COMMENT

That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine

Cathy Shuck†

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I. INTRODUCTION

Federal anti-discrimination laws typically prohibit employers from discriminating based on protected characteristics, such as race, sex, age, or disability. Thus, an employer may not fire someone based on one or more of these protected characteristics. As written, however, anti-discrimination laws do not literally prohibit employers from coercing an employee into quitting by making the employee's work life miserable. Because such conduct would clearly violate the intent of the statutes, courts have developed the doctrine of constructive discharge.5 The doctrine allows an employee who resigns under discriminatory conditions that a "reasonable person" would find "intolerable" to be treated as having been...
fired for purposes of suit.® Constructive discharge is an invaluable aid to plaintiffs in federal employment discrimination cases, because a plaintiff who voluntarily quits a job generally forfeits the right to backpay and other equitable remedies.® The constructive discharge doctrine allows a plaintiff to quit yet preserve her right to equitable remedies, provided the employer has engaged in discriminatory or otherwise prohibited conduct.®

The concept of constructive discharge originated in cases brought under the National Labor Relations Act (NLRA or "the Act").® The National Labor Relations Board (NLRB or "the Board"), and later enforcing courts, found that an employer could violate the Act not only by firing employees who engaged in activity protected by the Act, but also by making working conditions so intolerable that an employee protected by the Act was forced to resign. This doctrine was imported into cases brought

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7. The distinction between a resignation and a firing is critical, because a plaintiff who resigns voluntarily generally forfeits her right to backpay and other equitable remedies. Section 706(g)(1) of Title VII permits a court to award, inter alia, backpay upon a finding of intentional discrimination. See 42 U.S.C. § 2000e-5(g) (2000). However, courts have interpreted the statute as only permitting backpay where the employee was terminated or constructively discharged. See, e.g., Satterwhite v. Smith, 744 F.2d 1380, 1381 n.1 (9th Cir. 1984); Boehms v. Crowell, 139 F.3d 452, 461 (5th Cir. 1998). But see Ezold v. Wolf, Block, Schorr & Solis-Cohen, 758 F. Supp. 303, 312 (E.D. Pa. 1991), rev'd on other grounds, 983 F.2d 509 (3d Cir. 1992) (awarding backpay where employee was not constructively discharged but rather resigned voluntarily).


9. A constructive discharge is not an independent cause of action under federal anti-discrimination law. See, e.g., Russ v. Van Scoyoc Assoc's., 122 F. Supp. 2d 29, 36 (D.D.C. 2000) ("The Court holds that there is no independent cause of action for constructive discharge. However, constructive discharge can still be a part of plaintiff's retaliation claim as an adverse employment action."); see also Brock v. U.S., 64 F.3d 1421, 1423-24 (9th Cir. 1995) ("Allegations of discriminatory failure to promote, retaliation...and constructive discharge do not state more than an employment discrimination claim and are therefore not separately actionable."); EEOC v. R.J. Gallagher Co., 959 F. Supp. 405, 408 (S.D. Tex. 1997), rev'd on other grounds, 181 F.3d 645 (5th Cir. 1999); Vitag v. Multistate Tax Comm'n, 88 F.3d 506, 517-18 (7th Cir. 1996); Knab v. Boury Corp., 114 F.3d 407, 407 n.1 (3d Cir. 1997). Rather, a constructive discharge is a "counter-defense to the employers defense that the worker quit" voluntarily. EEOC v. R.J. Gallagher Co., 959 F. Supp. 405, 408 (S.D. Tex. 1997). A plaintiff can only "succeed" on a claim of constructive discharge if the plaintiff proves that the discharge occurred because of the plaintiff's protected group status. See, e.g., Drake v. Minnesota Mining & Mfg., 134 F.3d 878, 886 (7th Cir. 1998) ("Not only must conditions be intolerable; for a Title VII constructive discharge claim to succeed, they must be intolerable because of unlawful discrimination.").

under Title VII and other federal anti-discrimination statutes beginning in the early 1970s.\(^1\)

The Board's original reasoning, however, was lost in the translation. While early Board decisions focused on the employer's illegal conduct in assessing whether an employee was constructively discharged, courts in employment discrimination cases have, over time, appended two requirements to the constructive discharge doctrine.\(^2\) First, some circuit courts require that a plaintiff show not only that the employer engaged in discriminatory conduct, but also that the employer did so with the subjective intent of causing the employee to resign.\(^3\) Second, all courts require that the employee's resignation be a "reasonable" response to the discriminatory conduct. This second requirement is critical, because it shifts the focus of the constructive discharge inquiry from the employer to the employee. The reasonableness of the employee's response is generally evaluated by asking whether the discrimination was more egregious than "ordinary" actionable harassment, and whether or not the employee, prior to quitting, gave the employer an opportunity to remedy the harassment.\(^4\)

Recently, the constructive discharge doctrine has been subjected to a new round of judicial scrutiny. The Supreme Court's decision in *Burlington Industries, Inc. v. Ellerth*\(^5\) created a new model for analyzing an employer's liability when sexual harassment is perpetrated by supervisory employees. The *Ellerth* model allows an employer to raise an affirmative defense to liability for the otherwise actionable harassment if the supervisor's harassment has not culminated in a "tangible employment


\(^{12}\) The Board has appended these same requirements. See generally Roslyn Corenzwit Lieb, *Constructive Discharge Under Section 8(a)(3) of the National Labor Relations Act: A Study in Undue Concern over Motives*, 7 INDUS. REL. L.J. 143 (1985). A constructive discharge is only found under the NLRA if the employer subjectively intended to cause the employee's resignation, and if the resignation was a reasonable response. See infra Part II and accompanying notes.

\(^{13}\) See infra Part III.A, III.B, and accompanying notes.

\(^{14}\) See infra Part III.C and accompanying notes. Most courts and commentators identify the requirement of employer intent and the requirement of reasonableness on the part of the employee as two different standards. See, e.g., Steven D. Underwood, Comment, *Constructive Discharge and the Employer's State of Mind: A Practical Standard*, 1 U. PA. J. LAB. & EMPL. L. 343, 345-46 (1998); Martin W. O'Toole, Note, *Choosing a Standard for Constructive Discharge in Title VII Litigation*, 71 CORNELL L. REV. 587, 588 (1985); Ira M. Saxe, Note, *Constructive Discharge Under the ADEA: An Argument for the Intent Standard*, 55 FORDHAM L. REV. 963, 972 (1987); Sheila Finnegan, Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U. CHI. L. REV. 561, 562 (1986). If an employee shows that the employer deliberately intended to rid itself of the employee, the employee may not have to prove that her resignation was objectively reasonable; in that case the reasonableness requirement is built into the analysis, because courts assume it was reasonable for an employee to resign in the face of an employer's attack campaign. This Comment discusses the intent and reasonableness requirement as two separate though interrelated elements, both of which must be present under current doctrine for a court or the Board to find a constructive discharge.

\(^{15}\) 524 U.S. 742 (1998).
action." The Court in *Ellerth* explained that a tangible employment action "constitutes a significant change in employment status, such as hiring [or] firing." The lack of clarity in *Ellerth* has produced a split in the lower courts over whether a constructive discharge is or is not a tangible employment action, and over whether or not it bars an employer's affirmative defense. The confusion in the wake of *Ellerth* constitutes the latest attack on the constructive discharge doctrine. Originally, the doctrine simply recognized that an employer should be held liable for consequence flowing from its violation of anti-discrimination law. It has evolved—or perhaps devolved—into a doctrine that focuses not on the employer's illegal conduct, but on the reasonableness of the employee's response. The result is muddled jurisprudence and inconsistent results: while the standard for actionable discrimination is fairly objective, in that it has been well described, the question of whether an employee's response is reasonable is susceptible to subjective interpretation.

This Comment surveys the current state of the law on constructive discharge as applied to employment discrimination claims brought under federal law in the federal courts. The Comment traces the historical and theoretical underpinning of the doctrine and tries to explain how the doctrine has arrived at its muddled state. Part II traces the creation and evolution of the constructive discharge doctrine under the NLRA, focusing on how courts removed the doctrine from its original theoretical framework. Part III looks at constructive discharge cases under federal anti-discrimination law (primarily Title VII), and examines the idea of "reasonableness" underlying constructive discharge law. It also examines why courts have felt compelled to evaluate the reasonableness of an employee's response to employer discrimination rather than simply finding a constructive discharge any time an employer has intentionally discriminated against the employee. Part IV looks at where the doctrine is now by examining recent cases applying the *Ellerth* holding to constructive discharge.

Part V proposes a way to streamline and clarify constructive discharge doctrine and provide a framework for evaluating employee conduct and employer liability. It concludes that eliminating the reasonableness prong and applying a simplified analysis to the intent prong will result in a workable rule that will restore the original role of the constructive discharge doctrine, yet not unduly burden employers.

16. *Id.* at 761.
17. 524 U.S. at 761; *see also* Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (the companion case).
18. *See infra* Part IV.
II.
CREATION AND EVOLUTION OF CONSTRUCTIVE DISCHARGE LAW
UNDER THE NLRA

In order to understand where the constructive discharge doctrine is today, it is helpful to examine where it began. The NLRB first developed the idea of constructive discharge to address situations where employers coerced employees into resigning because the employees engaged in statutorily-protected collective bargaining activities. The courts resisted the doctrine at first, but they eventually adopted it, changing its focus in the process.

A. Early Cases Decided by the NLRB

The NLRA makes it an unlawful, unfair labor practice for an employer to, among other things, "interfere with, restrain, or coerce employees" in the exercise of their right to organize or to encourage or discourage labor union membership "by discrimination in regard to hire or tenure of employment or any term or condition of employment." The latter type of illegal conduct, which is prohibited by § 8(a)(3), is most often implicated in constructive discharge cases under the NLRA.

Soon after the passage of the NLRA, the NLRB recognized that an employer violated § 8(a)(3) by creating hostile, intimidating, or threatening conditions that resulted in an employee's resignation. For example, in 1937, in Matter of Clover Fork Coal Co., the Board held that mine employees who quit after being assigned to a section of the mine which "[u]nion men were assigned to work in... either as a punishment or a means of forcing them to quit," were protected by the Act.

The NLRB appears to have first used the term "constructive discharge" in 1938. In Matter of Sterling Corset Co., six women who had joined the union and/or attended or held meetings on behalf of the union were

The Board, with the approval of lower courts, has long held that an employer violates §§8(a)(3) not only when, for the purpose of discouraging union activity, it directly dismisses an employee, but also when it purposefully creates working conditions so intolerable that the employee has no option but to resign—a so-called "constructive discharge."
22. 4 N.L.R.B. 202 (1937), enforced, Clover Fork Coal Co. v. NLRB 97 F.2d 331 (6th Cir. 1938).
23. 4 N.L.R.B. at 221.
24. See id. at 221-22. Additionally, the men were told they would not be paid for doing the work. See id. at 225; see also Lieb, supra note 12, at 146-47 (discussing early Board cases addressing constructive discharge).
25. 9 N.L.R.B. 858 (1938).
subjected to threats, harassment, and surveillance by the employer. In holding that the employees were entitled to reinstatement and backpay the Board explained, “[t]he employees who were compelled to leave their employment acted under compulsions that constituted unfair labor practices. In effect their departure from the plant amounted to a constructive and discriminatory discharge of each of them.” The Board described the employees as being “emotionally upset and unnerved,” as having “nerves frayed,” and as being “overwrought by the continual harassment.”

B. NLRA Cases in the Circuit Courts

Although the Board was immediately receptive to the concept of constructive discharge, the courts were not. The first circuit court case to acknowledge the term “constructive discharge” appears to have been NLRB v. Waples-Platter Co., decided by the Fifth Circuit in 1944. Waples-Platter involved an employer charged with unfairly attempting to prevent organizing activity by transferring two organizers to different work locations. The employer transferred the employees to positions “where the working conditions were the same or just as good as the places they originally worked; the hours and the pay were exactly the same, and they were informed that the transfers were only temporary.” Both men left their jobs in protest. On these facts, the Board found that the men were constructively discharged because the transfers were motivated by anti-union animus and the men were within their rights to resign in the face of illegal conduct by the employer. The Fifth Circuit disagreed, holding that although the men must be reinstated, as the transfers violated the NLRA, they were not entitled to backpay for the time following their separation from the company because they left voluntarily and “were not constructively discharged.”

The circuit courts continued to reject specific Board findings of

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26. Id. at 867-68.
27. Id. at 871 (emphasis added); see also 18 N.L.R.B. 402, 403-05 (1939) (Board’s supplemental decision and order).
28. Sterling, 9 N.L.R.B. at 867-68.
29. NLRA cases are heard first by a trial examiner and then by the NLRB, with a right of appeal to the federal circuit courts. See 49 Stat. 449 §§ 10, 10(f) (codified as amended at 29 U.S.C. § 160 (2000)).
30. 140 F.2d 228 (5th Cir. 1944).
31. Id. at 230.
32. See In re Waples-Platter Co., 49 N.L.R.B. 1156, 1174-75 (1943).
33. Waples-Platter Co., 140 F.2d at 230. Both of the transferred employees were leaders in the unionizing effort. See Waples-Platter Co., 49 N.L.R.B. at 1167, 1170. The Fifth Circuit’s decision omits the Board’s lengthy findings about the extent of the employees’ union involvement in its decision that the transfers were ordinary business decisions. See Waples-Platter Co., 140 F.2d at 229-30.
constructive discharge for several years. For example, seven years after the Fifth Circuit decided Waples-Platter, the Seventh Circuit, in Progressive Mine Workers of America v. NLRB, rejected an NLRB finding that an employer constructively discharged two employees by knowingly permitting an organizing union to coerce the employees into leaving work in the midst of rival organizing campaigns. The court called the constructive discharge theory "both novel and ingenious . . . . Whether this 'constructive' discharge theory is within the contemplation of the Act we need not decide. Its use, however, demonstrates the extreme position to which the Board is driven . . . ."

It was not until 1953 that any circuit court upheld a Board finding of constructive discharge. In NLRB v. Saxe-Glassman Shoe, the First Circuit affirmed the Board's ruling that an employee who quit following her employer's discriminatory interrogation was constructively discharged and entitled to backpay. Like the female employees in the Board's Sterling Corset Co. decision, who developed emotional health problems due to the employer's harassment, the female employee in Saxe-Glassman became ill as well. The court found convincing the fact that the employee's "complaint . . . that [the foreman's] harassment was affecting her health, received only the response that the situation would be corrected after the election." The court noted that the evidence provided "ample justification for the conclusion that [she] was forced to quit in the face of discriminatory treatment calculated to make her job unbearable."

By the 1960s, most courts characterized a constructive discharge as an NLRA violation.Ironically, however, the judicial doctrine applied by the

34. 187 F.2d 298 (7th Cir. 1951).
35. See id. at 302.
36. Id. at 304. Similar disdain was evidenced in NLRB v. Russell Mfg. Co., 191 F.2d 358, 360 (5th Cir. 1951) ("The Board made no finding of any overt acts on the part of the employers or their officials on which it could base its conclusion of discrimination. Its conclusions amount to no more than that these employees were constructively discharged . . . with such conclusions being based merely on hearsay, inference, and suspicion.").
37. 201 F.2d 238 (1st Cir. 1953).
38. Id. at 242-43.
39. 9 N.L.R.B. 858 (1938).
40. Saxe-Glassman, 201 F.2d at 243.
41. Id. Courts may be more likely to find a constructive discharge, especially if female employees are involved, when they find that the employees were emotionally upset, as in Sterling Corset and Saxe-Glassman. The role that an employee's emotional response plays in evaluating a constructive discharge claim is discussed infra Part IV as part of the inquiry into why courts feel compelled to attach a reasonableness requirement to constructive discharge claims.
42. See, e.g., NLRB v. Tenn. Packers, Inc., 339 F.2d 203 (6th Cir. 1964). "[T]he respondent deliberately made [the employee's] working conditions intolerable and drove her into 'an involuntary quit,' which [the Trial Examiner] found was a constructive discharge . . . . Such a constructive discharge is a violation of Section 8(a)(3) of the Act." Id. at 204-05 (citing NLRB v. Saxe-Glassman Shoe, 201 F.2d 238, 243 (1st Cir. 1953)).
courts was an inversion of the Board's original reasoning in constructive discharge cases. The Board originally framed the course of events as follows: first, the employer violates the Act by engaging in discriminatory conduct, and, second, the employee responds by justifiably resigning. The resignation, therefore, constitutes a constructive discharge. Courts, however, characterized the employee's resignation, rather than the employer's conduct, as the violation. This distinction is important, because it shifted the focus from the employer's discrimination to the employee's response. As a result, even if an employee is able to show that he is the victim of unquestionably illegal conduct, now he must also show that his response is reasonable in order to prevail on his claim.

The circuit courts never adopted the NLRB's original theory that an employer's violation of the NLRA, standing alone, renders an employee's resignation reasonable and entitles the employee to backpay. Instead, the courts questioned whether the employee's resignation was a reasonable response to the particular discrimination. For example, the Board's decision in *Waples-Platter*\(^43\) was based on the Board's belief that it was reasonable *per se* for the employees to quit in the face of the employer's intentional, discriminatory transfers. In reversing the Board, the Fifth Circuit would have required the employees to accept the transfers, rather than quit, because a reasonable person would seek redress while staying employed. In holding that the employees were not entitled to backpay, the court noted that the employees "elected to quit the service of the Corporation and at a time when vacancies were occurring and when labor was sorely needed."

Thus, the court gave more weight to the fact that the employees' resignation seemed unreasonable than to the fact that the transfers were discriminatory and in violation of the Act.

The Board at first refused to accept the *Waples-Platter* reversal, expressly noting in *Acme Industrial Police*\(^45\) that "the purposes and policies of the Act [are] best effectuated" by recognizing constructive discharge in the face of illegal activity and permitting backpay.\(^46\) This suggests that the Board saw the purpose of the Act as forbidding employers from interfering with employees' protected rights and, consequently, found it appropriate to punish employers who so interfered. Courts like the Fifth Circuit, on the other hand, perhaps saw the Act as setting forth a general prohibition on employer discrimination, but one that employees were not privately

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\(^{43}\) 49 N.L.R.B. 1156 (1943)

\(^{44}\) 140 F.2d at 230.

\(^{45}\) 58 N.L.R.B. 1342, 1346 n.3 (1944).

\(^{46}\) Id at 1344. The Board further stated that although "[t]he Fifth Circuit Court of Appeals . . . set aside the Board's order in *Waples-Platter* insofar as it awarded back pay to two constructively discharged employees . . . . In the absence of a final determination of the question by the Supreme Court, we adhere to our view in that case." Id. at 1346 n.3.
permitted to enforce by taking matters into their own hands and quitting. Courts, unlike the early Board, have uniformly failed to recognize that an employer’s mere discrimination is enough to warrant a finding of constructive discharge.

Opening the door to an inquiry into the employee’s response as an element of the constructive discharge claim has resulted in a two-part requirement for constructive discharge in employment discrimination cases. First, a constructive discharge only occurs if the resignation is in response to an employer’s intentional (rather than unintended) conduct motivated by the employee’s protected status or activity. Second, the employee’s resignation in response to the intentional discrimination must be reasonable.

III.
THE MODERN TWO-PART CONSTRUCTIVE DISCHARGE INQUIRY

The constructive discharge doctrine was firmly established in the federal courts by the time Title VII was enacted. Although courts were not initially inclined to recognize constructive discharges in Title VII cases, they did not question the validity of the doctrine itself. This section explores the developments of the two prongs of the constructive discharge inquiry: the requirement of intentional discrimination by the employer, and the requirement that the employee’s response be reasonable.

A. The Employer Intent Requirement

Even the earliest NLRB cases recognizing constructive discharge did so only when the case involved deliberate acts by an employer. In Clover Fork Coal, the employee quit after a supervisor intentionally gave him a discriminatory work assignment. In Sterling Corset, the employees were subjected to purposeful surveillance and other harassment by the

47. “It is a well recognized rule in labor relations law that a man is held to intend the foreseeable consequences of his conduct.” Tenn. Packers, 339 F.2d at 204-05 (internal quotation omitted).

48. For example, in Andres v. Southwestern Pipe, Inc., 321 F. Supp. 895 (W.D. La. 1971), one of the first Title VII cases to raise a constructive discharge claim in court, the court rejected a claim of constructive discharge on weak facts—the employee alleged that the fact that the employer wouldn’t give him a day off to pay bills, with the consequence that employee had to quit, constituted a constructive discharge. The employee did not offer any evidence that the denial was discriminatory, however, and the court rejected the claim. See Andres, 321 F. Supp. at 899; see also Gerstle v. Cont’l Airlines, Inc., 358 F.Supp. 545, 552-53 (D. Colo. 1973) (holding no constructive discharge where the employer airline had a “no marriage” rule for flight attendants and the flight attendant plaintiffs resigned their employment to get married because the court found plaintiffs failed to prove a causal nexus between the airline’s no marriage rule and their resignations to get married).

49. 4 N.L.R.B. 202, 221 (1937).
CONSTRUCTIVE DISCHARGE DOCTRINE

In Saxe-Glassman, the plaintiff's foreman intentionally interrogated and harassed her. So it was logical for early courts hearing Title VII cases to inquire into whether the employee's resignation was caused by an employer's intentional discrimination. But the inquiry into intent soon expanded into a much more demanding requirement, as some courts began to require a finding that the employer discriminated with the specific intent of forcing the employee's resignation.

For example, in 1975, the Tenth Circuit held in Muller v. U.S. Steel that a Title VII constructive discharge only occurs when an employer specifically intends to force the employee to resign. The plaintiff, a Latino, had been employed at the mill for fourteen years and, although qualified, was never promoted; nor was any other Latino employee promoted during the time period at issue. The appellate court upheld the district court's finding of national origin discrimination, but reversed the finding of constructive discharge. The Muller court held that illegal discrimination alone is not enough to justify a constructive discharge. "Plaintiff would have us rule that the Steel Company's refusal [to promote him] created intolerable conditions which satisfied the requirement of constructive discharge," said the court. "We are persuaded, however, that his reassignment and the other actions complained of were not designed to

50. 9 N.L.R.B. 858, 867-68 (1938).
51. 201 F.2d at 243 (1st Cir. 1953).
52. The NLRB currently requires employees to meet the specific intent standard in order to establish a constructive discharge. "First, the burdens imposed upon the employee must cause, and be intended to cause, a change in 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." Pacific FM, Inc. d/b/a KOFY, 332 N.L.R.B. No. 67, 2000 WL 1587477, at *45 (Sept. 29, 2000) (citing Crystal Princeton Refining, 222 N.L.R.B. 1068 (1976)). The requirement was apparently first specified in Crystal Princeton. As Professor Roslyn Corenzwit Lieb has asserted, this requirement is inconsistent with both "the spirit and letter of the Act." Lieb, supra note 12, at 158. The goal of the NLRA is to protect employees in their right to engage in collective bargaining activities. See 49 Stat. 449 § 1 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1988)). Professor Lieb explains that the point of the constructive discharge doctrine originally was to recognize that an employer thwarts that goal whenever its conduct discourages protected activity. Therefore, whenever an employee resigns pursuant to such discriminatory conduct, her resignation "is reasonable and should be characterized as a constructive discharge." Lieb, supra note 12, at 163 ("When the employer's conduct discourages protected activity, section 8(a)(3) has been violated. Any subsequent resignation, therefore, is reasonable and should be characterized as a constructive discharge, regardless of whether the resignation was foreseeable."). Thus, an additional showing of employer intent to rid itself of an employee should not be required. However, Professor Lieb's approach, including her straightforward characterization of employee reasonableness, has not been adopted by the Board or enforcing courts.

53. 509 F.2d 923 (10th Cir. 1975).
54. Id. at 924-25.
55. See id. at 923. The court relied on NLRB precedent. See id. at 929 (citing J. P. Stevens & Co., Inc. v. N.L.R.B., 461 F.2d 490 (4th Cir. 1972)). J.P. Stevens found a constructive discharge where the company set an employee's pay rate "at an artificially low level for the purpose of causing her to resign." 461 F.2d at 494 (internal quotations omitted).
The court held that something more than the presence of discrimination must be found to establish a constructive discharge: the discrimination must be deliberately targeted at coercing the plaintiff's resignation, not merely aimed at the plaintiff.\textsuperscript{56}

In contrast to Muller, that same year the Fifth Circuit in Young v. Southwestern Savings and Loan\textsuperscript{58} held that an employee who quit because she felt forced to attend required religious meetings was constructively discharged.\textsuperscript{59} The Fifth Circuit explained that the employee's working conditions must be made intolerable \textit{as a result} of the employer's deliberate discriminatory conduct, but did not hold that an employer must create the intolerable conditions with the specific intent of causing the employee's resignation.\textsuperscript{60}

Although the distinction between Muller's specific intent standard and Young's discriminatory intent standard is subtle, it is important, because the specific intent standard is much more difficult to satisfy.\textsuperscript{61} Under Young's discriminatory intent standard, a plaintiff can demonstrate that an employer's conduct was deliberate by showing that the employer, or an agent of the employer, intentionally committed the conduct.\textsuperscript{62} If the constructive discharge plaintiff claims, as is typical, that some type of employment action, such as a demotion or failure to promote, forced her resignation, then she need only show that the employer actually demoted or failed to promote her, and that this was motivated by her protected status. Additionally, a plaintiff may be able to satisfy the discriminatory intent requirement merely by showing that the employer was aware of the intolerable conditions and permitted them to continue.\textsuperscript{63} Under the specific intent standard of Muller, however, the plaintiff must also somehow prove the employer was motivated by a desire to force the plaintiff to resign.

\begin{itemize}
\item \textsuperscript{56} Muller, 509 F.2d at 929 (emphasis added).
\item \textsuperscript{57} Id.
\item \textsuperscript{58} 509 F.2d 140 (5th Cir. 1975).
\item \textsuperscript{59} Id. at 143.
\item \textsuperscript{60} The court explained that "[t]he general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee." Id. at 144.
\item \textsuperscript{61} For a thorough discussion of the Muller and Young cases and their different results, see Martin W. O'Toole, Note, Choosing a Standard for Constructive Discharge in Title VII Litigation, 71 CORNELL L. REV. 587, 591-96 (1986).
\item \textsuperscript{62} See, e.g., Burlington Indus. v. Ellerth, 524 U.S. 742, 754-55, 758-60 (1998) (discussing the applicable rules of agency).
\item \textsuperscript{63} See, e.g., Audenreid v. Circuit City Stores, Inc., 97 F. Supp. 2d 660, 664 (E.D. Pa. 2000) ("[T]o establish constructive discharge, a plaintiff must demonstrate that the employer permitted conditions of discrimination so intolerable that a reasonable person would have felt compelled to resign." (emphasis added)); see also Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888 (3d Cir. 1984). This approach seems consistent with the agency rules for sexual harassment liability articulated in Ellerth. See Ellerth, 524 U.S. at 758-60.
\end{itemize}
B. The Circuit Courts Split over Whether (and to what Degree) Specific Employer Intent is a Required Element of Constructive Discharge

Most circuits, including the First,64 Third,65 Fifth,66 Seventh,67 Eighth,68 Ninth,69 Tenth,70 and Eleventh,71 do not require the plaintiff to show the employer specifically intended to force her to quit.72 For example, the First
Circuit in *Ramos v. Davis & Geck*\(^{73}\) upheld a constructive discharge where the employee was replaced as supervisor by a younger employee, reassigned to an undesirable work station, harassed by the new supervisor on at least two occasions, and threatened with assault on one. The employee became upset after the final confrontation and left the company.\(^{74}\) The court rejected the employer’s argument that no constructive discharge should be found because it did not subjectively intend to force the employee’s resignation. The court explained, “such a requirement would be inconsistent with the purpose of the constructive discharge doctrine to protect employees from conditions so unreasonably harsh that a reasonable person would feel compelled to leave the job.”\(^{75}\) The Fifth Circuit similarly repudiated the specific intent standard in *Bourque v. Powell Electrical Manufacturing Co.*\(^{76}\) explaining that the court should simply analyze “the conditions imposed” by the employer, rather than “attempt[ing] to divine the state of mind of the employer.”\(^{77}\)

The Eighth Circuit at one time espoused the view that a constructive discharge only happens when the employer specifically intends to cause the resignation.\(^{78}\) However, the circuit has since tempered its view, explaining in the 1993 case of *Hukkanen v. International Union of Operating Engineers*\(^{79}\) that the court’s previous holdings do “not mean constructive discharge plaintiffs must prove their employers consciously meant to force them to quit . . . When an employer denies a conscious effort to force an employee to resign . . . the employer must necessarily be held to intend the reasonably foreseeable consequences of its actions.”\(^{80}\) The Eighth Circuit did not exactly abandon the specific intent requirement, but made it easier to satisfy by allowing a court to infer specific intent.

In *Hukkanen*, the Eighth Circuit took the expansion of the standard one step further, however. In finding that the plaintiff employee, whose

\(^{73}\) *Ramos v. Davis & Geck*, 167 F.3d 727 (1st Cir. 1999).

\(^{74}\) *Id.* at 730. This may be another case where evidence of becoming emotional/upset benefits the plaintiff: “Shaken by the confrontation, Ramos began to cry and went to the company infirmary. Ramos was excused from work by the company doctor; he never returned to work.” *Id.*

\(^{75}\) *Id.* at 732.

\(^{76}\) *Bourque v. Powell Elec’l Mfg. Co.* 617 F.2d 61 (5th Cir. 1980).

\(^{77}\) *Id.* at 65.

\(^{78}\) See *Johnson v. Bunny Bread*, 646 F.2d 1250, 1256 (8th Cir. 1981) (“the employer’s actions must have been taken with the intention of forcing the employee to quit”).

\(^{79}\) 3 F.3d 281 (8th Cir. 1993).

\(^{80}\) *Id.* at 284. The court explained, “[t]o hold otherwise would draw an irrational distinction among discrimination victims who reasonably feel forced to quit: employees who are discriminated against because their employer wants them to quit could prove a constructive discharge, while employees like [plaintiff] who are discriminated against because of their employers’ ongoing pursuit of sexual gratification could not. Constructive discharge plaintiffs thus satisfy *Bunny Bread’s* intent requirement by showing their resignation was a reasonably foreseeable consequence of their employers’ discriminatory actions.” *Id.* at 284-85.
supervisor had subjected her to a three-year campaign of sexual harassment, was constructively discharged, the court held, "[a]lthough the district court did not expressly find [plaintiff’s] resignation was a reasonably foreseeable consequence of [the supervisor’s] conduct, the district court’s finding that a reasonable person in [plaintiff’s] position would have felt compelled to quit is equivalent to such a finding." Thus, the Eighth Circuit allowed two inferences in satisfying the constructive discharge: first, that the employer intended to force the employee to resign, because that was a reasonably foreseeable consequence of the harassment and, second, that the perspective of a reasonable person may be substituted for the actual perspective of the plaintiff in order to find the resignation reasonably foreseeable. Although purporting to clarify the standard, the *Hukkanen* decision leaves some ambiguity in the circuit’s constructive discharge law.

A minority of circuits do still purport to require that the plaintiff show that the employer subjectively intended to force him to quit. The Second and Fourth Circuits adhere to the view that a constructive discharge “exists only if the actions complained of were intended by the employer as

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81. Id. at 285.
82. The Tenth Circuit has wrestled with the appropriate standard as well. At one time the Tenth Circuit was frequently cited as espousing a requirement of employer intent, but adopted an objective standard in *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986): “[O]ur focus may once have been on the explicit subjective intent of the employer to force the employee to leave ... we have been struggling with the problem of what the employee must prove.” *Derr* explicitly adopts the rule that a plaintiff must show “whether the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee’s position would feel compelled to resign.” Id.

Two additional circuits have somewhat murky standards for the level of employer intent a plaintiff must demonstrate. The Sixth Circuit requires specific intent on the part of the employer, but rules that intent can be determined via the “foreseeable consequences of the employer’s actions.” *Moore v. Kuka Welding Sys.*, 171 F.3d 1073, 1080 (6th Cir. 1999) (“To constitute a constructive discharge, the employer must deliberately create intolerable working conditions, as perceived by a reasonable person, with the intention of forcing the employee to quit and the employee must actually quit. To determine if there is a constructive discharge, both the employer’s intent and the employee’s objective feelings must be examined. Intent can be shown by demonstrating that quitting was a foreseeable consequence of the employer’s actions.” (citations omitted)). The D.C. Circuit also has a standard that can be read both ways, requiring proof of “whether the employer deliberately made working conditions intolerable and drove the employee out.” *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1558 (D.C. Cir. 1997). *But see Clark v. Marsh*, 665 F.2d 1168, 1175 n.8 (D.C. Cir. 1981) (“To the extent that appellant denies a conscious design to force Clark to resign, we note that an employer’s subjective intent is irrelevant; appellant must be held to have intended those consequences it could reasonably have foreseen.”). Whether these courts will continue to require, or at least say that they require, a showing of specific intent, or whether they will allow an inference of specific intent once a lower threshold has been met in the manner of *Hukkanen* is difficult to predict.

84. See, e.g., *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985); *see also Scott v. Amerix Yam*, 72 F. Supp. 2d 587, 594 (D. S.C. 1999) (“Deliberateness requires proof that the actions complained of were intended by the employer as an effort to force the employee to quit.” (internal citations and quotations omitted)).
an effort to force the employee to quit.\textsuperscript{85} However, these circuits are showing signs of retreating from a hard-line rule. For example, the Maryland District Court has conceded that "this proof requirement may be satisfied with circumstantial evidence such as evidence of a failure to act in the face of known intolerable conditions."\textsuperscript{86} This standard closely resembles the Eighth Circuit's observation that employers must be assumed to intend the reasonably foreseeable consequences of their actions. Nonetheless, courts in the Second and Fourth Circuits must be satisfied that the specific intent element has been met, whether by direct evidence, circumstantial evidence, or judicial sleight of hand.\textsuperscript{87}

The role of the employer's intent in a constructive discharge actually plays two parts. First, employer intent is an element of the plaintiff's constructive discharge claim. Second, as is shown in Muller and other cases, the employer's intent also has significant evidentiary value in determining whether the plaintiff's response was reasonable. If a court requires that the employer specifically intend to cause the employee's resignation, then the court will not find that the resignation was reasonable unless the employer possessed the requisite specific intent. Thus, even if an employee is subjected to egregious discrimination, if the employee cannot also show that the object of the discrimination was to force him to quit, his quitting will not be deemed reasonable. The confusion stems from courts' failure to see that constructive discharge should be a straightforward question of disparate treatment. Because a constructive discharge claim cannot exist independently of a discrimination claim, the inquiry into whether the employer subjectively intended to cause the resignation, or can be construed to have intended to cause the resignation, unnecessarily complicates the process. The inquiry should be limited simply to whether intentional disparate treatment occurred, and should proceed under the framework established by \textsection 703 of Title VII.\textsuperscript{88} If the employee succeeds in

\textsuperscript{85} Bristow, 770 F.2d at 1255.
\textsuperscript{87} See Underwood, supra note 14, at 361-62 (noting that the federal courts "have yet to adopt and carefully delineate a thoroughly equitable, yet practical standard," and advocating adoption of a standard focusing on whether or not the employer or an agent had become aware of the intolerable working conditions and whether the conditions persisted after the employer "had a reasonable time to correct the situation"). For an argument that courts should require a showing that the employer subjectively intended to cause the employee's resignation (i.e., advocating a uniform use of the specific intent standard) in Title VII and ADEA cases, see Saxe, supra note 14.
\textsuperscript{88} 42 U.S.C. \textsection 2000-e2 (2001). Section 703(a)(1) makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's" protected status. Id. (emphasis added). See the framework established in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and refined in Texas Dep't of Comm. Affairs v. Burdine, 450 U.S. 248 (1981) and St. Mary's Honor Center v. Hicks, 9 U.S. 502 (1993).
showing intentional discrimination violating Title VII's prohibition on
disparate treatment, the element of employer intent should be satisfied,
because proving disparate treatment requires proof of intent, whether by
direct or circumstantial evidence. The additional requirement of
subjective intent is both unfair and unwarranted, and is symptomatic of the
courts' shift in focus from the employer's discriminatory conduct to the
reasonableness of the employee's response. That is, courts have been lured
into examining the subjective intent of the employer as part of their inquiry
into whether or not the employee's resignation was reasonable.

C. The Employee Reasonableness Standard

Although early NLRB cases did not articulate the requirement that the
employee's response to the employer's illegal conduct be reasonable, the
decisions do seem to assume that the employees acted rationally and
reasonably. By the time courts began addressing constructive discharge
claims under Title VII, the reasonableness inquiry had shifted focus from
asking whether the employer's discrimination was illegal (making a
resignation reasonable) to whether the particular discrimination was so
"difficult or unpleasant that a reasonable person in the employee's shoes
would have felt compelled to resign." To understand how and why this
shift occurred, we return briefly to cases decided by the NLRB.

1. Reasonableness Under the NLRA

NLRA decisions prior to the mid-1970s never explicitly articulated a
requirement that an employee's resignation be reasonable, but the Board
and the circuit courts clearly included such a requirement in their analysis.
However, the Board and the courts seemed to approach the question
differently. Whereas the Board tended to find an employee's resignation
reasonable as long as the employer engaged in illegal discrimination, the
courts inquired into whether resignation was a reasonable response to the
totality of the circumstances. In making this determination, courts
examined whether the employees experienced more than mere "garden-

89. Of course, the current structure of disparate treatment law is problematic in itself, as Professor
Linda Hamilton Krieger has thoroughly explained. See Linda Hamilton Krieger, The Content of Our
Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47
STAN. L. REV. 1161, 1241-43 (1995) (arguing for the elimination of the pretext model of individual
disparate treatment and the use of "a unitary 'motivating factor' analysis" and a two-tiered liability
system modeled on the ADEA). While agreeing that reforms are necessary, this paper assumes that a
plaintiff in a constructive discharge action should be required to show intentional discrimination by the
employer (but not the specific intent to cause the resignation) by whatever prevailing model of proof is
in place.

variety” (but otherwise illegal) discrimination, as well as whether or not the employee attempted to mitigate the harm prior to quitting.

In early cases especially, the Board seemed to trust the employee’s ability to gauge whether or not a resignation was reasonable in light of the employer’s discrimination. For example, in Clover Fork Coal,91 the Board found actionable discrimination where an employee quit in response to a retaliatory transfer and observed that the employee “had been a coal loader for 21 years. It appears unlikely that he would be unable to analyze a place as a good working place or a bad one, and that he would refuse to work on a good place.”92 There is an implicit belief in the Board's language that the employee had correctly evaluated the situation as unreasonable, and that the Board believed he reasonably resigned his employment. Similarly, in Russell Manufacturing,93 the Board found an employee who left in the face of discriminatory treatment was constructively discharged, explaining that the employee had “correctly evaluated the situation when he informed the superintendent . . . that the treatment to which he had been subjected was . . . the final act in a course of conduct which could not be justified with the reasonable business requirements of [the employer], and which could only be characterized as discriminatory.”94 The Board was satisfied that an employee who chooses to leave a discriminatory work environment acts reasonably.

Enforcing courts, on the other hand, tended to look for some type of harm to the employee beyond a violation of his or her rights under the NLRA. In other words, resignation in response to mere illegal conduct was not enough to clear the reasonableness hurdle; the employee must have suffered some type of more tangible harm than the mere infringement of his rights under the NLRA. In Waples-Platter,95 for example, even though the court recognized that the transfers constituted discrimination prohibited by the NLRA, the court refused to find a constructive discharge where the temporary transfer entailed “working conditions . . . the same or just as good as the places they originally worked [and] the hours and the pay were exactly the same.”96 The court thus found an absence of economic (or any other tangible) harm fatal to the constructive discharge claim, in spite of the fact that the Board had made no such inquiry. The Board had simply held that the employees were justified in resigning; because the transfers were

91. 4 N.L.R.B. 202 (1937), enforced, Clover Fork Coal Co. v. NLRB, 97 F.2d 331 (6th Cir. 1938).
92. Id. at 222. The Board also noted that the employee’s credibility was bolstered by the fact that “the incident occurred on . . . a day on which there were a great many discharges of and discriminations against union members.” Id.
94. 82 N.L.R.B. 1081, 1164.
95. In re Waples-Platter, 140 F.2d 228 (5th Cir. 1944).
96. Id. at 230.
discriminatory, the employees had been constructively discharged. In Saxe-Glassman, the court noted that in addition to suffering discriminatory treatment, the female employees were emotionally and physically upset by the actions the employer had taken. The court upheld the Board's constructive discharge finding.

Courts also began to evaluate the reasonableness of an employee's resignation by examining whether the employee attempted to remedy the situation himself before quitting. For example, in Progressive Mine Workers of America v. NLRB, the court rejected a constructive discharge claim where the employer knew two employees were being kept from work by union coercion, but the employer did nothing to assist the workers or stop the coercion. The court noted disapprovingly that neither employee returned to the mine for work, nor did they make any attempt or effort so to do. Neither ever made any complaint to or notified the company as to why they did not return, neither of them made known to the company a desire to exercise their right to work and neither of them requested that the company protect them in the exercise of their right.

The court acknowledged that "[t]rue, they testified that their failure to return to their jobs was because of the threats which had been made against them by Union officials. But, this does not explain their failure to notify the company of their predicament and their failure to request protection if they desired work." The court was especially incensed at the inaction of one of the employees as he had "ample opportunity to notify the company inasmuch as he had a telephone in his home, and on several occasions he saw [the] mine manager . . . on the streets of the city where [the employee] resided." The Board, on the other hand, had not seen the necessity of second-guessing what the employees could have or might have done. In fact, the Board's Progressive Mine opinion, which held that the employees had been constructively discharged, placed the burden on the employer to mitigate the situation, because the employer knew that the employees were being kept away from the mine by the union.

It is not clear what measurement or baseline courts used in trying to determine whether an employee had acted reasonably. Perhaps judges looked for evidence of harm that seemed tangible to them. Economic detriment is surely a salient harm in the labor arena. Or, perhaps employers

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98. NLRB v. Saxe-Glassman Shoe Corp., 201 F.2d 238 (1st Cir. 1953).
99. Progressive Mine Workers of America v. NLRB, 187 F.2d 298 (7th Cir. 1951).
100. Id. at 303-04.
101. Id. at 304.
102. Id.
104. Id. at 1492-94.
who inflicted emotional harm on their female employees aroused the chivalrous indignation of judges—at the time, virtually all men—and made them more willing to find a constructive discharge. Whatever the reasons, they are not explicitly revealed in the cases, and can only be speculated upon, or at best divined from the language of the cases.

Whereas the Board surely viewed employees engaged in organizing efforts as unequal in power to the employers from whom the NLRA was intended to protect them, courts do not seem to have shared that view. Courts seemed to assume that no rational employee would choose to leave a job merely because he had suffered some type of discrimination. Perhaps this viewpoint was a holdover from the Great Depression, when those who had jobs (even if the conditions of employment were unfair or discriminatory) were seen as fortunate. Judges may have believed that it would be more rational for an employee to try to work things out with his employer on his or her own, perhaps underestimating the enormity of the power gulf between employees and employers. Finally, some judges may have simply seen resignation as an overreaction to the discrimination. Whatever the reasons, they continued to influence courts in evaluating whether an employee's resignation was a reasonable response to an employer's discriminatory violation of federal law. As the next section demonstrates, courts today continue to operate on the assumption that it is rarely reasonable for an employee to quit her job in response to illegal discrimination.

2. Reasonableness in Employment Discrimination Cases

The current, most prevalent test for evaluating whether an employment discrimination plaintiff has been constructively discharged requires that

105. In 1934, Florence E. Allen became the first female federal judge when she was nominated to the Sixth Circuit. She remained the only woman on the federal bench until President Truman nominated Burnita Shelton Matthews to a district judgeship in 1949. The first female NLRB member, Betty S. Murphy, did not join the Board until 1975.

106. In any event the results are very inconsistent. Sometimes the Board and courts adhered to a surprisingly formalistic view of the conduct necessary for a constructive discharge. In Steel Industries v. NLRB, 325 F.2d 173, 175-76 (7th Cir. 1963), the employee, a known union sympathizer in a known anti-union company, was transferred from night shift to day shift; in response she quit. The court reversed the Board's order of reinstatement based on a finding of constructive discharge because it found dispositive the fact that the employee admitted saying to her supervisor, "I quit," and further admitted that she intended to quit. Id. at 176. While the facts as stated by the court seem to give scant support for the argument that the transfer was motivated by anti-union animus rather than being a legitimate business decision, the court's utter dismissal of any other explanation is troublesome. "It appears to have been the position of... the Board," intoned the court, "... that the Company concocted a scheme to rid itself of [her] as an employee. The argument is specious and any weight to which it might be entitled is completely dissipated by the undisputed fact that [the employee] quit voluntarily without even giving a reason or excuse." Id. at 178-79 (emphasis added). The possibility that an employee could be coerced into saying "I quit" does not seem to have been considered by the court.
"the trier of fact must be satisfied that the . . . working conditions [are] so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign."¹⁰⁷ This standard, first articulated by the First Circuit in a First Amendment case brought by a government employee, has since been adopted in some form by all of the circuits and applied to constructive discharges in Title VII cases.¹⁰⁸ In evaluating whether a "reasonable person in the employee’s shoes would have felt compelled to resign," courts look to whether the discrimination suffered was more than mere actionable discrimination, and to whether the employee attempted to mitigate the harm.

a. The Requirement of "Something More" than Mere Discrimination

In Drake v. Minnesota Mining & Manufacturing Co.,¹⁰⁹ the Seventh Circuit found no constructive discharge where two white employees, a husband and wife, brought a hostile environment race discrimination claim alleging that they had been shunned by their co-workers because of their association with black employees during a period of racial tensions at the plant. Other workers left the room whenever plaintiffs entered and refused to speak to them; following publication of a series of news articles about the problems at the plant, the plaintiffs received threatening phone calls;¹¹⁰ and Mrs. Drake suggested that she feared for her safety.¹¹¹ In response to the ongoing harassment, the Drakes resigned.¹¹² Upholding the lower court’s grant of summary judgment in favor of the defendant, the court held that, "[m]ore than ordinary discrimination is necessary to establish a constructive discharge claim."¹¹³ In the Seventh Circuit’s opinion, the presence of harassment was not enough to amount to unreasonable, intolerable working conditions. The court informed the plaintiffs that they should have patiently pursued a statutory remedy rather than taking matters into their

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¹⁰⁸. See, e.g., Ramos v. Davis & Geck, 167 F.3d 727, 731 (1st Cir. 1999) ("[T]he test is whether "a reasonable person in the employee’s shoes would have felt compelled to resign."); Lindale v. Tokheim Corp., 145 F.3d 953, 955 (7th Cir. 1998) ("[T]he test for intolerable working conditions is whether a reasonable employee would have concluded that the conditions made remaining in the job unbearable."); Bristow v. Daily Press, 770 F.2d 1251, 1255 (4th Cir. 1985) (holding the test is "whether a 'reasonable person' in the employee's position would have felt compelled to resign"); see also EEOC Policy Guide, page 6, at 405:6693 ("[A]n employer is liable for constructive discharge when it imposes intolerable working conditions [which] foreseeably would compel a reasonable employee to quit . . . .").
¹⁰⁹. 134 F.3d 878 (7th Cir. 1998).
¹¹⁰. Id. at 882.
¹¹¹. Id. at 886. The court dismissed with this assertion, saying that Mrs. Drake had presented no evidence that her fear was reasonable.
¹¹². Id. at 882.
¹¹³. Id. at 886.
own hands and quitting.\textsuperscript{114}

In \textit{Bourque v. Powell Electrical Manufacturing Co.},\textsuperscript{115} the Fifth Circuit refused to recognize a constructive discharge even while upholding an egregious sex discrimination claim. The plaintiff, Claudette Bourque, was employed as a secretary and applied for an opening as a buyer. Her employer told her she could have the position, but he would not raise her secretarial salary of $675 per month to the $950 per month paid to other buyers, saying, "I will not pay a woman, any damned woman, the same money that I will pay a man for that position. I don't care."\textsuperscript{116} Ms. Bourque agreed to take the job for a 90-day trial period with the understanding that her salary would be increased from $675 to $850 per month—still $100 less than the normal rate—at the end of her probationary period.\textsuperscript{117} After the three months elapsed her employer raised her salary, but only to $719 per month.\textsuperscript{118} Bourque quit.\textsuperscript{119} Although the court had no trouble finding for Ms. Bourque on her equal pay claim, it refused to recognize that she had been constructively discharged. The court explained,

Ms. Bourque voluntarily accepted a promotion at a rate of compensation she knew to be unequal to that earned by males holding the job. Further, she agreed to work for unequal pay and expected only that her compensation would be increased to a level she also knew to be unequal to that earned by male buyers. We have no question that her resignation resulted directly from her disappointment in not receiving the raise she had expected. We cannot fault her for that disappointment. Nevertheless, we cannot accept that under the circumstances presented here a reasonable employee would have felt compelled to resign.\textsuperscript{120}

Because the plaintiff had agreed to work under unequal conditions, the court found she was unreasonable in not agreeing to work for the more unequal conditions to which her employer chose to subject her. She agreed to work with the understanding that she would receive a $175 raise. Instead, she received a $44 raise—only one quarter of the amount she had agreed to. Yet the court believed she was unreasonable in resigning her

\textsuperscript{114} \textit{Id.} at 887; \textit{see also} Tutman v. WBBM-TV, Inc., 209 F.3d 1044, 1050 (7th Cir. 2000) ("Working conditions for constructive discharge must be even more egregious than the high standard for hostile work environment because "in the ordinary case, an employee is expected to remain employed while seeking redress." (quoting Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878 (7th Cir. 1998)); Arroyo v. WestLB Administration, Inc., 54 F. Supp. 2d 224, 232 (S.D.N.Y. 1999) (observing that "there is a growing body of case law [t]o the effect that to prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment" (quotations and citations omitted)).

\textsuperscript{115} 617 F.2d 61 (5th Cir. 1980).

\textsuperscript{116} \textit{Id.} at 64 n.2.

\textsuperscript{117} \textit{See id.} at 64.

\textsuperscript{118} \textit{See id.}

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Id.} at 65.
employment in the face of such entrenched sex discrimination, explaining, "[w]e think that unequal pay alone does not constitute such an aggravated situation that a reasonable employee would be forced to resign."[121] Ms. Bourque was subjected to sex discrimination, pay discrimination, and an employer who reneged on his bargain. However, by reducing the sum of her experience to "unequal pay alone," the court easily found her resignation unreasonable. It is hard to imagine how much more severe the discrimination would have needed to be before the court would have found resignation justifiable.

Although the Supreme Court in *Harris v. Forklift*¹²² promised that "Title VII comes into play before the harassing conduct leads to a nervous breakdown,"¹²³ plaintiffs are more likely to present the aggravating circumstances necessary to succeed on a constructive discharge claim if a breakdown is looming. In *Chertkova v. Connecticut General Life Insurance Co.*,¹²⁴ the court, in reversing summary judgment for the employer, noted that "a finding of constructive discharge would be supported by the fact that plaintiff had a breakdown on the day before her discharge letter was to be delivered."¹²⁵ It seems that *Harris'* promise does not apply in the constructive discharge arena; a plaintiff may be deemed unreasonable if she quits her job prior to the point at which it becomes a detriment to her health. However, in some cases even a breakdown is not enough to invoke the protection of the constructive discharge doctrine. Plaintiffs who cry or otherwise become emotionally upset do not necessarily succeed on their constructive discharge claims any more frequently than those who stalwartly remain on the job.¹²⁶

Although many courts have held that single instances of discrimination, even egregious discrimination, are not enough to support a

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121. Id. at 66.
123. Id. at 22.
124. 92 F.3d 81 (2d Cir. 1996).
125. Id. at 90; see also Goss v. Exxon Office Systems Co., 747 F.2d 885 (3d Cir. 1984). In *Goss*, a saleswoman suffered miscarriages twice after meetings with her supervisor in which he was verbally abusive and questioned her ability to combine her career with motherhood. After the second miscarriage she was reassigned from a lucrative to a less-desirable territory. *Id.* at 888. The court found not only that the transfer constituted a reduction in compensation, because of the reduced commissions the plaintiff was likely to earn, but also that the supervisor's treatment undermined her confidence and therefore her ability to perform her job as a salesperson. *Id.* Such an impact on both her earnings and her state of mind was sufficient to sustain the finding of constructive discharge. *Id.* at 889.
constructive discharge, courts have also rejected employers' arguments that a pattern of discriminatory incidents, which standing alone would not support a constructive discharge, are not sufficiently "aggravating" in the aggregate. "[T]he fallacy in this 'divide and conquer' approach," explained one court, "is that these events must be viewed as part of a single behavior pattern." For example, the Ninth Circuit, in Nolan v. Cleland, found that a jury could infer the "aggravated situation" necessary for a constructive discharge where the plaintiff was subjected to discriminatory assignments and evaluations over a two-year period. The court explained that "this history of unlawful discrimination provides sufficient aggravating factors that may have made [the plaintiff]'s position intolerable."

The bottom line is that it is very difficult to tell what "aggravating circumstances" need to be present for resignation to be a "reasonable" response to employer discrimination and harassment. The confusion stems from a refusal to recognize the inherent reasonableness in quitting in the face of illegal discrimination. As long as courts insist on evaluating employee response on a case-by-case basis, applying vague, subjective notions of reasonableness, the doctrine will remain incoherent.

Equally troubling, the doctrine is susceptible to a continual ratcheting upward of the standard for an appropriate employee response. Without a firm doctrinal anchor, the notion of what the reasonable employee should have to endure will continue to be shaped by the whims of judges who, perhaps cynical from years of hearing discrimination cases, simply may

127. See, e.g., Alicea Rosado, 562 F.2d 114 (1st Cir. 1977) (holding loss of prestige from discriminatory job transfer may not be enough); Pena v. Brattleboro Retreat, 702 F.2d 322 (2d Cir. 1983) (holding loss of prestige because of discriminatory replacement by trainee not enough); Vaughn v. Pool Offshore Co., 683 F.2d 922 (5th Cir. 1982) (holding pranks, tricks, heavy-handed humor, and being required to work two consecutive shifts not enough).

128. Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 563 (1st Cir. 1986) (finding summary judgment improper where, in an attempt to coerce early retirement, the employee was "demoted, reprimanded for doing something he had done before without sanction, excluded from training sessions, and threatened with a drastic increase in working hours . ."); see also Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1084 (3d Cir. 1996) (noting that a history of discrimination could constitute the "aggravating circumstances" necessary to support a constructive discharge claim).

129. Nolan v. Cleland, 686 F.2d 806 (9th Cir. 1982).

130. Id. at 814. What most likely saved Ms. Nolan from Ms. Bourque's fate was the fact that Nolan persevered in her job for two years prior to quitting. Having shown sufficient industry by staying on the job and attempting to mitigate the harm she suffered, she convinced the court that she was worthy of a remedy and her constructive discharge was recognized. But although the Ninth Circuit in Nolan found a two-year history of discrimination sufficient to show constructive discharge, the Tenth Circuit in Thomas v. Dennys, 111 F.3d 1506, 1514 (10th Cir. 1997), found that an eight-year history of failure to promote was not enough to overcome summary judgment. While the court found merit in the plaintiff's prima facie case for race discrimination, the court dismissed the constructive discharge claim saying only that "the conditions of [plaintiff's] employment . . . do not rise to the level necessary to create a fact issue on this claim." The District of Columbia Circuit in Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir. 1981), however, found that a discriminatory failure to promote over eleven years could constitute the "aggravating factors" necessary for a constructive discharge claim.
cease to be moved by garden variety discrimination claims. Professor Rebecca Hanner White notes that in discrimination cases in general, "[t]he level of adversity needed to support a prima facie case . . . appears to be rising. Numerous courts now insist that the challenged action be 'materially adverse' before a prima facie case will exist." Thus the reasonable plaintiff may devolve over time into someone who clings to his job long after common sense, not to mention common decency, would advise him to quit.

b. The Requirement of Mitigation

Not only must an employee often experience "materially adverse" discrimination before bringing a constructive discharge claim, but, according to the Seventh Circuit in *Drake*, “[i]n the ‘ordinary’ case, an employee is expected to remain employed while seeking redress” as well. The standard is rather unforgiving; for example, in *Bourque* the Fifth Circuit explained that, “[u]nequal pay is not a sufficient justification to relieve [the plaintiff] of her duty to mitigate damages by remaining on the job.” Like Mr. and Mrs. Drake, since Ms. Bourque had another remedy for her garden-variety discrimination, she was not permitted to quit. “[W]e believe,” said the Fifth Circuit, “that society and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships.”

Courts require that plaintiffs not only remain on the job, but take affirmative steps to mitigate the harm as well. The district judge in *Ellerth*

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131. Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1143 (1998); see also Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove that the Employer's Action was Materially Adverse or Ultimate*, 47 U. KAN. L. REV. 333 (1999). Professor Hanner White further explains that, "to make matters more confusing, courts sometimes consider 'material adversity' as an element of a claim, an approach akin to that of the 'ultimate employment decision' courts, while at other times a 'materially adverse employment action' is regarded only as an element for a prima facie case." Hanner White, supra at 1143.

132. Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878, 886 (7th Cir. 1998); see also, e.g., Jackson v. Arkansas Dep't of Educ., 272 F.3d 1020 (8th Cir. 2001) (finding no constructive discharge where plaintiff unreasonably failed to avail herself of the employer's grievance procedure, and once she did, employer acted promptly); Wolf v. Northwest Indiana Symphony, 250 F.3d 1136, 1143 (7th Cir. 2001) (requiring that an employer be given the opportunity to remedy) (citing cases)).


134. *Id*; see also *Coffman v. Tracker Marine*, 141 F.3d 1241, 1247 (8th Cir. 1998) (plaintiff should have remained on the job while seeking redress). The courts' obsessive focus on the "prophylactic purpose" of Title VII has been criticized. See Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 335 (2001) ("By overemphasizing preventive efforts, the Court ignores deterrence through damages and compensation (making victims whole) as other important goals of Title VII.").
v. Burlington Industries\textsuperscript{135} rejected plaintiff Kimberly Ellerth's constructive discharge claim because she failed to take advantage of the employer's harassment complaint procedures. "Plainly," said the court, "when an employer provides an avenue for relief from sexual harassment and an employee chooses to forego that avenue, she cannot be heard to complain that she was constructively discharged by virtue of the harassment."\textsuperscript{136} This requirement that plaintiffs mitigate damages before quitting is not new, but it is inappropriate. Like the requirement of "something more than mere discrimination," it convolutes the constructive discharge inquiry by focusing on the reasonableness of an employee's response, rather than on the alleged intentional discriminatory conduct of the employer.\textsuperscript{137}

Although Alicea Rosado is generally cited for its enunciation of the objective reasonableness standard, Alicea Rosado also introduced the idea of an employee's responsibility to mitigate his damages before resigning.\textsuperscript{138} Rather than simply quitting, the court explained, the plaintiff had a duty to explore other options.\textsuperscript{139} Similarly, in Young v. Southwestern Savings\textsuperscript{&} Loan,\textsuperscript{140} the dissenting judge thought the plaintiff did not try hard enough to retain her employment when she resigned the same day she experienced the employer's discriminatory conduct rather than staying employed and investigating whether the conduct was warranted by company policy. The judge reasoned:

Although the company is by no means blameless in the matter, appellant's precipitous departure also made accommodation impossible..... I would

\textsuperscript{135} Ellerth v. Burlington Indus., Inc., 912 F. Supp. 1101 (N.D. Ill. 1996). See the complete discussion of the Ellerth cases in Part IV, infra.

\textsuperscript{136} Id. at 1124.

\textsuperscript{137} See, e.g., Mark S. Kende, Deconstructing Constructive Discharge: The Misapplication of Constructive Discharge Standards in Employment Discrimination Remedies, 71 NOTRE DAME L. REV. 39 (1995). Kende points out, however, that not all courts require that an employee attempt to mitigate damages prior to resigning.

\textsuperscript{138} Rosado v. Santiago, 562 F.2d 114, 118-20 (1st Cir. 1977) (citing, inter alia, to the Restatement of Contracts § 336 (1932) and Corbin on Contracts § 1042 at 268 (1964)). The case was remanded for evaluation, under the new standard, of whether the plaintiff was constructively discharged. Id. at 120. If the lower court were to find that the transfer did not amount to a constructive discharge, the court noted, the plaintiff "would not be entitled to recover damages for lost wages as he had a duty to remain on the job collecting his regular pay until relief from the [transfer] was afforded by legal process." Id.

\textsuperscript{139} Id. at 119. The court likened the plaintiff employee's duty to act reasonably under the circumstances to the idea of reasonableness in contract law. Id. The court did not consider, however, the question of whether the employer's illegal discrimination could be likened to a breach in the contract. The idea that an employer's violation of employment laws might somehow "void" the employment relationship is not explored here, but may make sense given the courts' willingness to find a duty on the part of employees to act reasonably. For example, in the Bourque case, Ms. Bourque and her employer agreed on a fixed salary once she had completed her probationary period, but the employer breached that promise. Yet the court did not consider that the employer's breach might have violated the agreement, giving Ms. Bourque the right to quit. Bourque v. Powell Mfg. Co., 617 F.2d 61, 64 (5th Cir. 1980).

\textsuperscript{140} Young v. Southwestern Sav. & Loan, 509 F.2d 140 (5th Cir. 1975).
CONSTRUCTIVE DISCHARGE DOCTRINE

simply hold that in cases like this one any “emotional discomfort...” is insufficient grounds to overweigh the substantial benefits of requiring as a precondition to constructive discharge the painless process of confirming the existence of the offensive company rule.\textsuperscript{141}

The judge found placing the burden of mitigation on the plaintiff prior to her termination desirable both because it “would encourage private settlement of employment disputes,” which is “not just desirable from the standpoint of judicial caseloads, [but also] in harmony with Congress’s intent in enacting Title VII.”\textsuperscript{142}

Some contemporary courts consider an employee’s attempts to resolve problems prior to quitting as an evidentiary “factor to be considered” in evaluating a constructive discharge.\textsuperscript{143} The employee’s duty to save the situation is elaborated in \textit{Lindale v. Tokheim Corp.},\textsuperscript{144} where the Seventh Circuit, in rejecting a constructive discharge claim by a plaintiff who alleged sex discrimination after she was twice passed over for an engineering promotion, explained,

In some situations, the standard of reasonableness will require the employee who wants to make a successful claim of constructive discharge to do something before walking off the job. The reason... is that passivity in the face of working conditions alleged to be intolerable is often inconsistent with the allegation. The significance of passivity is thus evidentiary... Failure to exhaust may show that the employee didn’t really consider his working conditions intolerable or may deny the employer a reasonable opportunity to correct the situation without facing a lawsuit.\textsuperscript{145}

In \textit{Lindale}, the court held that the plaintiff’s constructive discharge claim must fail because “a reasonable employee would not have considered a failure to be promoted an event that made her working conditions intolerable.”\textsuperscript{146} The court did not discuss the possible discriminatory conduct by the employer, but focused instead on the employee’s response and stated, “we cannot see how a reasonable jury could find that the failure to promote [plaintiff] made her working conditions intolerable. Indeed, her working conditions, tolerable before, were unchanged.”\textsuperscript{147} The court

\textsuperscript{141} Id. at 146. (Thornberry, J., dissenting).
\textsuperscript{142} Id. The judge notes, for example, “before the E.E.O.C. may take formal enforcement action it must investigate and attempt to settle the dispute by ‘informal methods of conference, conciliation, and persuasion.’” Id.
\textsuperscript{144} Lindale v. Tokheim Corp., 145 F.3d 953 (7th Cir. 1998).
\textsuperscript{145} Id. at 955-56 (citations omitted).
\textsuperscript{146} Id. at 956 (citations omitted).
\textsuperscript{147} Id. The court also dismissed the aggravating condition of two harassing co-workers who continually logged her off the computer and took over her cubicle, presumably with the employer’s knowledge. “[T]he boorish behavior was an annoyance rather than an offense. Many workers have to put up with boorish colleagues.” Id.; see also Steele v. Offshore Shipbuilding, 867 F.2d 1311, 1313-14
conceived of one reasonable response—fighting back—and did not even consider the possibility that other responses could be equally reasonable. Given the plaintiff's job position, or age, or gender, or race, or previous work experience, or any of a myriad of other factors, perhaps a "reasonable" response would be to keep a low profile, or simply abandon the situation.

Some courts have carried the requirement that an employee actively combat the discrimination a step further by accepting the idea that a plaintiff's failure to seek legal redress for her claimed injuries while still employed might weigh against a finding that she had found her job unbearable. In *Swiech v. Gottlieb Memorial Hospital*, the court rejected the employer's argument that it was entitled to summary judgment because of the plaintiff's failure to pursue legal remedies while still employed. However, the court agreed that at trial the plaintiff's lack of initiative could be "compelling evidence" that she, or a reasonable person in her situation, would not actually have found the conditions unbearable.

Yet plaintiffs must be chary of appearing willing to do too much to stay employed, lest they undermine their constructive discharge claims. In explaining why the plaintiff in *Bristow v. Daily Press* failed to show his work conditions were "intolerable," the court noted that his "desire for reinstatement to his position belies the claim that intolerable conditions underlay his resignation." Since, to be actionable, the intolerable working conditions must be the product of some type of discrimination, not merely part and parcel of a crummy job, one hopes that an order to reinstate would be accompanied by an order to eliminate the discriminatory conditions. One exception to the mitigation requirement may be that if an employee correctly senses that her termination on unlawful, discriminatory grounds is imminent, she may quit without attempting to mitigate the situation with her employer.

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149. *Id.* at *4. The plaintiff, an accounting clerk who suffered from lupus, alleged in her ADA/ADEA claim that her supervisors "isolated her from coworkers, stripped her of significant responsibilities, repeatedly subjected her to cruel remarks, pressured her to retire, and ignored her doctor-recommended requests for flexibility in her work schedule."
150. 770 F.2d 1251 (4th Cir. 1985).
151. *Id.* at 1256 (holding the plaintiff's evidence was insufficient to overcome summary judgment where the plaintiff alleged he was singled out for criticism based on his age, but court said could not show the employer had "impose[d] intolerable working conditions with the intent to compel him to retire").
152. *See EEOC v. Univ. of Chicago Hosp., 276 F.3d 326, 331-32 (7th Cir. 2002).*
whose employers have no intention of firing them, but also no intention of complying with anti-discrimination laws.

The requirement that a plaintiff stay employed while patiently pursuing mitigation measures contravenes the express purpose of constructive discharge. It signals to plaintiffs that, in spite of Title VII’s prohibition on discrimination, it is not unreasonable to endure some discrimination on the job. While “society and the policies underlying Title VII” may be “best served” from the court’s point of view by requiring employees to wage war on discrimination at an individual level as the Bourque court suggested, requiring plaintiffs to exhaust mitigation measures prior to quitting seems inconsistent with Title VII’s focus on reducing the harm to individuals.

Further, research suggests that when it comes to sexual harassment, the mitigation requirement is simply unreasonable. As Professor Theresa M. Beiner has explained,

Although the courts increasingly place the burden on the victim to report harassment, social science studies show that this requirement may not reflect reality. There is little doubt that sexual harassment is underreported, despite increased awareness of the problem. Some women do not report sexual harassment because they do not identify their situations as constituting harassment. Other women, and men, recognize behavior as harassment, but they fail to report it for a variety of reasons.

The most frequently cited reason for failing to report harassment is fear of negative outcomes—fear that the employee will lose her job, not be believed, or “simply because it will not help [her] situation.” The most common response to harassment is to ignore it and to avoid the harasser. Beiner notes that this is consistent with the requirement that a victim take mitigating measures to avoid harm generally, but it is inconsistent with the requirement, discussed below, that victims avail themselves of an employer’s complaint process. Beiner continues:

Courts simply have not proven to be in the best position to understand the victim’s perspective, especially at the summary judgment stage, where many of these cases are decided. Harassment victims should not be summarily dismissed for initially failing to report or delaying reporting until the incidents are repeated or become more severe. Indeed, expecting immediate reporting is counter-intuitive, especially given that the sexual harassment might not yet have reached an actionable level or a level that the victim believes she can no longer handle. Thus, the victim of harassment is caught in a difficult catch twenty-two.

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153. 617 F.2d at 66.
155. Id. at 317.
156. Id. at 331; see also Woods v. Delta Beverage Grp., 274 F.3d 295, 301 (5th Cir. 2001) (explaining that “a reasonable woman would have felt compelled to report” the hostile work
Further, requiring a plaintiff to mitigate her damages by remaining in a
discriminatory environment is contrary to Title VII’s rules for post-
termination mitigation of damages. Generally, an employee is not required
to accept employment that is humiliating, demeaning, or inferior,157 or to
accept re-employment with an employer that has previously discriminated
against the employee.158 Requiring an employee to stay in a discriminatory
workplace does both.

Perhaps most importantly, requiring the plaintiff to remain in a
discriminatory, hostile, and/or demeaning environment while seeking a
remedy only furthers the harm the employee suffers. As Professor Mark
Kende has observed, quoting a Wisconsin court, “requiring a discrimination
victim to stay put to mitigate damages [is] like requiring ‘victims of legal
malpractice to continue being serviced by their negligent lawyer in order to
give the lawyer the chance to improve his or her skills.’ ”159 Rather than
punish the employer for its discriminatory conduct, courts have imposed a
requirement that plaintiffs mitigate the harm they suffer while the harm is
ongoing. This is contrary to the general principle that “victims should in no
way have the obligation of changing the unlawful behavior of their
assailants.”160 Nevertheless, courts have uniformly adopted the mitigation
analysis.

3. A Critique of “Reasonableness”

In assessing whether a plaintiff has taken adequate mitigating measures
and whether she has suffered an actionable level of discrimination, judicial
analysis begins from the starting point that employers are reasonable,
reasonable actors. If an employer does not act reasonably, the unreasonable
conduct gives rise to an inference of discrimination. As the Supreme Court
explained in Furnco Construction Corp. v. Waters:161

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discharged employee has a duty to use “reasonable diligence” to seek “substantially equivalent”
employment, the employee “need not go into another line of work, accept a demotion, or take a
demeaning position”).

158. See, e.g., Feges v. Perkins Rests., 483 N.W.2d 701, 709 (Minn. 1992) (“[T]he employee is not
required to accept the position if doing so would be offensive or degrading.”); Rice v. Community
Health Ass’n, 40 F.Supp.2d 788, 797 (S.D. W. Va. 1999) (“an offer of reemployment by an employer
will not diminish the employee’s recovery if the offer is not accepted if circumstances are such as to
render further association between the parties offensive or degrading to the employee” (quoting Voorhees v. Guyan Machinery Co., 446 S.E.2d 672, 679 (W. Va. 1994))).

159. Kende, supra note 137, at 54-55 (quoting Marten Transp., Ltd. v. Dep’t of Indus., Labor, &
Human Rel., 491 N.W.2d 96, 99 (Wis. Ct. App. 1992)).

160. Id. at 77 (quoting Marten Transp., Ltd. v. Department of Indus., Labor & Human Rel., 501
N.W.2d 391, 400-01 (Wis. 1993) (Bablitch, J., dissenting)).

[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons... have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration...  

Yet, whereas courts expect that an employer always acts reasonably, with any irrational behavior giving rise to an inference of discrimination, courts, conversely, do not seem to assume that employees always act reasonably. An employee's actions are fair game to be scrutinized for reasonableness. Even though the prevailing standard for constructive discharge considers what a "reasonable person in the employee's shoes" would have done, what is reasonable is generally evaluated based on what the judge thinks is reasonable. And, most judges apparently simply do not think it is reasonable for an employee to resign in the face of unlawful discrimination. Rather, courts assume that a reasonable employee would remain employed while seeking redress.

Thus, the analytic deck is stacked from the beginning in favor of the employer. It is interesting that employers have been so successful at convincing judges that their policies and procedures are reasonable. Courts presume that an employee acts unreasonably when she fails to take advantage of structures set up by the employer to protect the employee from discrimination by the employer. This phenomenon, which Professor Lauren Edelman has termed "legal endogeneity," shows the enormous power of employers to influence the standards by which their actions, and their employees' actions, are judged. Edelman explains that because the language of anti-discrimination statutes is vague, the personnel profession

prima facie case raises an inference of discrimination.). In Furnco, the plaintiffs brought a claim of racially discriminatory failure to hire.

162. Id. at 577 (emphasis added).

163. See, e.g., Ramos v. Davis & Geck, 167 F.3d 727, 731 (1st Cir. 1999) ("[t]he test is whether 'a reasonable person in the employee's shoes would have felt compelled to resign'") (emphasis added).

164. Although the issue may be one for a jury to decide, the instruction on what is "reasonable" conduct by the employee is drawn from judge-made law. Also, since a significant percentage of constructive discharge cases, like all employment discrimination cases, are decided adversely to the employee on the employer's summary judgment motion, it is frequently the judge alone who decides whether the employee's conduct was reasonable. See generally Stewart D. Aaron & Thomas M. Skelton, Summary Judgment in Employment Discrimination Cases, N.Y. L.J., Aug. 31, 1995, at 1, 4 (noting that summary judgment motions by employers had increased substantially since the 1986 Supreme Court decision in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (encouraging the use of summary judgment)); Philip M. Berkowitz, An Early Analysis of the Impact of Reeves v. Sanderson, 224 N.Y. L.J., Sept. 28, 2000, at 5 (noting that in spite of Reeves' caution against courts making credibility determinations on summary judgment motions, courts in the Second Circuit have not been inhibited from deciding summary judgment motions in favor of employers).

has responded by, among other things, creating internal grievance procedures as a way to both comply with the law and insulate employers from discrimination complaints.\footnote{166}{See id. at 412-16.} Edelman has shown that in hostile environment cases in particular, employers and their lawyers have been extremely successful at “fram[ing] their arguments so that courts will be likely to defer to their internal grievance procedures.”\footnote{167}{Id. at 440.} Thus, the employer sets the rules, the court endorses the rules, and the employee is left with no choice but to play by the rules. “[O]rganizations are both responding to and constructing the law that regulates them [which] renders the law ‘endogenous’; the content and meaning of law is determined within the social field that it is designed to regulate.”\footnote{168}{Id. at 407. See also id. at 439, concluding that Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986), in particular, “has legitimated the grievance procedure defense. Since that case, many more employers raise the grievance procedure defense, and courts are far more predisposed to them.”} Employers have been able to present a unified front to the courts in arguing that internal grievance procedures are both reasonable and effective. Individual plaintiffs, on the other hand, generally lack the organization and resources of employers as a whole, and so have been forced to respond to a compliance framework created without their input. Even if an employer’s grievance procedure is ineffective or unfair, an employee who fails to use it is found unreasonable.\footnote{169}{Additionally, actions of an employer that result in an employee’s resignation might also be insulated from attack if they are consistent with reasonable business necessity. In Matter of Russell Mfg., 82 N.L.R.B. 1081 (1949), the Board found a constructive discharge where an employee was singled out to perform an unfavorable task due to his union affiliation, and the task was not consistent with reasonable business requirements. The Board explained that the employee had: “Correctly evaluated the situation when he informed the superintendent, in the course of their final conversation, that the treatment to which he had been subjected was a challenge to his pride. Whatever decision may be reached as to the general propriety or wisdom of the order... it is clear from the manner in which it was announced to [the employee] that it constituted, insofar as he was concerned, the final act in a course of conduct which could not be justified as consistent with the reasonable business requirements of the mill, and which could only be characterized as discriminatory.” Id. at 1164.} Of course, the idea of “reasonableness” in discrimination law is doubly problematic, because the standards of reasonableness are invariably set by that segment of society and, more specifically, those members of the legal establishment who are unlikely to bring discrimination claims themselves (e.g. judges and lawyers). As one commentator has noted, “the reasonable person is intimately connected with the judicial mind, for it is in this mind that the reasonable person is concocted... It is the rule of the majority determined by the majority.”\footnote{170}{Larry A. Dimatteo, The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment, 48 S.C. L. REV. 293, 316 (1997).} Further, the “reasonable person” rule for
constructive discharge is uniformly an objective standard. Generally, courts have rejected suggestions that events giving rise to an employee's resignation should be considered in light of any circumstances or characteristics particular to the employee. In *Johnson v. Bunny Bread*, for example, the Eighth Circuit noted sternly that "[a]n employee may not be unreasonably sensitive to his working environment." Similarly, the First Circuit in *Calhoun v. Acme Cleveland Corp.*, admonished, "the law does not permit an employee's subjective perceptions to govern a claim of constructive discharge."

Thus, the "reasonableness" of an employee's response is often determined by the norms and experience of the particular judge deciding the employee's case. Different judges can, and do, arrive at very different conclusions about the reasonableness of a single employee's resignation. For example, in *Southwestern Savings v. Young*, a split Fifth Circuit panel found that the plaintiff was constructively discharged when she quit after a single instance of discrimination. In *Young*, plaintiff Martha Young's employer, a bank, required employees to attend monthly business meetings that opened with a "short religious talk and a prayer." Employees were paid for attending the meetings, but Young, an atheist, objected to the

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171. 646 F.2d 1250 (8th Cir. 1981).
172.  Id. at 1256.
173.  798 F.2d 559 (1st Cir. 1986).
174.  Id. at 561 (internal citations and quotations omitted). A potentially important twist on the notion of using an objective point of view was suggested by the Seventh Circuit in *Lindale v. Tokheim Corp.*, 145 F.3d 953 (7th Cir. 1998). Writing for the *Lindale* court, Judge Posner suggested that in cases where an employee has a "known idiosyncratic vulnerability" and the employer "is proved to be deliberately taking advantage of [the] vulnerability... by altering the employee's working conditions in order to make the employee's life at work intolerable," id. at 955, the court should apply a "reasonable employee" standard. Judge Posner gives, as an example of a known idiosyncratic vulnerability, "Winston's fear of rats in Orwell's Nineteen Eighty-Four." Id. (stating, but not holding; there was no indication that the *Lindale* plaintiff had any such idiosyncratic vulnerability.) Thus, the court opened the door to considering, in a very limited circumstance, the events from the point of view of the particular plaintiff.

The *Lindale* court's view dovetails nicely with the reasonable person of contract law who, unlike the reasonable person of tort law, is not an objective ideal. Rather, the person "is a more specialized creature, possessing all of the idiosyncratic features of the contracting parties viewed within the context of their interaction." Dimatteo, supra note 170, at 317. Perhaps the Seventh Circuit was on the right track in *Lindale*. If courts continue to insist on evaluating the reasonableness of an employee's actions aside from the employer's intentional discrimination, perhaps the best possible outcome is the adoption of the contract law model of reasonableness. Since the analysis of constructive discharge tends to focus on contract-type characteristics, it seems sensible that it should adopt a reasonable person not necessarily with the "idiosyncratic features" of the employee at issue, but with the features of the employee that matter most in evaluating the employee's resignation, be they race, gender, or any other salient characteristics or experience.

175.  509 F.2d 140 (5th Cir. 1975).
176.  Id. at 142.
177.  Id.
“theological appetizer,’” and, after attending the first two meetings, decided not to attend any more. She neither complained to anyone at the bank, nor informed anyone that she would not attend. When Mrs. Young conveyed her objections to the religious aspect of the meetings, the manager told her that she was required to attend the meetings, and if she didn’t like the religious component she could “close her ears.” At the end of the day, Mrs. Young resigned.

The Young court held this single instance of discrimination sufficient to support the constructive discharge because it found the plaintiff could reasonably infer that she might eventually be discharged because of the discrimination. In fact, the holding seems based more on Mrs. Young’s fear of imminent termination than on any religious discrimination. The dissenting judge, however, would have held that the employer’s conduct was not proven to be egregious enough to warrant a constructive discharge, and suggested mitigating measures the employee should have taken prior to quitting, such as attempting to clarify the company’s policy. As it turned out, the corporate policy would not have required Mrs. Young to attend the meetings, but the branch manager did not know that. The dissenting judge explained that “allowing an employee to claim a constructive discharge only after requesting an authoritative ruling from the company management would encourage the private settlement of employment disputes, [which] seem[s] in harmony with Congress’ intent in enacting Title VII . . . .” The dissenting judge would have required a showing of either more discrimination or more effort by the plaintiff to obtain an accommodation (or preferably both) to sustain a showing of constructive discharge in order

178. Id.
179. Id.
180. Id.
181. Id.
182. Id. at 144.
183. Id. The court explained, “[i]t is true that there is no evidence of proselytization by [the bank] here and that the course of events leading to Mrs. Young’s departure was rather too swift and spontaneous to admit any inference of an ‘atmosphere of religious intimidation.’” Id. at 143. However, the court held, no such campaign against an employee is required to establish a constructive discharge:

The only possible reason for [Mrs. Young’s] resignation . . . was her resolution not to attend religious services which were repugnant to her conscience, coupled with . . . the reasonable inference that if she would not perform this condition of her employment, she would be discharged. In these circumstances . . . she could reasonably infer that in one week, one month or two months, she would be discharged because of the conflict between her religious beliefs and company policy . . . . This is precisely the situation in which the doctrine of constructive discharge applies . . . .

Id. at 144. The court also rejected the bank’s argument that the plaintiff could not have been discharged because the bank manager had no actual authority to fire her, saying that the plaintiff had no reason to know of his limited authority and “in fact had every reason to assume the contrary, in view of [his] firm language” informing her of the attendance requirement. Id. at 144 n.7.
184. Id. at 146 (Thomberry, J., dissenting).
to clear the reasonableness threshold.\textsuperscript{185}

The district court in \textit{Young} arrived at the same conclusion as the dissenting judge, but via a third route, discussing facts that neither Fifth Circuit opinion mentions.\textsuperscript{186} In deciding that Mrs. Young did not act reasonably, the lower court found persuasive the fact that Mrs. Young had only applied for one other job since leaving the bank, which she declined because she didn’t like the hours;\textsuperscript{187} that no other employee had ever objected to the religious aspect of the meetings;\textsuperscript{188} and that no one else had ever been fired from the bank for failing to attend the religious portions of the meetings.\textsuperscript{189} Essentially, since Mrs. Young acted differently than everyone else connected with the meetings, the district court found her conduct unreasonable.

The different outcomes are attributable to the different ways in which each judge went about determining reasonableness. The Fifth Circuit majority seemed to try to place itself in Mrs. Young’s shoes, and imagined how it would feel if required to attend a compulsory religious meeting. When Mrs. Young resigned her employment she told her employer that she “considered herself fired,”\textsuperscript{190} and the Fifth Circuit majority agreed with her that it was reasonable to assume that her continued refusal to follow company policy would result in her termination. Notably, the court did not believe it was reasonable for her to resign because the employer committed an ongoing discriminatory practice; rather, it believed Mrs. Young was reasonable in foreseeing dire consequences for herself.

The dissenting judge likewise seemed to put himself in the plaintiff’s position, but reached the opposite conclusion from the majority. It is hard to understand what, more than a difference of opinion about “how bad” it is to be force-fed religion, could account for the disparate outcomes. The dissenting judge felt it would have been reasonable to require Mrs. Young to take mitigating measures, but the majority sweeps that notion aside, concluding that Mrs. Young was likely to be fired anyway so she was

\textsuperscript{185} \textit{Id.} at 145 (Thornberry, J., dissenting). “I would not hesitate for a moment to join my brothers in finding an employer liable for imposing or attempting to impose ‘forced religious conformity,’” stated the judge, but “[t]his is not such a case.” \textit{Id}. The judge also noted that “[t]his case is distinguishable from the normal run of constructive discharge cases because it is a company policy rather than a company practice that appellant claims required her to voluntarily resign. Mrs. Young apparently does not contend that the mere holding of the devotional offended her sensibilities to the extent that she could not continue to work for Southwestern. Rather, it is the company’s ostensible mandatory attendance policy that she found incompatible with further employment.” \textit{Id.} at 145 n.1.


\textsuperscript{187} \textit{Id.}

\textsuperscript{188} \textit{See id.}

\textsuperscript{189} \textit{See id.} at *3.

\textsuperscript{190} \textit{Id.} at *2; \textit{see also Young}, 509 F.2d at 142.
reasonable in simply quitting.

Finally, the district judge did not take the approach of evaluating the circumstances from Mrs. Young’s point of view. Rather, he seemed to place her conduct along the continuum of what other employees’ experience had been, and found her to be an outlier. No one else had quit or been fired because of the meetings; no one else had even voiced objection to them. The judge was so caught up in comparing Mrs. Young to everyone else that he extended his evaluation of the reasonableness of her resignation to her post-resignation conduct, bolstering his conclusion with the fact that she had only applied for one other job since leaving the bank. It is hard to see what Mrs. Young’s post-termination conduct has to do with the reasonableness of her response to the employer’s discrimination, but it fits with the judge’s evaluation method: if she didn’t do what other people did, she must be unreasonable.

Thus, four different judges evaluated the reasonableness of Mrs. Young’s resignation in three different ways. While it would be impossible to eliminate the notion of “reasonableness” from the law, it is such a problematic concept that it should not be invoked where, as in constructive discharge, it is not needed. The focus should be on the discrimination, not on the employee’s response.

In some sense, the courts’ focus on the reasonableness of an employee’s response to an employer’s illegal discrimination made sense in the union context. The goal of the NLRA was (and is) to encourage collective bargaining as a matter of national labor policy. Once employees are represented, employers and employees can bargain on equal footing, and the power imbalance is (presumably) equalized. Employment discrimination laws, however, do not have as their goal the balancing of power between employer and employee, but the prevention of discrimination in the workplace and the redress of individual injuries.

191. Even if it were possible to somehow codify or standardize what constitutes a “reasonable” response to discrimination, how would it work? Judge Calabresi frames the problem nicely:

Is reasonableness defined by the attitudes and points of view of the dominant ethnic, racial, or sexual groups in the society, or are those who do not share these views to be tested by their own standards? ... And if the attitudinal differences are so great that such a mixture is impossible ... which attitudes should be considered reasonable, and for whom?

GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 27 (1985). Even if it were possible or ideal to do so, attempting to reduce all standards and experiences of reasonableness into a single standard results in what Professor Angela Harris first termed “essentialism.” That is, a single standard necessarily eliminates the experiences of those on the margins of the mainstream—the very individuals whom discrimination law purports to protect. See Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 588 (1990).

192. See 29 U.S.C. § 151 (2002). (“It is heavily declared to be the policy of the United States to...encourage[ ] the practice and procedure of collective bargaining...”).

193. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) (Title VII’s “primary objective” is “a prophylactic one”).
Employment discrimination laws do not do anything to alter the power imbalance between employer and employee; rather, they are intended to protect employees from that power imbalance. The Court in *Faragher* recognized this:

When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose "power to supervise—which may be to hire and fire and to set work schedules and pay rates—does not disappear when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion."\(^{195}\)

Although they may recognize that supervisors exercise power over their employees, courts nevertheless insist on treating employers and employees as equal negotiating parties. For example, the doctrine of at-will employment assumes that because either the employee or the employer may sever the employment relationship at any time, the parties are somehow on equal footing. Although this may be true for certain rare categories of employees (for instance, computer network administrators during the "dot.com" boom or other high-level professionals/management), the vast majority of employees simply wield far less power than their supervisors and employers.\(^{196}\) Assuming that an employee somehow can be an equal partner in eradicating discrimination from the workplace simply asks too much of employees. Yet courts are uniform in requiring ever greater mitigation efforts by employees and ever more egregious instances of discrimination by employers before they are willing to recognize a constructive discharge. The mitigation requirement and the heightened discrimination requirement are front and center in the most recent important development in constructive discharge law: the debate about whether a constructive discharge constitutes a "tangible employment action" for purposes of determining employer sexual harassment liability.

\(^{194}\) See Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 850 (2002) (front pay "is awarded 'to effectuate fully the 'make whole' purposes of Title VII'") (quoting Brooks v. Woodline Motor Freight, Inc. 852 F.2d 1061, 1066 (8th Cir. 1988)).


\(^{196}\) See, e.g., Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) (suggesting that the absolute right of discharge is "the prime source of the employer's power over his employee"). *Id.* at 1405.
IV.

CONSTRUCTIVE DISCHARGE AFTER ELLERTH:
THE CIRCUIT SPLIT OVER WHETHER CONSTRUCTIVE DISCHARGE IS A TANGIBLE EMPLOYMENT ACTION

The muddle that courts have created by a failure to recognize that intentional violation of Title VII alone should transform a resignation into a constructive discharge has caused an especially troubling split in the circuits about whether a constructive discharge is equivalent to an actual firing. Of course, the whole point of the constructive discharge doctrine is to recognize a resignation as equivalent to a firing in the appropriate circumstances. But some courts have seized on a bit of unfortunate dicta in the Supreme Court’s 1998 decision, Burlington Industries v. Ellerth, and have decided that a constructive discharge is somehow less than an actual firing. This is patently wrong.

In Harris v. Forklift Systems, plaintiff Sharon Harris quit her job in response to severe and pervasive sexual harassment. The fact that Harris quit, rather than being discharged, did not bar her recovery against her employer. However, five years later in Ellerth, the Court held that plaintiff Kimberly Ellerth had not suffered a “tangible employment action” at the hands of her employer where she endured harassment but was not denied raises or promotions, and eventually quit in response to the sexual harassment by her supervisor. Ellerth and its companion case, Faragher v. City of Boca Raton, announced a new scheme for employer sexual harassment liability where the absence of a tangible employment action opens the door to an employer’s affirmative defense to the harassment.

The Court in Ellerth invented the requirement of a tangible employment action in an attempt to clarify when an employer is and is not liable for the illegal harassing conduct of its employees. The Court explained that a tangible employment action “constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” A tangible employment action triggers vicarious liability and precludes the availability of an affirmative defense, the Court explained, because such actions are

199. Id. at 22; In fact, Harris ultimately prevailed on claims of sexual harassment and constructive discharge. See Harris v. Forklift Sys., Inc., 1994 WL 792661, No. 3:89-0557 (M.D. Tenn. Nov. 9, 1994) at *2 (awarding Harris $151,435 plus attorneys fees and costs on remand).
202. See Ellerth, 524 U.S. at 765.
203. Id. at 761.
the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.204

A. Interpretations of Ellerth

Kimberly Ellerth quit her job at Burlington Industries in response to the harassment she experienced. The Court did not squarely address whether she had been constructively discharged; instead, it simply held that she had not suffered a tangible employment action. Ellerth can, and should, be read to say only that the circumstance of the plaintiff’s departure, as alleged, do not rise to the level of a constructive discharge as the doctrine is currently applied by the courts.205 The district court, in fact, held just that, finding that Ellerth’s failure to avail herself of the company’s grievance procedure was unreasonable and therefore fatal to her claim of constructive discharge.206 However, while some lower courts have interpreted Ellerth only as finding or suggesting that plaintiff Kimberly Ellerth was not constructively discharged, and have held that a constructive discharge is equivalent to a tangible employment action,207 others have read Ellerth to mean that a constructive discharge can never amount to a tangible employment action.208 The landscape will continue to evolve in the near future as the issue wends its way from district to appeals courts,209 but the initial interpretations are troubling. The doctrine of constructive discharge recognizes that an employer who makes conditions so difficult that the employee is forced to resign commits a discriminatory act equivalent to the act of actually firing the employee. If courts refuse to view a constructive discharge as equivalent to an “actual” firing in the context of sexual

204. Id. at 762.
205. See 524 U.S. at 766 (“Ellerth has not alleged she suffered a tangible employment action at the hands of [her supervisor]”).
Ellerth consciously chose not to use Burlington's grievance procedure; therefore, it can not be said that Burlington made Ellerth's working conditions intolerable forcing her into an involuntary resignation. Plainly, when an employer provides an avenue for relief from sexual harassment and an employee chooses to forego that avenue, she cannot be heard to complain that she was constructively discharged by virtue of the harassment. Accordingly, Burlington is entitled to judgment as a matter of law as to Ellerth's constructive discharge claim.”

Id.
207. See infra Part IV(A)(2).
208. See Part III.C.1.a.
harassment, the entire doctrine of constructive discharge will become vulnerable to attack in other discrimination contexts as well.

The point of the Ellerth/Faragher rule requiring a tangible employment action is to determine when an employer is vicariously liable for the acts of its agents. The idea of a tangible employment action captures acts that invoke "the official power of the enterprise" and therefore are attributable to the employer. But a constructive discharge cannot happen absent the official power of the enterprise. All courts require that a constructive discharge result from either deliberate conduct by the employer or conduct which the employer has knowingly permitted to continue. A constructive discharge is therefore by definition a tangible employment action.

1. Courts Finding That a Constructive Discharge is not a Tangible Employment Action

The Second Circuit and district courts within the Fourth and Ninth Circuits have reasoned that because a constructive discharge is not endorsed by the employer, it does not meet the Ellerth definition of a tangible employment action. In Caridad v. Metro-North Commuter Railroad, for example, the Second Circuit articulated three reasons for its refusal to recognize constructive discharge as a tangible employment action. First, explained the court, "co-workers, as well as supervisors, can cause a constructive discharge." Second, "unlike demotion, discharge, or similar economic sanctions, an employee's constructive discharge is not ratified or approved by the employer [as Ellerth requires]." Finally, "the facts of Ellerth... indicate that constructive discharge is not a tangible employment action..." The Second Circuit recognized the inconsistency in its holding: "we have stated in another context that 'when a constructive discharge is found, an employee’s resignation is treated as if the employer

210. Ellerth, 524 U.S. at 762.
211. See Part III.B and accompanying notes.
212. See, e.g., Caridad v. Metro-North Commuter Railroad, 191 F.3d 283, 294 (2d Cir. 1999). This determination is in keeping with the Second Circuit’s apparent hostility towards constructive discharge. See Symposium: Civil Rights Law in Transition, 27 FORDHAM URB. L.J. 1105, 1208 (2000) (plaintiffs’ lawyer, Wayne Outten, remarking: ‘constructive discharge doctrine... is already tough enough in the Second Circuit, and that already causes us plaintiffs’ lawyers to admonish our clients to think eighty-five times before considering constructive discharge’).
215. 191 F.3d 283 (2d Cir. 1999).
216. Id. at 294.
217. Id.
218. Id.
had actually discharged the employee." But the court dismissed the objection, insisting (though not elaborating) that “constructive discharge is not a tangible employment action” under the Ellerth standard.220

The South Carolina district court employed similar reasoning in Scott v. AmeriteX Yarn, holding that in a constructive discharge,

[T]here is no official act, no documentation, no review, and no use of internal procedures. Instead, constructive discharge involves unofficial acts by a supervisor that lead an employee to make a decision to resign in order to avoid intolerable conditions. Such unofficial acts certainly do not carry the 'imprimatur' . . . of the corporation.222

The Nevada District Court used similarly tortured logic in Alberter v. McDonald's, finding that although constructive discharge “may come about as the result of actions taken by a supervisor, it is not an action taken by an employee's supervisor."224

2. Courts Finding That a Constructive Discharge is (or at Least Could be) a Tangible Employment Action

Courts within the Third, Fifth, Eighth, and Eleventh circuits have expressly stated that a constructive discharge amounts to a tangible employment action. The Iowa District Court forcefully repudiated the

219. Id. at 295 (quoting Lopez v. S.B. Thomas, Inc. 831 F. 2d 1184, 1188 (2d Cir. 1987)).
220. Id. The Caridad plaintiff argued that the lower court had erred in dismissing her sexual harassment claim. The employer moved for summary judgment alleging that the plaintiff had failed to cooperate in its investigation of her complaint. The plaintiff argued that the constructive discharge constituted a tangible employment action depriving the employer of the opportunity to use the investigation as an affirmative defense. The court affirmed the dismissal, based on its view that the constructive discharge was not a tangible employment action, that the employer had exercised reasonable care to prevent and correct harassment, and that the employee had unreasonably failed to avail herself of the employer's procedures. See id. at 295-96. But see Fitzgerald v. Henderson, 251 F.3d 345, 357-58 (2d Cir. 2001).
222. Id. at 595.
223. Alberter v. McDonald's, 70 F. Supp. 2d 1138 (D. Nev. 1999). But see Montero v. AGGO Corp., 192 F. 3d 856, 861 (9th Cir. 1999) (emphasis added), filed just eight days after Alberter: “We need not decide whether a constructive discharge can be a ‘tangible employment action’ . . . because Plaintiff was not constructively discharged.”
224. Id. at 1147 (ultimately granting summary judgment to the defendant employer).
225. See, e.g., Cardenas v. Massey, 269 F.3d 251, 263 (3d Cir. 2001) (assuming without deciding that constructive discharge is a tangible employment action); see also id. at 266, n.10 (noting the dispute among the circuits); Durham Life Ins. v. Evans, 166 F.3d 139, 149 n.5 (3d Cir. 1999).
228. See, e.g., Jones v. USA Petroleum Corp., 20 F. Supp. 2d 1379, 1383 (S.D. Ga. 1998) (“If the employer made working conditions so intolerable that the employee was ‘forced’ to resign, courts can recognize that a constructive discharge occurred, and that is a tangible employment action.”).
argument that a constructive discharge is not a tangible employment action in *Cherry v. Menard.*

The court rejected the employer's motion for summary judgment on the plaintiff’s claims of racial and sexual harassment, retaliation, and constructive discharge. In the process, it also refuted the Second Circuit’s reasoning in *Caridad.*

First, the *Cherry* court explained, the fact that co-workers as well as supervisors can cause a constructive discharge is "irrelevant to what constitutes a 'tangible employment action'" under *Ellerth.* What is important, reasoned *Cherry,* is whether the harm inflicted "constitutes a significant change in employment status" or "inflicts direct economic harm." Therefore, it is the nature of the harm inflicted "that determines whether the supervisor's action is a tangible employment action, not whether a co-worker could also inflict such harm."

Second, the *Cherry* court attacked *Caridad*'s assertion that a constructive discharge "is not ratified or approved by the employer." Explaining that a constructive discharge is a legal device equating a forced resignation with discharge, the court said that the *Caridad* position "overlooks the fact that a constructive discharge resulting from a supervisor's conduct is, legally, the employer's own 'deliberate act.'" As a "deliberate act" of the employer, *Cherry* concluded, a constructive discharge resulting from supervisory discrimination should constitute a tangible employment action.

Finally, the *Cherry* court dismissed the Second Circuit’s assertion that the Supreme Court “indicated” in *Ellerth* that a constructive discharge would not constitute a tangible employment action. The Second Circuit

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230. Id. at 1171-75, 1189.
231. Id. at 1171.
232. Id. at 1172 (quoting *Ellerth,* 524 U.S. at 761-62).
233. Id. at 1173 (quoting *Ellerth,* 524 U.S. at 761-62). The court notes, however, that co-worker conduct is "relevant to the employer’s liability for the constructive discharge, but under the 'knew or should have known' standard left undisturbed in *Ellerth and Faragher.*” Id. at 1171 n.4; see also Hanner White, *supra* note 131, at 1191-92 (arguing that "a tangible employment action need not be one that visits economic or material harm on a worker... A tangible employment decision encompasses discrimination that supervisors are empowered to inflict on their subordinates because of their supervisory status.").
234. Id. at 1173 (quoting *Caridad,* 191 F.3d at 294).
235. Id. at 1174. The court notes that of the eight separate opinions filed by the Seventh Circuit after hearing Ellerth’s appeal en banc, see *Jansen v. Packaging Corp.,* 123 F.3d 490, 515 (7th Cir. 1997), only Judge Posner’s concurrence/dissent mentioned constructive discharge. Judge Posner wrote, “since there is always some paperwork involved in an employee’s quitting, the higher-ups in the company will have some ability to monitor constructive discharges, and I would therefore impose strict liability in such cases.” *Cherry* notes that Judge Posner’s comments are the only reference to constructive discharge in the eight separate opinions issued by the Seventh Circuit en banc in the case. See *Cherry,* 101 F. Supp. 2d at 1174.
based its rationale on the fact that the Supreme Court, in remanding the case, noted that "Ellerth has not alleged she suffered a tangible employment action at the hands of her supervisor." However, Cherry insisted, "whether Ellerth had adequately pleaded a constructive discharge and whether a constructive discharge, as a general proposition, can constitute a tangible employment action, were never at issue before the Supreme Court." The district court dismissed Ellerth’s constructive discharge claim, and the constructive discharge issue was not before the Seventh Circuit on appeal. Thus, concludes Cherry, Ellerth "left entirely open the question of whether a constructive discharge resulting from conduct of a supervisor can constitute the sort of ‘tangible employment action’ that deprives an employer of the Ellerth/Faragher defense." Having concluded that the Supreme Court left the issue open, Cherry held that a constructive discharge does constitute a tangible employment action.

B. Why a Constructive Discharge is a Tangible Employment Action

The point of constructive discharge is to recognize that an employer is responsible for deliberately creating working conditions so intolerable that a reasonable person would be forced to resign. Every circuit requires that the employer either deliberately create the conditions or at least be aware of them and permit them to continue. This requirement of employer

237. Id. (quoting Ellerth, 524 U.S. at 746).
238. Id. (quoting Jensen, 123 F.3d at 490).
239. Id. at 1175.
240. Id.
241. Id. The court bolstered its holding with language from the Eighth Circuit’s opinion in Phillips v. Taco Bell Corp., 156 F.3d 884, 889 n.6 (8th Cir. 1998) (emphasis added), which noted that the plaintiff there was not constructively discharged, nor did she suffer any other tangible detrimental employment action.” Courts in the First, Third, Sixth, Seventh, and Tenth Circuits have touched upon the question of whether a constructive discharge amounts to a tangible employment action but have not resolved the issue. See Gauthier v. New Hampshire Dep’t of Corrections, No. CIV. 98-298-M, 2000 WL 1513705, at *6 (D. N.H. Aug. 28, 2000) (suggesting, but not holding, that an employee’s constructive discharge is “unlikely” to constitute a tangible employment action); Evans v. Nine West Group, Inc., 2002 WL 550477 at *9 (E.D. Pa. April 15, 2002) (noting that the Third Circuit has declined to resolve the issue); Bowman v. Shawnee State University, 220 F.3d 456, 462 n.6 (6th Cir. 2000) (suggesting, but not holding, that a constructive discharge would be a tangible employment action and finding no constructive discharge); Mosher v. Dollar Tree Stores, 240 F.3d 662, 666 (7th Cir. 2001) ("[W]e have yet to determine whether a constructive discharge is a tangible employment action . . ."); see also Marsicano v. American Soc’y of Safety Eng’rs, No. 97 C 7819, 1998 WL 603128, at *6 (N.D. Ill. Sept. 4, 1998) (strongly suggesting, in dicta because plaintiff did not allege constructive discharge or any tangible employment action, that a constructive discharge would not be a tangible employment action because tangible employment actions “[d]o not embrace a responsive action on the part of the employee that brings about a change in employment status”); Mallinson-Montague v. Pocnick, 224 F.3d 1224, 1231-32 (10th Cir. 2000) (suggesting that whether a constructive discharge constitutes a tangible employment action must be determined on a case-by-case basis and noting that it is “unwise to merge the Supreme Court’s specific language in Faragher and Burlington into the general umbrella concept of ‘constructive discharge’” (citing to Caridad, 191 F.3d 283, 294 (2d Cir. 1999)).
consciousness should satisfy the Ellerth requirement that "official power of the enterprise" be brought to "bear on subordinates." 242

The holdings in the Second and Fourth Circuits that a constructive discharge does not constitute a tangible employment action are particularly perverse, considering that these circuits follow the specific intent rule, requiring that an employer subjectively intend to cause the employee's resignation in order for the plaintiff to prove a constructive discharge. Even a plaintiff who succeeded in proving that her employer deliberately intended to force her out would fail to show that the employer should not be permitted to raise the Ellerth affirmative defense.

Because constructive discharge requires a discriminatory act by the employer or the employer's agent, there should be no question that a constructive discharge, if proven, is a tangible employment action. 243 If the resignation rises to the level of a constructive discharge, it means that the working conditions were so discriminatory, or "objectively intolerable," that a "reasonable person" would feel compelled to resign. Again, perhaps courts are struggling with this issue because of their failure to recognize that intentional discrimination should permit a finding of constructive discharge. 244 If the employer intentionally discriminates and the employee is forced to resign, clearly the employer has acted in a tangible manner. Courts are confounded because rather than recognizing that a resignation in the face of discriminatory conditions is per se reasonable, they insist on applying a standard of "reasonableness" that is not anchored to any firm doctrinal foundation.

Even under the existing definition of constructive discharge, constructive discharge of a sexual harassment plaintiff should foreclose the availability of the employer's affirmative defense. In the case of a constructive discharge, the Ellerth inquiry duplicates the mitigation requirement. That is, ordinarily a plaintiff will not be deemed constructively discharged unless she remained on the job and tried to mitigate her damages. If she has done so, but the harassment remains intolerable, then her eventual resignation should be deemed a constructive discharge. In the case of a sexual harassment plaintiff who has been

242. Ellerth, 524 U.S. at 762.

243. A student note recently published argues the opposite: that constructive discharge should never be a tangible employment action, because employers should always be permitted to assert an affirmative defense in cases of constructive discharge. See Sara Kagay, Applying the Ellerth Defense to Constructive Discharge: An Affirmative Answer, 85 IOWA L. REV. 1035, 1060 (2000) (arguing that this would "lead to greater consistency in employment discrimination cases"). While this approach has, as the author advocates, the advantage of economy in that it provides a uniform (and employer-friendly) standard, see id. at 1058-61, it puts the doctrinal cart before the horse. The Ellerth doctrine reasons that because there is a tangible employment action, there is an affirmative defense; not that because there should be an affirmative defense, there must be a tangible employment action.

244. See supra notes 105-106 and accompanying text (discussing this failure).
harassed by a supervisor, if the plaintiff satisfies the mitigation requirement for a constructive discharge, then the employee has not failed to avail herself of remedies available in her employment, and the employer’s response was not effective. Instead, I suspect that courts will begin to duplicate the inquiry for plaintiffs claiming both sexual harassment and constructive discharge. Courts will first ask whether the plaintiff availed herself of the employer’s grievance procedure as required by Ellerth, and then whether the plaintiff took additional steps to prevent the constructive discharge. Thus a reasonable person in the sexual harassment plaintiff’s shoes may have to show she is a mediator, a negotiator, and a saint in order to survive summary judgment.

V. CONCLUSION: A PROPOSAL FOR REFORM

Considering the history and purpose of the doctrine, constructive discharge should simply be defined as a resignation in response to an employer’s intentional, illegal discrimination. The inquiry into the reasonableness of the employee’s resignation should be eliminated. Courts should recognize that resigning in the face of prohibited discrimination is per se reasonable, and that “mere discrimination,” because illegal, is enough to warrant a resignation. Likewise, the mitigation requirement should be eliminated; plaintiffs should be and can be relieved of the responsibility to rehabilitate their employers. This formulation would return the constructive discharge doctrine to its original format under the NLRA, shifting the focus of the inquiry from the employee’s response back to the employer’s violation of anti-discrimination law.

Shifting the focus away from the reasonableness of the employee’s response and back towards the employer’s discrimination would result in more consistent and coherent outcomes in constructive discharge cases. Thus, if Mrs. Young succeeded in proving to the courts that she had been the victim of unlawful religious discrimination at Southwestern Savings, then the courts could simply have concluded that she was entitled to backpay and other equitable remedies.245 Although the four different judges who analyzed Mrs. Young’s case three different ways might have disagreed about whether she had proven a case of religious discrimination, they would not have disagreed about whether, having proven that discrimination, she was constructively discharged. Similarly, the Fifth Circuit in Bourque would not have reached the shocking result that the egregious sex and pay discrimination the plaintiff suffered was not enough to support a

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245. See Young v. Southwestern Sav. & Loan, 509 F.2d 140 (5th Cir. 1975) and text accompanying notes 175-189, supra.
constructive discharge.\textsuperscript{246} Having concluded that her employer violated the Equal Pay Act when it refused to compensate her commensurate with male buyers, the court would have recognized that her resignation was \textit{per se} reasonable. Finally, courts would recognize that a constructive discharge is necessarily equivalent to a tangible employment action, because a constructive discharge can only result from intentional discrimination on the part of the employer.

Eliminating an inquiry into whether the employee’s resignation was an objectively reasonable response to the employer’s discrimination sounds radical, and sounds like it might open a floodgate of constructive discharge claims. However, it must be remembered that a constructive discharge claim can only operate if the employer has engaged in actionable prohibited discrimination. A “constructive discharge” is not an independent cause of action under federal anti-discrimination law.\textsuperscript{247} Thus, the “hyper-sensitive” plaintiff cannot simply walk off the job in response to an insulting comment or incident and expect to succeed in a suit against her employer.

Essentially, eliminating the reasonableness inquiry would allow a plaintiff to claim she was constructively discharged any time she succeeded on a discrimination claim. This, in fact, was the original intent of the doctrine as created by the NLRA. Employees should not have to challenge an employer’s unlawful discrimination while continuing to suffer from that discrimination. Rather, employees should be able to remove themselves from the discriminatory environment and then challenge it. Although this standard would allow plaintiffs to collect backpay rather than remaining patiently on the job, it would not result in a “plaintiff’s windfall,” because plaintiffs would still be required to mitigate post-resignation damages according to the well-established principles of Title VII.\textsuperscript{248} As long as a plaintiff fulfills the post-termination mitigation requirement, full equitable relief should be available to that plaintiff.

Further, the intent requirement ensures that employers will not be liable for a constructive discharge unless the employer either deliberately created the discriminatory conditions or knew about them and permitted them to continue. Although the requirement of employer intent is problematic because it does not capture subconscious discrimination in the workplace, the intent requirement should not be eliminated entirely, because a constructive discharge is, after all, a type of intentional act by the

\textsuperscript{246} See Bourque v. Powell Elec. Mfg. Co., 614 F.2d 61 (5th Cir. 1980) and text accompanying notes 115-121, supra.


\textsuperscript{248} § 706(g)(1) (codified as amended, 2000e-5(g) (2000)) provides that: “Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.”
employer. However, plaintiffs should not have to prove that the employer discriminated with the specific intent of forcing a resignation, as some circuits have held. Rather, the plaintiff must only prove that the conduct motivating her resignation resulted from the employer's intentional discrimination.

The constructive discharge doctrine is an essential component of employment discrimination law, but its lack of coherence exposes the doctrine to erosion in the courts. Advocates should return to the first principles of the doctrine: constructive discharge recognizes that employees should not have to put up with illegal discrimination on the job. The doctrine originally recognized that the NLRA created a duty on the part of employers not to discriminate against employees who exercised rights under the Act. If employers breached that duty, an employee could resign. Likewise, anti-discrimination statutes create a duty on the part of employers not to discriminate against employees or harass employees on the basis of protected characteristics. Courts should recognize that plaintiffs need not stand idly by, or wait for years for a court-ordered remedy, if an employer breaches that duty.

249. As discussed supra at note 89, the current scheme for proving intentional discrimination suffers from the flaws identified by Professor Krieger and should be revised to encompass employer actions in which an employee's protected group status played a part, not merely when it was the result of conscious discrimination by the employer. See Krieger, supra note 89, at 1243. At this juncture I would not advocate eliminating the intent requirement entirely, simply because I cannot conceive a workable way to cabin the results. Whether the standard evolves or not, plaintiffs should not be required to show any more than intentional discrimination by the employer.