model relates to the nature of the reporting requirement and the assignment of the burden of proof on this issue. The *Ellerth/Faragher* affirmative defense is a specific two-pronged defense to guide the courts' inquiry into notice.³²⁹ The burden of proof is on the employer. In contrast, the implicit notice requirement read into the intolerability requirement is open-ended and permits courts greater latitude in interpretation.³³⁰ The burden of proof is on the employee. Under the pro-defendant model, it is not clear whether the *Ellerth/Faragher* framework would supplant the notice requirement embedded in the intolerability requirement or if both requirements would survive. If both survived, the factfinder could easily become confused, particularly given that the burden of proof would then depend on the precise cause of action. This would mean that the claim for constructive discharge would have to be treated separately from the claim for hostile environment. Not only would the former require proof of intolerable conditions, rather than merely severe or pervasive harassment,

327. See *supra* text accompanying notes 64–66.

328. Of course, a court could decide that a demotion qualifies as an official action and treat the whole case as one involving a tangible employment action. Sidestepping the issue in this way, however, fails to address the fact that it was the plaintiff's *unofficial* action of quitting that immediately led to her unemployment.

329. See *supra* text accompanying notes 84–86.

330. See *supra* text accompanying notes 93–97, 246–47.

but the plaintiff's duty to mitigate damages prior to quitting would be somewhat different for each claim. The complexity that the pro-defendant model introduces into an already complex body of law should give courts pause, even if they are inclined to shape the doctrine in a manner favorable to employers.

B. PRO-PLAINTIFF MODEL

- Tangible employment action
- No affirmative defense
- Retains intolerability requirement

The pro-plaintiff model, recently endorsed by the *Suders* court,³³¹ starts from the proposition that a constructive discharge is a tangible employment action. With its focus on the effects on the plaintiff rather than on the unofficial nature of the action, the pro-plaintiff model treats cases of constructive discharge the same as cases of actual discharge. Under this categorization, constructive discharge is assimilated to other disparate treatment cases: The *Ellerth/Faragher* affirmative defense is not available and vicarious liability is imposed.

It is easier to mesh the pro-plaintiff model with the framework of *Ellerth/Faragher* for the simple reason that this model takes constructive discharge cases out of the hostile environment framework. Thus, vicarious liability is imposed in all cases of constructive discharge, whether arising from discrete discriminatory actions or a hostile environment. There is also no confusion with respect to burden of proof and the notice requirement. Under the pro-plaintiff model, the defendant must establish the *Ellerth/Faragher* defense in pure hostile environment cases, while the plaintiff retains the burden of proving intolerability (with its implicit notice requirement) in constructive discharge cases.³³²

One deficiency I find in the pro-plaintiff model is that the courts applying the model have failed to examine whether the intolerability standard should be retained now that constructive discharge cases are more likely to arise from sexually hostile environments than discrete

331. See *supra* Part II.C.2.

332. In constructive discharge cases, although the plaintiff bears the burden of proof, the notice requirement is arguably more flexible than it is under the second prong of the *Ellerth/Faragher* affirmative defense. Courts have discretion to dispense with notice if they conclude that working conditions were so intolerable that a reasonable person would have felt compelled to resign. Under *Ellerth/Faragher*, the court must focus more specifically on whether the plaintiff unreasonably failed to report the harassment.

discriminatory acts. Courts have not yet asked the important question of whether it makes sense to maintain the elusive distinction between severe or pervasive harassment, on the one hand, and intolerable conditions on the other. Because this distinction was not present in the early cases when the intolerability standard was first fashioned and imported into Title VII law,³³³ there has been no discussion in the cases of the core issue of whether employees should have a right to quit their job when faced with a sexually hostile environment. Because, by definition, a hostile environment amounts to conduct that has altered the terms and conditions of employment,³³⁴ a rule that regarded the plaintiff's resignation as justified whenever she encountered severe or pervasive discrimination—whether in the form of harassment or a discrete discriminatory act—seems more workable and fair than the current doctrine.

Additionally, retention of the intolerability requirement with its built-in notice requirement does not alert courts to the possible inequity of making a plaintiff's recovery turn on whether she invoked the employer's internal grievance process. The problems commentators have noted in relation to the reporting duty under the second prong of the *Ellerth/Faragher* affirmative defense³³⁵ may also be present in judicial interpretations of the intolerability standard in the constructive discharge context. A model, such as the causation-based model discussed below, that is consciously designed to reflect the response of the typical employee and is skeptical of an internal reporting requirement would give considerably more protection for employees.

C. CAUSATION-BASED MODEL

- Tangible employment action
- No affirmative defense
- Eliminates intolerability requirement

The causation-based model permits plaintiffs to recover whenever they prove that they quit their job in response to a hostile environment. The model most closely resembles the pro-plaintiff model, but also expressly responds to the four guiding principles discussed above³³⁶ and

333. See *supra* text accompanying notes 51–61.

334. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998).

335. See *supra* notes 262–64.

336. See *supra* Part V.

the social science evidence on the responses of sexual harassment victims.³³⁷ Because it regards informal structures and the informal power of supervisors to be as important as formal structures and official supervisory action, it classifies constructive discharge as a tangible employment action. Like the pro-plaintiff approach, the focus is on the effect on the employee rather than on the formal or informal nature of the employer's conduct.

Moreover, because the causation-based model recognizes the interdependency of economic and psychological harm, it treats all constructive discharges alike, whether they derive from intangible, hostile working conditions or more tangible, discrete discriminatory actions, such as a cut in pay or demotion. Under this model, if the plaintiff proves that she has been constructively discharged, the employer is vicariously liable for all causally related damages and may not invoke the *Ellerth/Faragher* affirmative defense. Because the model considers the response of the typical employee to be a reasonable response, and because most harassment victims do not use their employer's internal grievance procedure to report incidents of harassment, the causation-based model does not expand the reporting requirement devised for pure hostile environment cases into the realm of constructive discharge.

The major innovation of the causation-based model is that it eliminates the requirement of proof of intolerable conditions. Under this model, the case would be streamlined to the question of whether the unlawful discrimination suffered by the plaintiff (whether by means of harassment or other discrimination) caused the plaintiff to quit. In this respect, the causation-based model treats constructive discharge as a remedy rather than a substantive cause of action.³³⁸ Thus, for example, when a plaintiff resigns in response to a hostile environment and suffers unemployment as a result, under the causation-based model she would be entitled to recover both her economic and noneconomic loss. To ensure

337. See *supra* Part IV.

338. The causation-based model described above is not the only conceivable model that would treat constructive discharge as a remedy rather than a substantive cause of action. For example, courts could decide to impose vicarious liability (with no affirmative defense) only in those constructive discharge cases stemming from discrete discriminatory actions and allow the affirmative defense whenever the constructive discharge stemmed from a hostile environment. Under such a model, vicarious liability would depend entirely on the categorization of the original claim, and it is unclear whether courts would see fit to abolish the intolerability requirement in either type of constructive discharge. I do not advocate such a remedially focused model because it extends the *Ellerth/Faragher* affirmative defense to cover the majority of constructive discharge cases that stem from hostile environments and does not follow the four guiding principles discussed above.

that plaintiffs do not resign precipitously, courts would continue to enforce the statutory duty to mitigate damages that requires plaintiffs to make an effort to find comparable employment when they are terminated from their employment.³³⁹

The causation-based model, in effect, tells employees that if they stay on the job, their duty to mitigate will most often mean that they must report the harassment to the employer and utilize the internal grievance procedures.³⁴⁰ While they are still employees, they must give the employer an opportunity to correct the situation and change the working environment. Once they decide to quit their job, however, the duty to mitigate is transformed into the statutory duty to find comparable employment as soon as possible.

Under this allocation of mitigation duties in cases alleging constructive discharge, employers run the risk that they will be liable for the economic losses plaintiffs sustain before they find comparable employment. As noted by the *Suders* court,³⁴¹ this risk provides an incentive for employers to monitor working conditions and screen supervisors in order to prevent conditions from rising to the level of severe or pervasive harassment and prompting employees to quit. Plaintiffs, however, also run a risk, for if they quit too soon, before the harassment is judged to be severe or pervasive, they must bear the economic loss stemming from unemployment. The only safe course for plaintiffs is to stay on the job until they are confident that a court would agree with their assessment that the working environment was hostile or abusive. This would seem to provide enough assurance that plaintiffs would not “walk off the job at the first sign of harassment,”³⁴² even without the added burden of requiring proof of intolerable conditions.

Not surprisingly, under a causation-based model, we could expect that doubts about the validity or strength of a plaintiff’s claim might sometimes be expressed through challenging proof of causation. For example, employers who disputed a plaintiff’s claim that she experienced severe or pervasive harassment could also be expected to argue that she did not quit because of such harassment and would likely point to reasons unrelated to the conditions at work, such as an employee’s ill health or family obligations, as the cause of her resignation. This cause-in-fact argument,

339. See *supra* text accompanying notes 64–66.

340. The duty to report arises from the judicial interpretation of the *Ellerth/Faragher* defense. See *supra* notes 85–92.

341. See *supra* notes 123–24.

342. See *supra* note 124.

however, potentially arises in any case of disparate treatment where the plaintiff must tie the discriminatory conduct to the harm she alleges. In this regard, constructive discharge cases do not seem to pose any special difficulties with respect to proof of cause-in-fact.³⁴³

The more intriguing question is whether the notion of proximate cause ought to be imported into Title VII to limit employers' liability in constructive discharge cases. Employers could argue that they should not be liable if a plaintiff's resignation was unforeseeable, unexpected, or not the natural or probable consequence of the working conditions she confronted (i.e., if it were not the proximate cause of the hostile working environment). As it does in torts, the proximate cause question goes beyond the factual inquiry of whether there is a connection between two events and entails normative judgments about the quality of the defendant's action and its relationship to the plaintiff's injury.³⁴⁴

In the context of constructive discharge, proximate cause would likely be reduced to the question of whether it was reasonable for the plaintiff to quit under the circumstances. This inquiry bears a similarity to the intolerability standard because both ask whether the plaintiff should have endured more discriminatory treatment before deciding to quit and potentially invite the factfinder to focus yet again on the objective severity of the working conditions and whether the plaintiff took measures to mitigate her harm. Thus, the objections to the intolerability standard, discussed above,³⁴⁵ might equally apply to assessments of proximate cause under a causation-based model.

In constructive discharge cases, I would argue that a compelling argument can be made for allowing employees the right to quit whenever they are confronted with a legally actionable hostile environment. This is tantamount to taking the position that, as a matter of law, resignation is a foreseeable and not an unexpected response to being subjected to severe or pervasive harassment (i.e., that proximate cause is established without a case-by-case inquiry). Admittedly, such a judgment is not simply an empirical matter, although the fact that employees often quit their job because of harassment adds considerable strength to this position.³⁴⁶ Instead, the decision to establish proximate cause as a matter of law stems from policy considerations—specifically, that employers ought to pay for

343. See LINDEMANN & KADUE, *supra* note 259 (discussing proof of causal connection in constructive discharge cases).

344. See *supra* note 142.

345. See *supra* Part III.E.

346. See *supra* note 14.

the economic consequences of supervisor-created hostile environments. Similar to tort cases in which an original tortfeasor is held responsible for the subsequent conduct of medical professionals or the actions of other foreseeable intervening actors that flow normally from the original wrongful action,³⁴⁷ it seems fair to hold an employer responsible when an employee responds to persistent harassment by quitting her job. Analyzing constructive discharge using the language of proximate cause, rather than proof of intolerability, suggests that in the context of employment discrimination (and similar to torts), those who violate the law should be held responsible for all causally related harms, except in truly unusual cases where the connection between the discrimination and the harm is too remote, attenuated, or improbable to warrant recovery.

In the minority of constructive discharge cases in which plaintiffs quit in response to discrete discriminatory actions—such as a discriminatory refusal to promote, a demotion, or a cut in pay—there arguably is more room for a case-by-case proximate cause limitation, in addition to proof of cause-in-fact. In contrast to a hostile environment case in which the plaintiff has already proved an aggravated form of discrimination by establishing the existence of severe or pervasive harassment, a plaintiff in a discrete discrimination case could conceivably quit because of minor but actionable discrimination. In such a case, courts could require plaintiffs to prove that the discrimination was a proximate cause of their resignation, thus allowing employers to escape liability in those unusual situations where only the most sensitive employee would quit when exposed to such a non-severe form of discrimination. The causation-based model thus uses proximate causation, a familiar and flexible concept, to screen out those cases that courts seemed most concerned about when they first developed the intolerability standard.³⁴⁸ In my view, it represents an improvement over the intolerability requirement because it conforms to the general structure of proof in Title VII cases (i.e., discrimination, causation, and damages), is consistent with the statutory language of Title VII,³⁴⁹ and does not treat constructive discharge as a distinctive claim that requires yet another doctrinal framework.

347. See DOBBS, *supra* note 142, § 192, at 481 (discussing proximate cause cases involving foreseeable intervening actions).

348. See *supra* text accompanying notes 51–61.

349. The Supreme Court has recently expressed its reluctance to impose a heightened proof requirement in Title VII cases absent explicit statutory authorization. See *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2153–54 (2003) (holding that there is no requirement of direct evidence in mixed-motivation cases).

Finally, in a small but not insignificant way, the causation-based model would redirect Title VII away from formalism by placing greater emphasis on the informal organization, the actual behavior of employees, and the effects of employer behavior. This move away from formalism has the potential to cut down on the incidence of sexual harassment because it addresses the prevailing norms and practices in the workplace and seeks to prevent courts from minimizing or misdiagnosing the problem. The causation-based model also attempts to curb the courts' enthusiasm for privatization of Title VII enforcement. By confining the *Ellerth/Faragher* defense to pure hostile environment cases that do not entail a claim of constructive discharge, the model would provide a remedy for the average employee who decides to quit when faced with a hostile environment and lacks faith in the fairness and efficacy of the employer's internal grievance system. The model could also aid in the quest to simplify Title VII law by providing a more streamlined version of constructive discharge that focuses on the key elements of discrimination, causation, and damages.

VII. CONCLUSION

Despite its recurring nature, constructive discharge has proven extremely difficult for the courts to handle. The claim defies easy categorization because it is situated on the boundary between disparate treatment and harassment and produces a mix of economic and psychological harm. Not surprisingly, courts have tried to push the claim into one framework or the other, without thoroughly analyzing the doctrinal and policy implications of their choice. They are sometimes influenced in their choice by the cognitive association of constructive discharge with sexual harassment and women's injuries. Now that the prototypical constructive discharge victim is a sexual harassment victim, there is a danger that the economic harm suffered by such employees will be eclipsed by the psychological harm that prompted the plaintiff to quit. My dissection of constructive discharge along the five doctrinal axes that most often surface in the case law convinces me that there is nothing in the nature of the claim that dictates its placement into any one of Title VII's frameworks of liability. In this area of Title VII law, the boundaries are overlapping and permeable.

Beneath the classification dilemma surrounding constructive discharge are familiar policy questions that have arisen in other contexts, particularly in hostile environment/sexual harassment litigation. Central to deciding how to classify constructive discharge is the substantive choice of whether to apply strict liability or negligence in such cases. Equally important is

the question of how the courts should evaluate an employee's response to sexual harassment and whether they should compel employees to use the employer's internal grievance procedures. I advocate that the courts take the opportunity to refine constructive discharge law in order to move away from formalism in interpreting Title VII law and privatization in enforcing it.

The three models I offer for constructive discharge cases represent the range of approaches that have emerged in the lower courts and can be extrapolated from the academic and social science literature on sexual harassment and constructive discharge. I urge adoption of a model that would classify constructive discharge as a tangible employment action and impose vicarious liability on employers. To provide equitable treatment of plaintiffs and to coordinate the elements of the claim with the Supreme Court's ruling in *Ellerth/Faragher*, it is also important to reconsider the requirements for proof of constructive discharge. I propose that plaintiffs be allowed to prevail if they prove that discriminatory working conditions caused them to quit their job, rather than require a showing of intolerable working conditions.

My analysis suggests that it is time to simplify Title VII law and devise a model of adjudication for constructive discharge that focuses on the key elements of discrimination, causation, and harm. Constructive discharge is not rare. It is not asking too much of the law to provide a secure avenue of relief for plaintiffs who quit their job because of harassment by their supervisor.