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IN THE SUPREME COURT OF THE UNITED STATES

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PENNSYLVANIA STATE POLICE, :

Petitioner :

v. : No. 03-95

NANCY DREW SUDERS. :

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Washington, D.C.

Wednesday, March 31, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

JOHN G. KNORR, III, ESQ., Chief Deputy Attorney General, Harrisburg, Pennsylvania; on behalf of the Petitioner.

IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

DONALD A. BAILEY, ESQ., Harrisburg, Pennsylvania; on behalf of the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 03-95, the Pennsylvania State Police v. Nancy Drew Suders.

Mr. Knorr.

ORAL ARGUMENT OF JOHN G. KNORR, III

ON BEHALF OF THE PETITIONER

MR. KNORR: Mr. Chief Justice, and may it please the Court:

In its decisions a few years ago in the Ellerth and Faragher cases, this Court held that where a supervisor has created a hostile work environment by acts of sexual harassment, the liability of the employer is not strict, but rather is subject to an affirmative defense which centers around the opportunities provided by the employer for corrective or preventive action.

The question here is whether that affirmative defense should continue to be available where there is an allegation that the hostile work environment resulted in a constructive discharge, and we submit that it should.

In our view there is nothing about a claim of constructive discharge that changes the Ellerth-Faragher analysis of hostile work environments. A supervisor's acts which create a hostile work environment don't produce

1 strict liability because they are not acts of agency; that  
2 is, they are not the acts of the employer. They don't  
3 bear the imprimatur of the employer. They aren't ratified  
4 by the employer, and they are not the sorts of things  
5 which could only be done by somebody invoking the  
6 authority of the employer.

7 QUESTION: Mr. Knorr, I'm -- I had a hard time,  
8 in reading the briefs on this case, figuring out what we  
9 ought to do with the suggestion that there's a  
10 constructive discharge theory. Now, I don't think this  
11 Court has ever weighed in on that. It comes out of the  
12 labor law context I guess.

13 MR. KNORR: Yes.

14 QUESTION: I'm wondering, you know, in -- in  
15 Ellerth and Faragher, what we said was that when no  
16 tangible employment action is taken, a defending employer  
17 may raise an affirmative defense to the liability. So I'm  
18 wondering if we shouldn't just try to look at the facts in  
19 this case and ask whether what the supervisors did  
20 amounted to a tangible employment action and that would  
21 answer the -- the question.

22 I -- I don't know that viewing it through the  
23 lens of a constructive discharge is helpful. What she  
24 says is that the supervisors -- that she had taken tests  
25 to qualify for a promotion, that the supervisors had

1 hidden the results of those tests and had thereby  
2 prevented any promotion, and that there was a false arrest  
3 I guess. Now, why shouldn't we just look to see if those  
4 actions occurred, and if so, whether they amounted to a  
5 tangible employment action? Wouldn't that answer the  
6 question?

7 MR. KNORR: Justice -- Justice O'Connor, if we  
8 haven't made this clear, then the Court has my sincerest  
9 apologies because that is exactly what we suggest the  
10 Court should do. If the underlying actions of the  
11 supervisor amounted -- which -- which provoked the  
12 constructive discharge amounted to a tangible employment  
13 action, then there is no affirmative defense.

14 QUESTION: But -- but Justice O'Connor is going  
15 a little bit further than that. I think she is suggesting  
16 that there cannot be a constructive discharge without some  
17 tangible employment action because constructive discharge  
18 itself attributes to the employer the desire to get rid of  
19 the employee, and that desire cannot simply be  
20 communicated through some lower -- lower people.

21 Now, maybe the -- the tangible employment action  
22 is the refusal of the employer to respond when the obscene  
23 actions of -- of the -- of the coworkers here are brought  
24 to the employer's attention. That would be I -- would  
25 that qualify as tangible action in -- in your part -- in

1 your estimation?

2 MR. KNORR: I'm not sure if it would be tangible  
3 action or not, but it would certainly indicate that if the  
4 employer didn't respond, that it was in some sense  
5 ratifying or approving what it has done.

6 QUESTION: I mean, the point is, how can you  
7 have a constructive discharge? The only person that can  
8 discharge is the employer. You have to pin it on the  
9 employer. I don't know how -- how subordinates alone can  
10 -- can produce a situation that amounts to a constructive  
11 discharge.

12 MR. KNORR: That, Justice Scalia, is partly true  
13 and it partly is not true because the precise elements of  
14 what you need to prove to -- to get a constructive  
15 discharge vary quite widely from court to court. And in  
16 some courts what you say is quite accurate. There has to  
17 be some proof of an intention on the part of the employer,  
18 even if it's only through a failure to respond to a  
19 complaint, to get rid of the employee. But in other  
20 courts -- and -- and this includes the Third Circuit --  
21 that is not really the case.

22 QUESTION: Well, what do you think it ought to  
23 be?

24 MR. KNORR: I think it ought --

25 QUESTION: There is a right answer to this,

1 isn't there?

2 MR. KNORR: Well, that's not a question that  
3 we've presented or that the court has addressed. In -- in  
4 our view, the right answer to that would be, yes, you have  
5 to in some sense prove employer intent --

6 QUESTION: Is there -- is there -- you -- you  
7 say the -- the standards vary. Is there any jurisdiction  
8 that -- for a -- that recognizes constructive discharge  
9 that does not require the employee to prove that the  
10 employee acted reasonably in relation to avenues for  
11 redress, filing grievances and so on? Is -- is there any  
12 -- is there any jurisdiction in which the employee's  
13 reasonableness in trying to adjust things before leaving  
14 is not an element of the -- of the claim?

15 MR. KNORR: I think that the short answer to  
16 that question is yes. There are such jurisdictions and  
17 they include the Third Circuit, but I need to be a little  
18 more expansive than that because in all jurisdictions,  
19 including -- including the Third Circuit, there is an  
20 inquiry into whether the employee acted reasonably, but --  
21 and in some jurisdictions, that inquiry is directed to --  
22 to the question of whether the employee tried to resolve  
23 this -- this matter internally. In other jurisdictions,  
24 including the -- the Third Circuit, the inquiry into  
25 employee reasonableness is tied only to the question of

1    how bad were the conditions; that is, were these  
2    conditions so bad that a reasonable person would quit?  
3    And in that inquiry, it may or may not even be relevant  
4    whether the employee tried to -- to resolve it internally.

5                   QUESTION:  But it was in the Third Circuit  
6    because the judge somewhere in that long opinion did say  
7    that the evidence that she had complained -- that that  
8    would be relevant, but not essential evidence to show the  
9    reasonableness of her reaction treating this conduct as a  
10   discharge.

11                   MR. KNORR:  I'm not sure the court went that  
12   far.  The court said that -- that it might conceivably be  
13   relevant and in -- in a later --

14                   QUESTION:  I thought -- I thought it was  
15   stronger than -- than that.  It may be different --

16                   MR. KNORR:  And it -- I'm sorry.

17                   QUESTION:  -- in different places because this  
18   opinion tended to say everything at least twice.

19                   (Laughter.)

20                   MR. KNORR:  My recollection is that the court  
21   didn't give very much specific direction on what should  
22   come in on a remand in this case.  As a general matter,  
23   the court of appeals was quite clear that it was up to  
24   district courts to decide whether all, some, or none of  
25   evidence about anti-harassment policies and remedial



1 efforts should come in. And that --

2 QUESTION: Excuse me.

3 MR. KNORR: I'm sorry, Justice Kennedy.

4 QUESTION: Did you finish your answer? I -- I  
5 beg your pardon.

6 MR. KNORR: If -- if I could.

7 And that inquiry, in turn, is tied simply into  
8 the question of how bad were the conditions. That is, if  
9 the conditions were bad enough, it doesn't matter if there  
10 was an anti-harassment policy. It doesn't matter if there  
11 were remedial efforts made. So the -- the inquiry, while  
12 it all is -- while it is all -- while it is always phrased  
13 in terms of employee reasonableness, can really be  
14 directed to quite different things.

15 QUESTION: May I ask you also to clarify? That  
16 -- you gave Justice O'Connor an answer that surprised me  
17 because she said let's stick to this case, and she said  
18 that action involving the not -- not letting her have her  
19 papers, and then the arrest, that looking at those facts,  
20 could that be -- is that the way the Court should go about  
21 it. But the district judge gave summary judgment for you  
22 in this case. Is that not so?

23 MR. KNORR: That's correct.

24 QUESTION: So, then on Justice O'Connor's facts,  
25 there would be no question whether she acted reasonably,

1 whether it was equivalent, whether it was equivalent to a  
2 tangible employment action.

3 MR. KNORR: In terms of this particular case, in  
4 our view it is a little bit -- it -- it is too late in the  
5 day to reopen the inquiry as to whether the underlying  
6 actions of the supervisors were or were not tangible.  
7 That -- that is something that should have been raised at  
8 the district court level when we raised the affirmative  
9 defense. What I -- what I --

10 QUESTION: But there was no trial. This was  
11 just summary judgment. There was no evidence submitted.

12 MR. KNORR: There -- well, there was no trial.  
13 There was certainly evidence submitted, and it seems to us  
14 that when we as the defendants say we are entitled to the  
15 affirmative defense and we are moving for summary judgment  
16 on it, it's incumbent on the plaintiff at that point to  
17 say, no, you aren't entitled even to assert the  
18 affirmative defense because we have this action and this  
19 action and this action which were taken, which are  
20 tangible employment actions, and therefore you aren't even  
21 entitled to the affirmative defense. And that didn't  
22 happen. At no point in this case has the respondent ever  
23 said that she was subjected to a tangible employment  
24 action other than the constructive discharge itself.

25 QUESTION: Suppose we're back before the summary

1 judgment stage and you're telling the trial court what the  
2 theory of the case should be. Would your theory be  
3 something like this? Whether we use the phrase,  
4 constructive discharge or tangible employment action --  
5 and we have to use some phrase because the law works with  
6 labels -- we're interested in the practical aspects of --  
7 of these cases, and one of them is this. Were there  
8 avenues of redress? And if the employer was -- employee  
9 was unreasonable in not following these avenues of  
10 redress, then there can be no constructive discharge or  
11 tangible employment action. Is that your position?

12 MR. KNORR: No, Justice Kennedy, and I -- I  
13 guess I --

14 QUESTION: It sounds like a good position. Why  
15 isn't that your position?

16 (Laughter.)

17 MR. KNORR: Our -- our position really is that  
18 this case and -- and hostile environment cases generally  
19 which are alleged to be constructive discharges are just  
20 like Ellerth, that what you do is you look at what the  
21 supervisor did to the employee to provoke the discharge,  
22 and if those actions were hostile work environment, if  
23 they were -- if they were -- I hate to use the word  
24 merely, but if they were acts of sexual harassment, not  
25 arising to tangible actions, if the employee had simply

1 sued on the hostile work environment, we'd have an  
2 affirmative defense. Our position is that doesn't change  
3 or it shouldn't change because there is also a claim that  
4 it was so bad that I had to quit.

5 QUESTION: How is that different from the  
6 formulation that one component in almost all cases of  
7 constructive discharge or tangible employment action,  
8 whatever you want to call it, is the existence or  
9 nonexistence of avenues for redress, and if they did  
10 exist, whether the employee took reasonable steps to  
11 follow them.

12 MR. KNORR: If that were true across the board,  
13 Justice Kennedy, there would be no difference. You're --  
14 you're entirely correct.

15 QUESTION: Why does --

16 QUESTION: Then why --

17 QUESTION: I'm sorry.

18 QUESTION: No, no please.

19 I was -- why isn't the way to simplify the  
20 problem and decide this case for us to say in order to  
21 have constructive discharge, there has got to be the  
22 element that Justice Kennedy just described, i.e., avenues  
23 of redress, reasonableness on the part of the employee in  
24 availing or perhaps in some cases not availing of them?  
25 If that element is shown, then there is no point in

1 recognizing the affirmative defense because that is in  
2 pretty clear contradiction to one element of the  
3 affirmative defense. And -- and that would make for a  
4 fairly simple body of law. Why -- why isn't that the  
5 appropriate way for us to go?

6 MR. KNORR: I think that is certainly a way to  
7 go, Justice -- Justice Souter. If it were -- if it were  
8 clear across the board in all jurisdictions that to prove  
9 a constructive discharge, you do have to have made some  
10 effort to invoke a remedial process, just as with the  
11 affirmative defense, then that would certainly -- that  
12 would certainly satisfy our concerns.

13 QUESTION: Why does a -- why does a plaintiff  
14 bring a constructive discharge suit instead of just a  
15 regular sexual harassment suit? Is it -- is it a matter  
16 of getting more damages? Is that the reason for --

17 MR. KNORR: Yes, I think so.

18 QUESTION: -- for couching it in those -- in  
19 those terms?

20 MR. KNORR: Yes, because then you've got the --  
21 the lost wages and so forth for -- for the entire time.

22 QUESTION: I'm troubled by that too. I mean, I  
23 don't understand why we're using that term at all in light  
24 of the case background here. Why isn't it couched in  
25 terms of allegations of sexual harassment and tangible

1 employment action?

2 MR. KNORR: That is -- that is the way we think  
3 that it should be couched, Justice O'Connor. The -- the  
4 use of the constructive discharge is -- was the  
5 plaintiff's choice, of course, and --

6 QUESTION: But that -- that too is the Third  
7 Circuit's theory in the case. They very much relied on  
8 the analogy to constructive discharge, didn't they?

9 MR. KNORR: Yes. I think that their -- their  
10 view is that a constructive discharge is -- is just the  
11 same as an actual discharge.

12 QUESTION: No -- no court has rejected the  
13 constructive discharge. The question is how do you define  
14 it. And you said, in response to Justice Souter, that it  
15 would be fine if you said, plaintiff, you're in this  
16 situation, you're claiming constructive discharge, you  
17 come in and -- and, in effect, negate what would otherwise  
18 be the affirmative defenses. But they --

19 QUESTION: Well, I -- I thought two circuits  
20 hold that a constructive discharge is never a tangible  
21 employment action. I mean, that's part of the problem.

22 MR. KNORR: Yes. That's -- that is correct.  
23 And -- and frankly, I don't think that is a correct  
24 analysis either. Our view is that a -- a -- in a -- in a  
25 sense a constructive discharge can't ever be a tangible

1 employment action because it isn't an action at all. It's  
2 just a construct. Our view is you look at -- to what it  
3 is that the supervisor did, and if that's a tangible  
4 employment action, then there is no affirmative defense,  
5 whether -- whether or not the employer is --

6 QUESTION: But there's an -- there's an  
7 intermediary situation and that's the one where there is a  
8 tangible action like you get demoted or you get  
9 transferred to a -- a worse position. And that -- that's  
10 one category. Another category is you say I was harassed  
11 constantly and that amounts to constructive discharge.  
12 Another is they did take a tangible action against me,  
13 they didn't discharge me, but they were so bad in  
14 harassing me and in this demotion, that it amounted to a  
15 constructive discharge. That -- that constructive  
16 discharge is the label used for that too, isn't it?

17 MR. KNORR: It can be. An employee can  
18 certainly say I was -- I was subjected to a humiliating  
19 demotion and that was so bad --

20 QUESTION: So I quit.

21 MR. KNORR: -- that I quit. Had she just sued  
22 just on the demotion, clearly a tangible employment  
23 action, and we would have no affirmative defense. If she  
24 also goes on to say, and it was so bad that I quit, I  
25 think we again should not have the affirmative defense.

1                   QUESTION: But the Seventh Circuit goes the  
2 other way on that.

3                   MR. KNORR: Yes, they do. Yes, they do.

4                   And by the same token, if the employee simply  
5 says, I was sexually harassed and subjected to a hostile  
6 work environment, we would have the affirmative defense.  
7 If she goes on to say, and --

8                   QUESTION: Is that true even if the person who  
9 did the harassment and so forth but did not otherwise take  
10 a tangible action, was the president of the company and  
11 said -- made the -- the workplace impossible to have it  
12 for the employee and she quits. Would that be a tangible  
13 employment action?

14                  MR. KNORR: I don't think you'd reach that  
15 question, Justice Stevens. I -- I think what would come  
16 into play there is the idea that there are -- there are  
17 some people in every organization who are so high up that  
18 they are proxies for the employer itself.

19                  QUESTION: Right.

20                  MR. KNORR: And so it -- it really is --

21                  QUESTION: And that person who's a proxy does  
22 not commit a -- make a -- a tangible decision, doesn't  
23 fire her. He just makes it impossible for her to work.  
24 Would that be actionable or not?

25                  MR. KNORR: That would be actionable because it



1 is the action of the employer, and you don't even have to  
2 get into the question of whether it is an agent of the  
3 employer or not.

4 QUESTION: Even though it was a tangible -- even  
5 though it was a constructive discharge.

6 MR. KNORR: I think at that point it -- that is  
7 all irrelevant because what you're talking about is the  
8 act of someone who is the proxy of the employer and  
9 therefore the employer is responsible for it.

10 Mr. Chief Justice, if I could reserve the  
11 balance of my time.

12 QUESTION: Very well, Mr. Knorr.

13 Mr. Gornstein, we'll hear from you.

14 ORAL ARGUMENT OF IRVING L. GORNSTEIN

15 ON BEHALF OF THE UNITED STATES

16 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

17 MR. GORNSTEIN: Mr. Chief Justice, and may it  
18 please the Court:

19 An employer is strictly liable for a  
20 constructive discharge in any harassment that has preceded  
21 it only when the constructive discharge comes about as a  
22 result of an official company act, such as a demotion. If  
23 the constructive discharge comes about as a result of a  
24 supervisor's creation of a hostile environment, then the  
25 employer has an affirmative defense and can show that the

1 plaintiff unreasonably bypassed available opportunities  
2 for correction.

3           Now, the requirement of an official company act  
4 as a predicate for strict liability comes from the Court's  
5 decision in Ellerth and is supported by two important  
6 considerations.

7           First, a company act is the kind of act that is  
8 likely to be documented and subject to higher levels of  
9 review, and so it's the kind of act over which the  
10 employer can exert the most control. And that heightened  
11 potential to control makes it fair to hold the employer  
12 strictly liable, even if in a particular case the employer  
13 would otherwise be able to show that it acted reasonably  
14 and the plaintiff did not.

15           It -- it -- second of all, furthering title  
16 VII's -- the -- recognizing the affirmative defense when  
17 there's not an official company act, furthers title VII's  
18 prophylactic purposes because it gives the employer an  
19 extra incentive to create policies that will help to  
20 prevent discrimination from occurring in the first place  
21 and it gives employees an added incentive to complain  
22 before problems become Title VII violations.

23           QUESTION: Well, how do you think we should  
24 analyze this particular case in light of the Third  
25 Circuit's treatment? How does this fit into your formula?

1           MR. GORNSTEIN: Well, in this -- in this case  
2 you might want to -- what I was going to go on to say is  
3 you might want to initially decide the logically  
4 antecedent question of what it takes to -- to make out a  
5 constructive discharge claim in the first place. And if  
6 you did that, you should say that to prove constructive  
7 discharge, a plaintiff has to show that there's no  
8 reasonable other alternative other than to resign. And a  
9 plaintiff who has unreasonably bypassed an available  
10 opportunity for correction can't make out a constructive  
11 discharge claim in the first place.

12           QUESTION: When you -- when you posit that  
13 reasonableness requirement, I take it you -- you mean to  
14 include that the employee must show either that the  
15 employee reasonably availed herself or himself of whatever  
16 grievance procedure there was or at least had a reasonable  
17 basis for not doing so.

18           MR. GORNSTEIN: That -- that's correct, Justice  
19 Souter.

20           QUESTION: Now, if -- if you do that, what is --  
21 what is left of the affirmative defense, whether there was  
22 -- whether there was a supervisor involved or not, because  
23 the affirmative -- as I understand the affirmative  
24 defense, the affirmative defense is inconsistent with that  
25 showing?

1           MR. GORNSTEIN: Justice Souter, you are right  
2 with respect to the constructive discharge claim itself;  
3 that is, proving the constructive discharge will  
4 necessarily negate the affirmative defense to the  
5 constructive discharge claim. But that --

6           QUESTION: So why don't we stop right there?

7           MR. GORNSTEIN: Because it doesn't necessarily  
8 negate -- proving the constructive discharge doesn't  
9 necessarily negate the affirmative case -- defense to the  
10 claim of a hostile work environment that preceded the  
11 constructive discharge.

12          QUESTION: Yes, but the hostile work environment  
13 claim -- and if -- if we're going to recognize  
14 constructive discharge, hostile work environment I -- I  
15 presume has been subsumed under constructive discharge  
16 because constructive discharge says, hostile environment  
17 plus something more. And we've been describing the plus  
18 something more. And -- and in order to prove the plus  
19 something more, you've got to prove, as you said,  
20 something which is inconsistent with the affirmative  
21 defense.

22          MR. GORNSTEIN: Let me try to explain to you how  
23 this could come up. You could have a situation in which  
24 at the moment of resignation, the plaintiff was reasonable  
25 in believing that there was nothing she could do other

1 than to resign and reasonable in bypassing the available  
2 procedures at the moment of resignation, therefore, could  
3 prove a constructive discharge. But it may have been the  
4 case that at a prior point in time, she would have been  
5 unreasonable in failing to complain about the harassment  
6 and therefore be vulnerable to the affirmative defense on  
7 the hostile environment claim even though she's proven her  
8 constructive discharge.

9 QUESTION: I understand what you're -- I  
10 understand what you're saying, but I -- I would suppose  
11 that if -- if the evidence shows that it was -- that there  
12 was a point at which she could have resolved this or at  
13 least a point at which it would have been reasonable to  
14 pursue grievances and so on to resolve it, and she didn't  
15 do it, that she's going to lose. In other words, if -- I  
16 -- I don't -- I don't see how she's going to get to the  
17 point that you describe.

18 MR. GORNSTEIN: The -- the way that she would  
19 get to the point that I described, Justice Souter, is if  
20 you had an escalating kind of harassment and at the last  
21 act of harassment, it would have been reasonable that --  
22 for the plaintiff to leave at that point -- let us say the  
23 supervisor does a lot of things, and then on the last act  
24 says, if you come back tomorrow, you're dead.

25 QUESTION: I -- I see your point. I -- I have

1 one question in response to the point, and that is, if --  
2 if we -- if we construct a system that -- that recognizes  
3 the possibility that -- that you just described, are we  
4 going to have a system that is just so darned complicated  
5 that it's going to be too difficult to administer?

6 In other words, every case is going to involve  
7 allegations of what you just say, denials of those  
8 allegations. In order to have an administrable system,  
9 shouldn't we simply say that if you can prove the  
10 constructive discharge, if the -- if the element includes  
11 the unreasonableness on grievance, no affirmative defense,  
12 and just get over with it simply because otherwise it  
13 would be just too complicated a system?

14 MR. GORNSTEIN: Justice Souter, it would be a  
15 simpler system, but the -- the system we are proposing  
16 really is just superimposing on this problem the same  
17 structure the Court created in Ellerth and Faragher. The  
18 Court could have devised a simpler rule in Ellerth and  
19 Faragher.

20 QUESTION: You're saying it's my fault.

21 MR. GORNSTEIN: Well --

22 (Laughter.)

23 MR. GORNSTEIN: I'm saying that the Court took  
24 into account various competing considerations in -- in  
25 structuring it, and it made for a somewhat more

1 complicated scheme.

2 QUESTION: But it wasn't --

3 QUESTION: Mr. Gornstein, could tell us what the  
4 Government proposes that we do in this case?

5 QUESTION: Yes. That's what I want to know.

6 QUESTION: You -- you asked us to remand because  
7 why?

8 MR. GORNSTEIN: We would say that you would  
9 remand because it is possible that there is a -- an  
10 official company act that caused the constructive  
11 discharge.

12 QUESTION: To wit.

13 MR. GORNSTEIN: To wit, the sequence of events  
14 leading up to the arrest, and that the arrest might be --  
15 we're not saying that it is -- but it might be an official  
16 company act. If it is and the plaintiff could show that  
17 that act left her with no reasonable alternative other  
18 than to resign, you would have a constructive discharge  
19 that leads to strict liability.

20 QUESTION: How -- how could the -- how could the  
21 arrest by an official company act?

22 MR. GORNSTEIN: It could be an official company  
23 if it is only the sort of thing -- if it depends on a  
24 grant of authority from the employer to the supervisor and  
25 it's only the sort of thing that a supervisor could do.

1           QUESTION: But it patently is not so. I mean,  
2 it -- it has nothing to do with employment. You don't --  
3 you don't arrest somebody because he's your employee.

4           MR. GORNSTEIN: Justice --

5           QUESTION: I mean, it -- it seems to me that --  
6 that this action you're concerned about is not an employer  
7 type of action. It is -- it is quite apart from  
8 employment.

9           MR. GORNSTEIN: Justice Scalia, I think it could  
10 be that you're right about that, but it also may be that  
11 it's the type of action where the -- the person was  
12 wearing both hats, as a supervisor and as a law  
13 enforcement officer, and that it was the -- only the sort  
14 of thing that a supervisor could have done. And all we're  
15 saying is that should be fleshed out.

16           If you don't think that should be fleshed out,  
17 if the Court didn't think that that was a possibility,  
18 then there wouldn't be the need for the -- the remand.  
19 You could just decide it without a remand and -- and  
20 reverse on the grounds -- to get back to Justice Souter's  
21 point, you still, under my scenario have to get to the  
22 question of whether a constructive discharge is a tangible  
23 employment action.

24           QUESTION: Suppose that the tangible employment  
25 action -- say, a demotion or an arrest or a firing --



1 could have been avoided if the employee had been prompt  
2 and reasonable in pursuing avenues for relief.

3 MR. GORNSTEIN: In that --

4 QUESTION: And a reasonable employee in that  
5 position would have done that and they didn't do it. Then  
6 it escalates. Then there's the discharge.

7 MR. GORNSTEIN: Then in that situation, there's  
8 a constructive discharge, but there's a potential defense  
9 to the harassment claim that would depend on whether the  
10 constructive discharge is itself a tangible employment  
11 action. It only is a tangible employment action if it's  
12 brought about by an official company act, such as a  
13 demotion. If it's not brought about by an official  
14 company act, then the affirmative -- no affirmative  
15 defense for the constructive discharge because that's been  
16 negated by proving constructive discharge. But there is  
17 affirmative defense for the prior acts leading up to it  
18 that are framed as a claim about hostile environment.  
19 There would be an affirmative defense to the hostile  
20 environment claim if the hostile environment culminates in  
21 a constructive discharge that's not effected by an  
22 official company act.

23 QUESTION: I -- I thought the first -- the last  
24 thing you said I thought is already there in Ellerth,  
25 either at least your tangible discharge or it doesn't or

1 does. You have to show, you know, that they were  
2 reasonable in not making -- take advantage of a -- of a  
3 complaint procedure, and insofar as it doesn't, Ellerth  
4 already says that there's a -- there's an affirmative  
5 defense and we had a reasonable complaint procedure in  
6 place. So I don't really see that problem.

7 Nor do I see the problem with the Third Circuit.  
8 The Third Circuit says working conditions were  
9 intolerable, so intolerable a reasonable person would have  
10 concluded there was no other choice but to resign.

11 MR. GORNSTEIN: May I answer, Mr. Chief Justice?

12 QUESTION: Briefly, yes.

13 MR. GORNSTEIN: Yes. The -- what's that's  
14 missing is there is that Ellerth requires an official  
15 company act to have a tangible employment action as a --  
16 not just a change in status from being employed to not  
17 being employed. And if there's not an official company  
18 act, then the employer has the affirmative defense.

19 QUESTION: Thank you, Mr. Gornstein.

20 Mr. Bailey, we'll hear from you.

21 ORAL ARGUMENT OF DONALD A. BAILEY

22 ON BEHALF OF THE RESPONDENT

23 MR. BAILEY: Mr. Chief Justice, and may it  
24 please the Court:

25 Pursuant to title VII, the general rule has been

1 that employers are liable for the discriminatory acts of  
2 their supervisors. The question presented is whether a  
3 constructive discharge is the equivalent of a formal  
4 discharge.

5 One of the greatest difficulties in dealing with  
6 the law that we're addressing today is one of semantics.  
7 A formal discharge is the equivalent of a constructive  
8 discharge by definition. It is a -- it is a matter of  
9 methodology.

10 The United States and the petitioner would have  
11 this Court define the culpability of the employer for the  
12 supervisor's acts as a matter of official act. That leads  
13 this Court down an incredibly complex road of -- of  
14 definitional problems.

15 If the Court goes back to Meritor, the Chief  
16 Justice's opinion, where the Court held clearly there is  
17 no automatic liability for the employer's being  
18 responsible for the wayward acts, clearly outside the  
19 scope of employment, clearly not authorized, but we're not  
20 going to find a -- a -- an automatic liability.

21 What the United States wants to do and why the  
22 respondent believes that the Third Circuit -- that the  
23 Third Circuit Court of Appeals decided this case properly  
24 is to devise a general rule and underline if proven, if  
25 the constructive discharge is proven, then the obvious

1 occurs. It's a tangible employment action.

2 QUESTION: Well, but that's the whole question  
3 that is presented in the -- in the question here. I mean,  
4 I don't think you can just say it's obvious.

5 MR. BAILEY: Well, it's -- it's the -- to go  
6 back to some of the questions that Justice Souter was --  
7 Souter was raising, the issue of the -- of the  
8 constructive discharge, when proven, reaches a point as a  
9 practical matter in litigation that the affirmative  
10 defense is no longer viable. And the issue in the  
11 question presented is when a -- if -- if we stick to that  
12 issue, is that is a constructive discharge a tangible  
13 employment action. Conversely, isn't it reasonable to  
14 assume that a constructive discharge, if proven, is an  
15 official company act?

16 QUESTION: But isn't it the same?

17 QUESTION: Why? Why? Why is that? It seems to  
18 me what you're saying is that up to the point where the  
19 harassment reaches such a level that a reasonable person  
20 would leave, up to that point, the individual could not  
21 sue the employer because the employer is not responsible  
22 for it. But suddenly when it goes over the edge and it's  
23 even worse and the person says, I'm going to leave,  
24 suddenly the employer is automatically responsible for it.  
25 Why -- why -- that doesn't make any sense at all.

1           MR. BAILEY: Your Honor, I believe -- Justice  
2   Scalia, I believe the -- the -- you can sue the employer.  
3   The issue -- and that's -- that's the hostile work  
4   environment claim that -- that this Court was really  
5   addressing in Faragher. The issue becomes --

6           QUESTION: You -- you can sue, but you're going  
7   to lose unless you show that there was some official  
8   action on the part of the employer that -- that caused  
9   this or -- or that the employer didn't have a -- a means  
10  of remedying it.

11          MR. BAILEY: Well, the case would then become a  
12  hostile work environment case.

13          QUESTION: Exactly.

14          MR. BAILEY: There would not be a tangible  
15  employment action. This -- the -- the employee can still  
16  sue. The issue then becomes that the affirmative defense  
17  is available. The issue here is the affirmative defense  
18  is not available.

19          QUESTION: Why? I don't understand. I mean,  
20  that's my point. Why is it that up to the point -- you  
21  know, there's terrible harassment, and the employer could  
22  -- and the employee could sue. But if the employee sued  
23  the employer, she would lose. But when it goes just --  
24  just an inch further and is justifiable cause for her to  
25  quit, all of a sudden the employer becomes responsible for

1 what he was not responsible for earlier. That -- that  
2 doesn't make any sense to me.

3 MR. BAILEY: Okay. I -- I don't think it's --  
4 it's a situation where the employer is not responsible.  
5 It's that the employer has mechanisms available to -- if  
6 proven, again, if -- if they can prevail on the  
7 affirmative defense to counteract the charges of hostile  
8 workplace harassment.

9 QUESTION: Okay. May -- may I interrupt you  
10 with -- with this question because it goes to Justice  
11 Scalia's question?

12 Isn't -- for the reason you just gave, isn't the  
13 reason that the claim goes from a hostile environment for  
14 which there's a defense to constructive discharge for  
15 which there isn't a defense -- isn't the reason that in  
16 order to get from hostile environment to constructive  
17 discharge, the employee has to prove something that she  
18 didn't have to prove merely for hostile environment?

19 MR. BAILEY: Yes.

20 QUESTION: And that is the element -- we're --  
21 we're assuming.

22 MR. BAILEY: Yes.

23 QUESTION: That is the element that she either  
24 reasonably availed herself of -- of the -- of grievance  
25 mechanisms or was reasonable in not doing so. And that's

1 the element that gets her to the more serious claim, and  
2 it's also the element that is inconsistent with the  
3 affirmative defense. Is -- is --

4 MR. BAILEY: No, Your --

5 QUESTION: Is that fair to say?

6 MR. BAILEY: No.

7 QUESTION: Okay. Tell me -- tell me why not.

8 MR. BAILEY: It's -- it's putting the cart  
9 before the horse. It's taking the burden that this Court  
10 carved out in Faragher and Ellerth and it's putting a  
11 burden on the employee which, as a practical matter, the  
12 employee has to carry anyway in proving the constructive  
13 discharge. We are back at the original question that you  
14 asked.

15 QUESTION: Yes.

16 MR. BAILEY: And -- and we're back where the  
17 Third Circuit in its -- in its opinion underlined if  
18 proven, held that if the constructive discharge -- if the  
19 constructive discharge is proven, the affirmative defense  
20 -- and even the -- the United States admits this -- is in  
21 all likelihood not a cogent defense at that point, the  
22 constructive discharge has been proven. That's --

23 QUESTION: Is the availability of avenues of  
24 redress and -- coupled with a showing that there was no  
25 pursuit of those reasonable avenues of redress, is -- are

1 those components or facts relevant to determining  
2 constructive discharge?

3 MR. BAILEY: Yes, they are relevant in this  
4 sense.

5 QUESTION: Then we're not arguing about very  
6 much. Justice Souter says the constructive discharge is  
7 then inconsistent. Maybe another characterization would  
8 be superfluous. I mean, the reasonable -- the reasonable  
9 attempts to obtain redress is inconsistent. I -- I think  
10 maybe superfluous. What are we arguing about here? Not  
11 very much.

12 MR. BAILEY: I respectfully disagree. Justice  
13 Kennedy, in the process of proving the constructive  
14 discharge, the salient factual issues that by implication  
15 you refer to are going to arise. The employer is going to  
16 have an opportunity in -- in the real case in controversy  
17 in the district court or during litigation and discovery  
18 of addressing issues and answering questions about -- and  
19 this is where we get into a great difficulty with the  
20 position of the United States. You know, when does the  
21 employee -- when does the employee have a responsibility  
22 to come forward?

23 MR. BAILEY: Well, it isn't the responsibility  
24 of the employee I'm concerned about. It's the  
25 responsibility of the employer. And I don't agree with



1 your description of -- of what the rule is. That is, if  
2 there were no grievance procedures available -- and that I  
3 agree ought to -- ought to pin -- pin the tail on the  
4 employer. It's his fault and I'd hold him for the  
5 constructive discharge. But you say if they were not  
6 available or if she reasonably didn't use them, well, I  
7 mean, these -- these renegade employees who were -- who  
8 were performing these acts of sexual harassment -- suppose  
9 they tell her if you file a grievance, we're going to kill  
10 you. Now, I'd say that's pretty reasonable for her not to  
11 file a grievance. But is that the employer's fault? How  
12 -- how does that somehow attribute all of this action to  
13 the employer? She should sue these individuals.

14 MR. BAILEY: Justice Scalia --

15 QUESTION: He -- he has in place the grievance  
16 procedures. The fact that they threatened her life is --  
17 is not at all his responsibility. So how do you -- how do  
18 you attribute to him a constructive discharge? I don't  
19 see it.

20 MR. BAILEY: Justice Scalia, it begs a multitude  
21 of questions. Those questions relate -- and they're  
22 probative. They're of probative value in any litigation.  
23 And they relate to how that -- that scheme, that remedial  
24 scheme, the internal, private remedial scheme, how it is  
25 enforced, how it's policed.

1           QUESTION: That's fine. But so -- so long as  
2 you're willing to acknowledge that the mere fact that she  
3 was reasonable in not resorting to the grievance  
4 procedures, does not establish that it's the employer's  
5 fault. So long as you accede to that, you say that's all  
6 up for -- for proof in -- in the -- fine. Then -- then  
7 I'll agree with you. But you're not willing to concede  
8 that.

9           MR. BAILEY: No, Justice Scalia.

10          QUESTION: So then -- so then it's not true that  
11 it's all available to be discussed in the -- I mean, what  
12 are you saying?

13          MR. BAILEY: What -- what I'm saying --

14          QUESTION: It's either relevant or it's not  
15 relevant. Now, which is it?

16          MR. BAILEY: It's relevant and it's probative in  
17 the conduct of the case, but it's not dispositive of a --  
18 of a constructive discharge being --

19          QUESTION: Why is it relevant then?

20          MR. BAILEY: -- being a tangible employment  
21 action.

22          The relevant facts -- the employee's conduct is  
23 always going to be a relevant fact situation for a jury or  
24 a court sitting as a fact finder to hear, to contemplate,  
25 and understand. There are issues --

1           QUESTION: There's not an ounce of evidence of  
2 any -- any -- activity by the employer. Not an ounce of  
3 any -- he has in place a wonderful grievance procedure and  
4 the only problem is they threatened her life. And that's  
5 why she didn't use it. Now, what is -- what is there for  
6 the jury to -- to consider?

7           MR. BAILEY: As a matter of law, it dispenses  
8 with the definition that set this Court on the road to  
9 Meritor and Ellerth and Faragher, and that is the  
10 definition of an employer in Title VII law. Of course,  
11 it's the employer's act, if it's an official act, and if  
12 there are issues that are --

13           QUESTION: Threatening her life is an official  
14 act by -- by his employees.

15           MR. BAILEY: To the extent the -- how do we  
16 define the employer? The board of --

17           QUESTION: I mean, I cannot imagine an act  
18 that's more ultra vires. I cannot imagine an act more  
19 unofficial than that.

20           MR. BAILEY: Justice Scalia, I -- I may not -- I  
21 may not be understanding your point. I apologize for  
22 that. But if I do -- if I do understand it correctly, we  
23 are now down the road embarking into a multitude of  
24 definitions of what the employer is, while in reality to  
25 an employee in the workplace, invariably the employer is

1 that immediate supervisor who, as described in -- in  
2 Faragher and Ellerth, has the power to make those tangible  
3 employment decisions. And to that employee --

4 QUESTION: May -- may I just interrupt there  
5 because I want to get one thing clear in mind? Is it your  
6 view that the constructive discharge can only be caused by  
7 a person with the authority to take a tangible employment  
8 action?

9 MR. BAILEY: No.

10 QUESTION: So your argument would apply whether  
11 -- if it's just coworkers as well as supervisors.

12 MR. BAILEY: No.

13 (Laughter.)

14 MR. BAILEY: I -- I think -- I think it can be  
15 both. I think, as correctly defined by this Court  
16 previously, there are certainly situations where by  
17 negligence -- in fact, the law of constructive discharge  
18 across the length and breadth of our country does include  
19 the reality that there are circumstances where there's  
20 ratification by omission, acquiescence and negligence --

21 QUESTION: Well, --

22 MR. BAILEY: -- of the acts of -- I'm sorry.

23 QUESTION: Let me just put the -- a little  
24 easier question for you. To what extent in your view is  
25 the -- is the -- is it relevant that the person who did

1 the harassing conduct has some status, enough authority to  
2 impose a tangible employment action? Is -- to what extent  
3 is it relevant?

4 MR. BAILEY: It's -- it's relevant to the extent  
5 of imputing that responsibility to the broader employer,  
6 the supervisor in other words. It's relevant. But --

7 QUESTION: And if it's -- but if it's not such a  
8 person --

9 QUESTION: But not conclusive. Right?

10 MR. BAILEY: I'm sorry.

11 QUESTION: But not conclusive.

12 MR. BAILEY: I think in --

13 QUESTION: Just -- just one of a whole mishmash  
14 of things that we sort of chuck at the jury.

15 MR. BAILEY: Well, I -- I think in -- as I  
16 understand the original question, we're referring to a  
17 coworker-induced discharge, let's say, or -- or  
18 involuntary quitting. And in that case, Justice Scalia, I  
19 -- I believe you -- you are certainly pointing at  
20 something here because the standards of proof factually  
21 and perhaps legally are different. They still go,  
22 however, at their core to the conduct and actions of the  
23 supervisor.

24 Now, unquestionably, the supervisor -- the  
25 supervisor's actions are not authorized by the employer.

1 Clearly they're not. The imputation that the Congress  
2 made of employer liability for agent actions was a policy  
3 consideration goal and this Court, in an effort to balance  
4 judgments and to balance realities in the workplace and  
5 achieve justice in terms of what is fair if you have that  
6 hardworking employer who works very, very arduously at  
7 structuring a workplace program and enforces it -- not the  
8 case here -- but enforces it and follows through with it,  
9 there should be some recognition, some issue of  
10 mitigation.

11 And under those circumstances, of course,  
12 depending upon what the trial court finds and -- and  
13 depending upon how this Court decides that constructive  
14 discharge if it is a tangible employment action, how --  
15 what role it plays and what -- what the demands or  
16 requirements this Court would have in Title VII situations  
17 so that -- so that -- the official act, which the  
18 Government would say is not a tangible employment action,  
19 in reality has to be. It's a semantic distinction without  
20 a difference.

21 QUESTION: Well, I don't follow what you said  
22 even in the context of the facts here. You said it's not  
23 the case that there wasn't -- that there was in place a  
24 good grievance procedure and that she availed herself of  
25 whatever she could avail herself of. I think that's very

1 murky in this case. She tells one story. The EEO officer  
2 tells another story, and we don't know how grievances have  
3 been handled in this workplace, whether it has been  
4 effective for other employees in the past. We just don't  
5 -- we have -- how can you make a judgment one way or  
6 another about the effectiveness of this grievance  
7 procedure on the basis of the evidence that's now in the  
8 record?

9 MR. BAILEY: Justice Ginsburg, you are correct  
10 in the sense that the facts of the record reflect that the  
11 employee, Nancy Suders, went to the -- the top dog in the  
12 Pennsylvania State Police in the affirmative action and  
13 discriminatory area, as a result of education she received  
14 on a test -- in a seminar taught by that person and  
15 because she could not locate an appropriate form.

16 Now, technically speaking -- technically  
17 speaking -- and the district court didn't even get into  
18 this, but to do fair and honest response to your question,  
19 Nancy Suders did not go and acquire the exact form. She  
20 could not find it. She couldn't locate it. It wasn't  
21 posted.

22 The record will indicate that in fact Nancy Drew  
23 Suders did complain. That complain found -- complaint  
24 found its way to the bureau of -- of the IAD, you know,  
25 where they -- they look at professional responsibility.

1 She didn't have the correct form, quote/unquote, according  
2 to the record.

3 Now, if that's not availing herself -- that's a  
4 factual determination that has to be made either as part  
5 of a -- a decision at law by the court as to whether a  
6 constructive discharge has been proven. And I assume in  
7 the litigation process at some point the trial judge is  
8 going to look at that record, is going to look at what is  
9 presented. They're going to be considered -- considering  
10 points of charge and a motion by the defendant to -- to be  
11 given permission to present an affirmative defense. To go  
12 back to what the Government even admits, in many  
13 circumstances -- and to questions that were raised by --  
14 by other Justices here, in many circumstances the -- there  
15 will be no affirmative defense available because the  
16 constructive discharge will have been proven.

17 Now, in this particular case, in the facts in  
18 this case, Nancy Drew Suders -- and I think this is what  
19 offended the sensibilities of the Third Circuit, and --  
20 and -- and the Third Circuit said that even --

21 QUESTION: Are you suggesting that the Third  
22 Circuit decided the case the way it did because its  
23 sensibilities were offended?

24 MR. BAILEY: Legal sensibilities, Justice  
25 Rehnquist -- Chief Justice Rehnquist.



1 QUESTION: That's as hard to figure out as  
2 constructive discharge.

3 (Laughter.)

4 MR. BAILEY: Well --

5 QUESTION: But it -- it --

6 MR. BAILEY: Justice Kennedy --

7 QUESTION: It seems to me that -- that both  
8 sides point the finger at the other and say you're using  
9 labels. Your -- your brief says a constructive discharge  
10 is a tangible employment action. And I -- and I assume  
11 you argue that there's no affirmative defense.

12 MR. BAILEY: Yes.

13 QUESTION: So the -- the label is of -- of  
14 immense importance.

15 MR. BAILEY: Yes, it is. The label -- and --  
16 and you made reference in earlier arguments this issue of  
17 label --

18 QUESTION: Depending on -- depending --

19 MR. BAILEY: -- legal labels --

20 QUESTION: The -- the question is, what does it  
21 consist of?

22 MR. BAILEY: Well --

23 QUESTION: But you're very unclear on what the  
24 employee has to prove to establish constructive discharge.  
25 It's very vague to me what it is you say the employee has

1 to prove with regard to the availability or lack thereof  
2 of employer remedies.

3 MR. BAILEY: Well, it's an objective person  
4 test. The employee has got to prove that the harassment  
5 was so intense and intolerable --

6 QUESTION: As to remedies available by the  
7 employer, it is unclear to me what position you take on  
8 what the employee has to prove. That the employer had no  
9 remedial scheme in place or what is it?

10 MR. BAILEY: I -- I believe that the remedial  
11 scheme is not relevant for two reasons. The remedial  
12 scheme is not relevant because the employee cannot avail  
13 themselves of the procedures in a procedural due process  
14 sense of a in-place employer remedial scheme because they  
15 are, in the case of a formal discharge, fired, in the case  
16 of a constructive discharge, precluded because they are  
17 really fired. Formal discharge equals constructive  
18 discharge equals official act.

19 QUESTION: I'm sorry. I don't understand that  
20 part.

21 MR. BAILEY: Yes.

22 QUESTION: The part I don't understand is when  
23 you say they are precluded from using a -- a corrective  
24 opportunity, a preventive or corrective opportunity  
25 because they have been fired. I think -- doesn't that beg

1 the question?

2           Imagine an employer who has notices in print 4  
3 inches, black print all over the place pasted. If anyone  
4 here creates a hostile work environment, threatens you in  
5 any way, does anything, I want you to phone this emergency  
6 number immediately 24 hours a day, and we will correct it.  
7 And -- and the -- the employee, who is totally not blind,  
8 in fact teaches a class that that's what they're supposed  
9 to do --

10           (Laughter.)

11           QUESTION: -- and now is subject to terrible  
12 harassment, but does not avail herself of those procedures  
13 for no understandable reason. Has that employee made out  
14 a claim of constructive discharge? Of course, I think  
15 obviously, the answer is no, she hasn't.

16           Now I want to know what you think.

17           (Laughter.)

18           MR. BAILEY: I -- I believe that you are  
19 correct, Your Honor. You're correct.

20           (Laughter.)

21           QUESTION: All right. Now, fine. Now, and if I  
22 am correct, if you believe I am correct --

23           MR. BAILEY: And that's --

24           QUESTION: -- doesn't the argument in this case  
25 simply disappear? Because all you have to say is there is

1 no constructive discharge as long as there was a  
2 preventive or corrective opportunity in place and the  
3 employee was unreasonable in failing to take advantage  
4 thereof.

5 MR. BAILEY: I -- I --

6 QUESTION: So if the employee was reasonable in  
7 not taking advantage, she's constructively discharged.  
8 But if she's unreasonable, she is not.

9 MR. BAILEY: I -- I -- that part is correct. I  
10 -- I believe your --

11 QUESTION: That's the whole thing.

12 MR. BAILEY: Well, I believe your analysis is  
13 erroneous until when what is brought into what's actually  
14 going to occur is an application of the reasonable person  
15 standard. Your hypothetical quite clearly would put a  
16 horrendous burden on an employee unless perhaps that  
17 employee is so traumatized, they don't have any faith in  
18 those great big 4-inch black letters.

19 QUESTION: Fine, and if the traumatized employee  
20 by the judge or jury is determined to have been  
21 reasonable, she wins. But if she's unreasonable, she  
22 loses like any other reasonable person test in the law.  
23 What's the problem with that?

24 MR. BAILEY: Assuming that what has occurred in  
25 that process is we've reached a hiatus where the employee

1 has either proven the constructive discharge, the issue  
2 then becomes what the issue in this case is. The  
3 affirmative defense is then not available. We've reached  
4 the same conclusion.

5 QUESTION: Yes, of course, I'm saying the  
6 affirmative defense is not available because there's no  
7 need for it. That's what we've been talking about, I  
8 thought, the last half hour.

9 MR. BAILEY: Your Honor, I don't disagree with  
10 that.

11 QUESTION: Now, do you win this case, by the  
12 way? Because the -- the Third Circuit seemed to say, as I  
13 read it, that in not taking advantage of the available  
14 opportunities, your client was reasonable. In other  
15 words --

16 MR. BAILEY: My -- my client's actions were  
17 reasonable.

18 QUESTION: Is that what the Third Circuit said?

19 MR. BAILEY: That was the Third Circuit  
20 conclusion, that my client indeed did act reasonable or --  
21 or at very best, when the district court granted summary  
22 judgment, there was a disputed material fact as to whether  
23 or not there was a plan that was in effect and Nancy Drew  
24 Suders took advantage of it. And then the court --

25 QUESTION: Well, if that's true -- if that's

1 true, the case has to go back.

2 MR. BAILEY: I disagree. I -- I was going to  
3 conclude, if -- if I may, Justice Kennedy.

4 Then the court says -- and they use the word --  
5 let's look at the last day. If there's any question,  
6 let's look at the last day. And if we look at the last  
7 day, Nancy Drew Suders is brought in. The bathroom, the  
8 toilet seat, the handle, everything is dusted with stuff  
9 -- powder. Her test results are taken. They're stuffed  
10 in the lingerie drawer. Nancy Suders happens to find  
11 them. They set the room up, and Nancy Suders is brought  
12 in and her hands are photographed and she's read her  
13 rights. And she's called a thief repeatedly and she's  
14 told she can't leave. And then finally, hands shaking,  
15 having drafted a resignation letter, she presents it.

16 So until the last day, which is where the  
17 hypothetical I was left with ended, it might be arguable  
18 that Nancy Drew Suders -- if we want to craft a rule which  
19 says -- and we -- and if it's possible to do -- which says  
20 there is some point in time where the burden arises for  
21 the employee to take a countermeasure or counteraction,  
22 when is that? How do we do that? How can we craft a  
23 general rule that way?

24 QUESTION: Just like you always do in the law.  
25 It's a question of reasonableness.

1 MR. BAILEY: I -- I agree.

2 And in this case Nancy Drew Suders did every  
3 conceivable thing that an employee could do, including  
4 contacting the head of the affirmative action in the  
5 department --

6 QUESTION: But as I tried to suggest before,  
7 Nancy Drew Suders and the head of the equal employment  
8 gave different versions of what happened in the -- in the  
9 only encounter that those two had, which was very far down  
10 the road. So is it -- if -- if the system works, if  
11 there's ample notification of it -- because she went --  
12 the first is -- the first episode is - Suders says, I  
13 think I may need your help. Nothing specific at all about  
14 what's going on. And then very far down the road -- one  
15 question is did she complain too late. What would have  
16 happened? How would this -- how can she say constructive  
17 discharge or anything if, had she been diligent about  
18 complaining, maybe none of this would have happened?

19 MR. BAILEY: Well, the facts in the case would  
20 indicate that she complained not only to Virginia Smith-  
21 Elliot who blew her off -- by the way, she only worked  
22 there for 5 months. She complained to a State Senator.  
23 She did everything. She went looking for help. She was  
24 frightened. She could do nothing at this rural barracks  
25 at this station.

1           The issue then becomes, in terms of -- of if --  
2 if we're looking at her actions in terms -- in a context  
3 of did she take -- did she assume that employee burden of  
4 reasonably responding, putting all of those things  
5 together, that's where the Third Circuit I think correctly  
6 analyzed that there -- that that Nancy Drew Suders acted  
7 reasonably. She was subjected to horrendous conditions at  
8 work.

9           She did go elsewhere to complain. She  
10 complained to Virginia Smith-Elliott. It's -- the  
11 difference is that Virginia Smith-Elliott said that Nancy  
12 Drew Suders complained about age and a number of different  
13 complaints that were being -- or -- or mistreatments she  
14 was suffering, but that she did not raise sexual  
15 harassment as an issue. That, indeed, is ironic on the  
16 record when you look at these --

17           QUESTION: Thank you, Mr. Bailey.

18           Mr. Knorr, you have 2 minutes remaining.

19           REBUTTAL ARGUMENT OF JOHN G. KNORR, III

20                           ON BEHALF OF THE PETITIONER

21           MR. KNORR: If it were really true that to prove  
22 a constructive discharge and a central element of that  
23 proof would be that the employee either invoked a remedial  
24 process or reasonably failed to do so, if that were  
25 required as an element of constructive discharge, that



1 would go a very long way toward meeting our concerns in  
2 this case. That is not, however, the current state of the  
3 law, at least not in all jurisdictions. That is really  
4 the only point I wanted to reemphasize on rebuttal --

5 QUESTION: You -- you would find it acceptable  
6 that she didn't do it because they threatened to kill her  
7 and -- right? That's certainly reasonable basis not for  
8 filing a complaint, and that -- that would attribute the  
9 whole thing to the employer.

10 MR. KNORR: Justice Scalia, that I wouldn't say  
11 is acceptable to us, but that problem --

12 QUESTION: You could live with it.

13 MR. KNORR: That problem --

14 QUESTION: It's not very logical, though, is it?

15 MR. KNORR: It is a problem that inheres in the  
16 Ellerth-Faragher affirmative defense from the beginning,  
17 and we have taken that defense as we found it. I -- I  
18 agree that it is not entirely satisfactory to us, but that  
19 is where we are.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Knorr.

21 The case is submitted.

22 (Whereupon, at 11:04 a.m., the case in the  
23 above-entitled matter was submitted.)

24

25