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CONSTRUCTIVE DISCHARGE—A. K. A. WAS IT A QUIT OR A DISCHARGE? UNDERSTANDING THE DOCTRINE AND PREVENTION OF CONSTRUCTIVE-DISCHARGE CASES

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ABSTRACT

It is increasingly common for employees to quit or resign their employment due to Title VII charges and subsequently claim their employment rights were violated since they were constructively discharged. That is, they were "forced to resign because of intolerable working conditions purposefully placed upon them by the employer. A finding of constructive discharge can be quite expensive for employers and entail reinstatement with back pay, front pay in lieu of reinstatement, damages, and attorney's fees. The purpose of this article is twofold. First, to trace the legal development of the constructive-discharge doctrine, thereby illustrating its impact on employee rights and employer responsibilities. Second, based on the court cases discussed, the article concludes by providing seven important guidelines to prevent constructive-discharge lawsuits.

Consider the facts in a frequently cited constructive-discharge case, *Young v. Southwestern Savings and Loan Association* [1]. Young, a teller, began her employment at a branch office of the organization. When initially hired, Young was informed that she would be required to attend monthly staff meetings. Unfortunately, Young, an atheist, was not told that staff meetings would begin with a brief religious exercise conducted by a Baptist minister. After attending several monthly meetings, Young informed her manager that she would not participate in future meetings because she objected to the opening prayer. She was told that attendance at all staff meetings was mandatory. Later that day Young resigned and brought suit against her employer alleging religious discrimination. At trial,

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Young further argued that she considered herself fired. The Fifth Circuit Court held that Young had indeed been fired, noting that Young would experience "the considerable emotional discomfort of waiting to be fired instead of immediately terminating her association with Southwestern [1, at 144]. The court concluded that a reasonable person would be compelled to quit since the supervisor's requirement to attend staff meetings would ultimately result in termination. *Young* invites the interesting question, "Did she quit or was she fired?"

Young illustrates what is an increasingly common problem faced by employers [2]. Cases where employees quit work, or resign, due to claims of discrimination under various equal employment opportunity (EEO) statutes and subsequently sue their employer, alleging to have been constructively discharged; that is, forced to resign because of intolerable working conditions purposefully caused by the employer's discriminatory acts [3]. What is the magnitude of the problem? While it is unrealistic to believe all EEO cases are potential constructive-discharge lawsuits, with tens of thousands of EEO charges filed yearly with federal and state agencies, the significance of the issue is evident. Additionally, constructive-discharge suits frequently arise under the National Labor Relations Act and logically could arise under various safety and health statutes.

The purpose of this article is twofold. First, the intent is to document and discuss the doctrine of constructive discharge, including its leading court cases. The goal here is to fully understand this legal construct. An informal survey of employers conducted by the author revealed little awareness of the constructive-discharge doctrine by supervisors, or its liability to managers. Second, based on the cases reviewed, the article offers special guidelines for organizations to follow to minimize constructive-discharge lawsuits. Application of these guidelines benefits both employers by avoiding litigation and employees by protecting their employment rights and, it is hoped, the resolution of their job concerns.

CONSTRUCTIVE DISCHARGE DEFINED

Constructive discharge has been described as a legal fiction permitting an employee resignation to be treated as a mandatory discharge under certain defined circumstances [4]. Since no formal discharge takes place, the courts infer from the circumstances surrounding the employee's decision to quit various negative employment conditions purposefully imposed by the employer. If the unfavorable employment conditions are construed to have forced the employee to sever his/her employment involuntarily, the courts will interpret employer actions as a constructive discharge and will treat the resignation as an explicit and direct employer discharge [5]. Put simply, the employer has forced on an employee working conditions so unreasonable and unfair that the employee has no choice but to quit. The *Young* court noted:

> The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if he had formally discharged the aggrieved employee [1, at 144].

The courts, by formulating the constructive-discharge doctrine, attempt to prevent employers from accomplishing covertly that which they are prohibited by law from achieving overtly [4, p. 1057]. For example, unscrupulous employers may desire to rid themselves of seemingly undesirable employees by deliberately forcing on them unfavorable working conditions so grievous that employees would rather quit than tolerate the disagreeable conditions. Under this action, the employer may be attempting to limit liability should an employee seek redress through various protective employment statutes. One court has articulated the dilemma by noting:

> It would defy both reason and fairness to immunize [an employer] from liability simply because he has been clever enough to [effectively fire an employee] by forcing a resignation. That would, in effect, reward him for the extra measure of malefaction of not only acting in contravention of some public policy but of making things so intolerable that the employee is forced to initiate his own unlawful termination [6, at 653, 1203].

Interestingly, the constructive discharge doctrine does not provide employees with any new employment rights. Rather, the employee's recourse through a constructive-discharge lawsuit provides a means of protecting only substantive employment safeguards previously granted.

HISTORICAL PERSPECTIVE: CONSTRUCTIVE DISCHARGE UNDER THE NLRA

The constructive discharge doctrine originated from union–management cases filed under the National Labor Relations Act (NLRA) [7]. The NLRA expressly prohibits employers from discriminating against employees regarding their intent to form, join, or assist labor organizations or to bargain collectively through representatives of their own choosing. Specifically, the act proscribes employer discrimination "in regard to hire or tenure of employment . . . to engage or discourage membership in any labor organization [7, §158(a)(3)]. This prohibition is found squarely in Section 8(a)(3) of the act, one of five employer unfair labor practices defined under the law. The courts and the National Labor Relations Board [NLRB] hold employers liable for constructive discharge claims specifically under Section 8(a)(3) [8], but also under Section 8(a)(1), which

prohibits employers from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by the act.

Since many employers today, and clearly those who opposed passage of the act, hold anti-union animus, the courts reason that employers may purposefully cause an employee to resign, thereby thwarting employee pro-union sentiments and, specifically, organizing activity. The employee's resignation is sparked by newly fashioned unfavorable working conditions like demotions, personal harassment, transfers to less desirable jobs, or the assignment of more onerous job duties. Faced with these conditions, the employee may feel no alternative but to quit, and the employer has accomplished indirectly what the NLRA forbids them to do directly [9].

Although the board first used the term constructive discharge in 1938 [10], the doctrine has been discussed most completely in the leading case, *Crystal Princeton Refining Company* [11]. In *Crystal*, the board formulated the constructive discharge standard as consisting of two points:

> There are two elements which must be proven to establish a "constructive discharge." First, the burdens imposed upon the employee must cause, and be 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 [11, at 1068].

In establishing this two-pronged test, the NLRB has conditioned the concept of constructive discharge by first imposing on the employee a burden of showing that intolerable working conditions forced his/her involuntary resignation. Second, and importantly, under NLRB cases, the employee must demonstrate that the burden was *purposefully* imposed by the employer as a result of the employee's protected rights under the act. That is, the employer willfully set out to rid himself/herself of the troublesome employee and the union activity. In *Sure-Tam, Inc. v. NLRB*, the Supreme Court held that employer intent to compel resignation is a significant element in determining the outcomes of NLRB constructive discharge cases [12]. Not surprisingly, for employees bringing constructive discharge claims in the union–management setting, proving employer intent to discharge is highly subjective and frequently the most difficult burden to uphold.

CONSTRUCTIVE DISCHARGE UNDER TITLE VII

The constructive discharge doctrine as initially formulated by the NLRB has now attained wide acceptance in all types of wrongful discharge cases, particularly those involving discrimination under Title VII. For example, employees who have quit or resigned their employment (e.g., have been constructively

discharged) have filed suits claiming they were improperly terminated as a result of discrimination based on sex [13, 14], age [15, 16], race [17, 18], national origin [19, 20, 21], religion [1], and sexual harassment [22]. However, although the courts appear to formulate very similar standards for applying the constructive discharge doctrine to discrimination cases, the use of those standards differs. Indeed, as a first step toward reducing constructive discharge claims, it is important to understand the criteria by which courts judge the appropriateness of a plaintiff's constructive discharge lawsuit.

Sustaining Constructive Discharge Claims

Circuit courts of appeal disagree on the approach used to evaluate constructive discharge allegations. A majority of circuit courts favor a *reasonable-person standard* based on an employee's refusal to work under employer-imposed, intolerable working conditions. The minority view adopts the reasonable-person standard; however, plaintiffs must additionally prove an employer's underlying *intent* to force discharge [23]. This is appropriately called the *employer-intent* standard. Both standards employ different criteria to sustain claims, and both affect employee rights and employer responsibilities differently.

Resaonable-Person Standard

To prove constructive discharge under the reasonable-person standard, the plaintiff must merely show that working conditions were intolerable to a "reasonable person," leaving the employee with no recourse but to resign. This standard omits the details and difficulties of analyzing employer intent and focuses solely on a court-imposed objective standard. Specifically, the conduct complained of must have the foreseeable result of inducing a reasonable person in the employee's position to quit. This objective standard, therefore, requires proof only of a circumstantial nature [24].

In a frequently cited case, *Bourque v. Powell Manufacturing Co.*, the plaintiff, a former buyer in the company's purchasing department, charged her employer with sex discrimination, alleging disparate pay increases between men and women [14]. Bourque resigned after she failed to receive an expected pay raise, and she argued at trial that her low salary increase must be construed as a constructive discharge. The company maintained, to no avail, that to prove constructive discharge the intolerable working conditions would have had to be deliberately imposed. The court, in supporting Bourque, refused to delve into the employer's state of mind and rather focused on the objective working conditions placed on the employee. Those conditions were judged sufficiently intolerable to support the quit, albeit the employer had absolutely no *intention* or *desire* for Bourque to resign. In a similar holding, the court in *Frazier v. KFC National Management Company* stated:

> In determining whether or not a constructive discharge occurred, the Court determines whether or not a reasonable person in the employee's position and circumstances would have felt compelled to resign. As such the employee does not have to prove that it was the employer's purpose to force the employee to resign [16, at 1105].

Importantly, while it is not necessary to show employer intent under the reasonable-person standard, the plaintiff nevertheless must demonstrate the employer was aware of the unfavorable conditions and did nothing to correct them. This issue was addressed specifically in *Calcote v. Texas Educational Foundation, Inc.* [25]. Here the court found the employer's acts (e.g., racial prejudice toward and below-standard pay raises for whites) were *deliberate* and not merely *accidental* [25]. Likewise, in *Goss v. Exxon Office Systems Co.*, a forced-retirement case based on the plaintiff's gender, the court stated, "The court need merely find that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign [26, at 1028].

Since Title VII cases are plentiful, it is reasonable to ask, "Are all alleged discrimination charges where employees quit automatically constructive discharge findings?" The answer is no, and the issue is addressed specifically in the leading case, *Heagney v. University of Washington* [27]. Here, the plaintiff charged the university with discrimination by paying her a low salary because of her sex. Heagney argued that she had traditionally received a low salary and quit when two male employees received substantial salary increases; however, she received none. In holding for the university, the court noted that while Heagney supported the charge of wage discrimination, she failed to prove that being underpaid *per se* caused working conditions so intolerable as to find her resignation a constructive discharge. *Heagney* is highly informative to both employers and employees, since it demonstrates that unlawful acts of discrimination, in themselves, will not automatically sustain a constructive-discharge claim. There must be a clear nexus between the discriminatory act and the supposed intolerable working conditions. The employee must prove more, namely, that the intolerable conditions are so highly grievous that a reasonable person would be forced to resign [27].

The *Bourque* [14] and *Heagney* [27] courts also fashioned another very important principle governing constructive discharge claims. These courts, and others, are clear in finding plaintiffs should seek to combat discrimination and their employment complaints while still employed rather than resign quickly and seek help later. From *Bourque*, "(W)e 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" [14, at 66]. The *Bourque* court clearly encourages employees to mitigate discrimination claims by remaining on the job. This admonition supports nonlitigious resolution

of discrimination disputes through employer-sponsored alternative dispute resolution (ADR) procedures or other in-house complaint resolution programs [14, at 66; 28].

Intolerable Working Conditions

Intolerable working conditions are central to sustaining a constructive discharge claim. Clearly, constructive discharge cannot exist unless employer-imposed employment conditions are so unbearable that employees are forced into involuntary resignation. Then, what necessitates working conditions so unbearable or intolerable that employees are forced to quit or resign their employment? The courts define the answer in what a *reasonable person* would find as intolerable—*not* what an individual employee might find as objectionable or onerous working conditions. The courts are unanimous that an employee's unique subjective assessment of what is intolerable will not suffice to impose damages on employers [5, p. 352]. Therefore, the degree of intolerability or how *aggravated* working practices must become to sustain a claim will, by necessity, be judged on a case-by-case basis. Figure 1 illustrates intolerable conditions frequently mentioned in constructive discharge cases.

In addition to the factors listed in Figure 1, courts will also consider the quality of the relationship between the employee and his/her supervisor. For example, did the employer attempt to resolve the employee's complaint, or did the employer actually discourage the employee from quitting or from resigning. In *Pittman v. Hattiesburg Municipal Separate School District*, the court spoke to the importance of demonstrating that the employer wished the employee to remain on the job [29]. By urging continuous employment, the court suggested a reasonable employee would consider the employer's wishes as a favorable option to resignation [29]. Finally, in a case important for its discussion regarding intolerable *future* employment conditions, the Fifth Circuit held in *Meyer v. Brown and Root Construction Co.*, that a reasonable person could resign in the face of perceived intolerable conditions without having to demonstrate prior aggravating circumstances [30].

Employer-Intent Standard

A minority of circuit courts have held that to prove constructive discharge under the employer-intent approach, a plaintiff must prove 1) the employer deliberately made working conditions intolerable, and 2) the employer's actions were taken with the expressed intention of forcing the employee to quit or resign. Under the intent standard, the employer could have reasonably foreseen the consequences of his/her actions. The intent test is thus more subjective than the reasonable-person standard; therefore, it necessitates a greater burden of proof for the employee and, conversely, it possesses an advantage for the employer's defense.

Transfer and Demotion Cases
- A comparison of the duties and responsibilities of the job offered to the job previously held.
- Extraneous job demands such as increased travel time, hours of work, or hazardous working conditions.
- Embarrassment to the employee. Humiliation usually justifies an unlawful discharge.
- A comparison of pay, benefits, or other compensation of the job offered to the job formerly held.

Pay Cases
- Employee's disappointment in not receiving a pay increase.
- Extremely low or nonexistent pay increases.
- Reduction in pay and benefits.
- Pay discrepancies between males and females.

Retirement Cases
- Employee coerced into retirement.
- Different, unfavorable job offers as an alternative to retirement.
- Nature of the retirement arrangement.

Racial/Sexual Harassment
- General and specific claims of verbal or physical harassment.
- Length of harassment period (e.g., continuous harassment).
- Prospect of future harassment.
- Deliberate reduction in job duties and responsibilities, pay and benefits, or other working conditions.
- Adding intolerable job requirements.
- Employer's failure to remove complained-about harassment.

Figure 1. Intolerable working conditions in constructive discharge cases.

In a leading employer-intent case, *Muller v. United States Steel Corp.*, a Spanish-American employee maintained he was a victim of national origin discrimination [20]. Muller argued the corporation discriminated against him and others of his origin by denying them promotions to foreman positions in the organization's pipe mill. Muller resigned and brought suit under Title VII [20].

The court found for Muller, concluding the corporation had indeed discriminated by denying his promotion. He was granted injunctive relief and awarded back pay and attorney's fees. The court concluded, however, the company's discriminatory promotion policy was not intentionally designed to

force Muller or other Spanish-Americans to quit. Thus, his resignation did not constitute a constructive discharge. The *Muller* court noted:

> Plaintiff would have us rule that the Steel Company's refusal to consider him as spell foreman and its assignment of him into an area which made it impossible for him to become spell foreman created intolerable conditions which satisfied the requirement for constructive discharge. We are persuaded, however, that his reassignment and the other actions complained of were not designed to coerce his resignation [20, at 929].

In another notable holding, *Johnson v. Bunny Bread Co.*, the court refused to uphold a constructive discharge claim since the plaintiff failed to show that his employer "did not wish to force all its employees to resign" [31, at 1256].

The employer-intent standard was significantly expanded in a 1989 case illustrating that direct evidence of employer intent is not required to prove the "deliberations" of an employer's actions [32, p. 91]. In *Paroline v. Unisys Corp.*, the court noted:

> . . . an employer's intent can be proved by "inference." . . . For example, evidence that the employer failed "to act in the face of known intolerable conditions" and did not treat all employees "identically" may create an "inference that the employer was attempting to force the plaintiff to resign [33, at 114].

Additionally, an employee may prove employer intent where the employee quit was based on the employer's possible *future* course of action. In *Hukkanen v. International Union of Operating Engineers,* the plaintiff quit after she was subjected to repeated acts of sexual harassment by her immediate supervisor [34]. The company argued the requests for sexual favors were not intended to force the employee to quit but were for the gratification of the supervisor. In finding for the plaintiff, the court concluded "the employer must necessarily be held to intend the reasonably foreseeable consequences of its actions" [34, at 283]. Here, if an employee reasonably believes future employer conduct would automatically lead one to resignation, employer intent is sufficiently demonstrated.

PREVENTING CONSTRUCTIVE DISCHARGE SUITS

The cases reviewed above offer meaningful lessons for both employees and employers. Importantly, these rulings provide the basis for practical guidelines to prevent constructive discharge cases, thus protecting the rights of employees while defining the responsibilities of management. Seven guidelines are offered to reduce constructive discharge claims.

1. *Train Supervisors.* Supervisors are largely unaware of the constructive discharge doctrine or how it arises. Furthermore, managers at all levels may wrongly assume that once an employee quits or resigns s/he is prevented from future employment lawsuits. Managerial training should include 1) what constructive discharge means, 2) the two court standards for judging constructive discharge claims, 3) liabilities incurred when claims are upheld, and 4) preventive measures to reduce constructive discharge lawsuits. Training need not be lengthy and could be conducted during routine supervisory meetings or, more specifically, during EEO training sessions. Providing numerous actual or hypothetical situations directly applicable to the employer's environment will highlight the importance of the material.

2. *Establish a Proactive Employment Climate.* Most employers have policies governing employment practices, including detailed procedures regarding EEO. However, these policies and procedures, by themselves, are insufficient to prevent constructive discharge claims. Rather, employers must act toward employees in a positive and constructive manner. The principles of dignity, respect, and the acceptance of a diverse workforce illustrates proactive employer behavior beyond formally written policy statements. As a general principle here, employees should be expected to perform only the duties and tasks outlined in their job descriptions.

3. *Monitor the Behavioral Conduct of Managers.* The typical scenario for a constructive discharge case occurs when a manager wishes to "get rid" of an employee by forcing a quit through imposing unfavorable working conditions. Or, a supervisor's harsh or unreasonable behavior toward employees in general, or a specific employee, may provoke the quit. In either case, upper management must continually monitor managerial conduct and correct undesirable behavior when needed. At no time should management tolerate the personal prejudices or preferences of managers toward any protected class or individual employee. Emphasize that all employees must be treated equally with respect to all types of employment conditions.

4. *Hold Exit Interviews.* Conduct exit interviews whenever an employee announces a resignation. Obtain a complete statement regarding the reasons for resignation and, if possible, have the employee sign the form. A signed statement will be valuable for detecting corrective action and, importantly, whether the employee thoroughly informed the employer of the reasons for resignation. Courts often give little weight to employee allegations that surface for the first time in litigation. This is especially true when the employee possessed the chance to voice complaints while employed but chose not to do so. Courts apply the constructive discharge doctrine with the employee's statutory duty under Title VII to mitigate damages. The duty to mitigate damages encompasses remaining on the job rather than quitting.

5. *Document all Adverse Employment Actions.* The successful defense of a constructive discharge lawsuit rests heavily on the quality of employer

documentation. Unfortunately, managers dislike the process of documentation, including the time it takes to properly accomplish the task. Nevertheless, managers in a position to impose adverse employment conditions must be encouraged to fully conduct the documentation process. Proper documentation includes complete written statements of incidents, including informing employees of adverse actions in a timely manner and with the specific reasons for change. Disciplinary meetings should be witnessed by management and disciplined employees should be requested to acknowledge receipt of any disciplinary documents. Higher levels of management should review all adverse decisions made by supervisors to ensure equality of treatment.

6. *Establish a Complaint Procedure.* Implement and publicize an alternative dispute resolution complaint procedure that is administered faithfully and even-handedly. Conduct all investigations with the intent of collecting all facts in an unbiased manner. Namely, conduct a full and fair inquiry, taking seriously all employee complaints. If an investigation leads to corrective action, make changes with the intent of making things right—*not* circumventing obvious ills. Importantly, an employer's actions, or inactions, after being told of intolerable working conditions constitute an important variable in the court's decision to find for or against the plaintiff.

7. *Discharge Fairly.* If an employee must be terminated because of poor work performance or other legitimate, nondiscriminatory reasons, it makes practical sense to level with the employee and discharge him/her rather than "forcing" the resignation. Employees may not like management's decision, but they are more likely to judge the decision fairly and undertaken without hostile intent. Furthermore, the court will be less suspicious if employer actions are ever challenged through litigation.

CONCLUSIONS

As previously noted, the constructive-discharge doctrine does not provide employees with additional substantive employment rights. Rather, the doctrine simply allows employees to exercise employment rights already possessed. Constructive discharge merely affects the scope of recovery and not liability for any underlying discriminatory conduct.

Where employers are guilty of discrimination but not culpable of constructive discharge, plaintiffs can usually recover preresignation back pay. If, however, the employer is guilty of both discrimination and constructive discharge, the plaintiff is entitled to both preresignation back pay and postresignation liability for lost wages occurring after the termination of employment. Because of the greater possibility of relief for those who are constructively discharged over those who merely resign, it is obvious former employees will attempt to use the doctrine to their advantage. Costly litigation is another important reason for employers to understand the constructive-discharge doctrine and prevent its occurrence.

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