SUPREME COURT OF THE UNITED STATES

No. 03–95

PENNSYLVANIA STATE POLICE, PETITIONER *v.* NANCY DREW SUDERS

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

[June 14, 2004]

JUSTICE THOMAS, dissenting.

As the Court explains, the National Labor Relations Board (NLRB) developed the concept of constructive discharge to address situations in which employers coerced employees into resigning because of the employees' involvement in union activities. See *ante*, at 9–10. In light of this specific focus, the NLRB requires employees to establish two elements to prove a constructive discharge. First, the employer must impose burdens upon the employee that "cause, and [are] intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities." *Crystal Princeton Refining Co.*, 222 N. L. R. B. 1068, 1069 (1976).

When the constructive discharge concept was first imported into Title VII of the Civil Rights Act of 1964, some courts imposed similar requirements. See, *e.g., Muller* v. *United States Steel Corp.*, 509 F. 2d 923, 929 (CA10 1975) (requiring a showing that "an employer deliberately render[ed] the employee's working conditions intolerable and thus force[d] him to quit his job"). Moreover, because the Court had not yet recognized the hostile work environment cause of action, the first successful Title VII constructive discharge claims typically involved adverse

employment actions. See, *Muller*, *supra* (denial of job promotion); *Derr* v. *Gulf Oil Corp.*, 796 F. 2d 340, 344 (CA10 1986) (demotion). If, in order to establish a constructive discharge, an employee must prove that his employer subjected him to an adverse employment action with the specific intent of forcing the employee to quit, it makes sense to attach the same legal consequences to a constructive discharge as to an actual discharge.

The Court has now adopted a definition of constructive discharge, however, that does not in the least resemble actual discharge. The Court holds that to establish "constructive discharge," a plaintiff must "show that the abusive working environment became so intolerable that [the employee's] resignation qualified as a fitting response." *Ante*, at 1. Under this rule, it is possible to allege a constructive discharge absent any adverse employment action. Moreover, a majority of Courts of Appeals have declined to impose a specific intent or reasonable foreseeability requirement. See, *e.g., Brooks* v. *City of San Mateo*, 229 F. 3d 917, 930 (CA9 2000) ("[C]onstructive discharge occurs when the working conditions deteriorate, as a result of discrimination, to the point that they become sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer" (internal quotation marks and citation omitted)).

Thus, as it is currently conceived, a "constructive" discharge does not require a "company act[] that can be performed only by the exercise of specific authority granted by the employer," *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742, 768 (1998) (THOMAS, J., dissenting) (*i.e.,* an adverse employment action), nor does it require that the act be undertaken with the same purpose as an actual discharge. Under these circumstances, it no longer

makes sense to view a constructive discharge as equivalent to an actual discharge. Instead, as the Court points out, a constructive discharge is more akin to "an aggravated case of . . . sexual harassment or hostile work environment." *Ante*, at 15. And under this "hostile work environment plus" framework, the proper standard for determining employer liability is the same standard for hostile work environment claims that I articulated in *Burlington Industries, Inc.*, *supra.* "An employer should be liable if, and only if, the plaintiff proves that the employer was negligent in permitting the supervisor's conduct to occur." *Id.*, at 767. If a supervisor takes an adverse employment action because of sex that directly results in the constructive discharge, the employer is vicariously liable. *Id.,* at 768. But, where the alleged constructive discharge results only from a hostile work environment, an employer is liable if negligent. *Ibid.* Because respondent has not adduced sufficient evidence of an adverse employment action taken because of her sex, nor has she proffered any evidence that petitioner knew or should have known of the alleged harassment, I would reverse the judgment of the Court of Appeals.