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Constructive Discharge Under Section 8(a)(3) of the National Labor Relations Act: A Study in Undue Concern Over Motives*

Roslyn Corenzwit Lieb†

This Article discusses the proof of employer motive required by the NLRB to establish an unfair labor practice violative of section 8(a)(3) of the NLRA. After drawing a comparison between 8(a)(3) cases involving actual and constructive discharge, the author concludes that the dual proof of motive now required in the latter cases is necessitated by neither the language nor the objectives of the NLRA, thus placing an unwarranted burden upon the General Counsel.

I
INTRODUCTION

Our system of law is replete with legal fictions which are used “to allow an action which otherwise would not have lain.”1 The constructive discharge is one such fiction.

At common law, the employee and the employer each may sever their employment relationship at any time and for any reason, unless the parties are bound by a contract; this is the essence of employment at will.2 If an employee were to quit a job, the employer would have no legal recourse for the “loss of employment.” Similarly, if an employer

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1. L. FULLER, LEGAL FICTIONS 6 (1967).
were to discharge the employee, the employee would have no basis for a suit against the employer.

The common law concept of employment at will, however, has not survived unaltered. During the twentieth century, both the legislatures and the courts have made serious inroads on the absolute character of the concept. The Wagner Act or National Labor Relations Act of 1935 ("NLRA" or "the Act")\(^3\) is a prime example of the limitations placed on employment at will and is the statute whose consideration is most relevant to this paper. With the passage of the NLRA, it became more difficult for an employer legally to justify firing a worker. An employer no longer could discharge an employee in response to protected union or concerted activity.

But what of the employee who quits work because of "intolerable" working conditions? Neither the NLRA nor the judicially created exceptions to employment at will specifically address that situation. This is where the fiction of the "constructive discharge" comes into play. A constructive discharge occurs when the employer creates or acquiesces in intolerable terms or conditions of employment which cause the employee to quit. Although the employer has not literally discharged the employee, the National Labor Relations Board ("the Board" or "Labor Board") will treat the employee's quitting as if it were a discharge and, therefore, will hold the employer accountable for the employee's loss of employment.

In such cases, the employer has not been an innocent bystander. The employer has created or acquiesced in the conditions which caused the employee to leave. From this viewpoint, it would appear that the employer did discharge the employee. By referring to the forced resignation as a constructive discharge, the Board is using "a metaphorical way of expressing a truth."\(^4\)

The Labor Board has used the concept of the constructive discharge for nearly half a century. During that period, the concept has become better defined. This paper traces the development of the concept and analyzes its usage by the Board, with particular emphasis on the Board's increased concern with the issue of employer motive. Since the focus of section 8(a) of the Act is the unfair labor practices of the employer, employer motive clearly is important. However, by requiring proof of an employer's motive to cause the employee to quit as well as proof of the employer's motive to discourage protected activity, the Board has placed an undue burden on the General Counsel in constructive discharge cases. Neither the statutory language of the Act nor Board precedent dictates

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\(^4\) L. FULLER, supra note 1, at 10.
such an approach. Accordingly, the Board should reevaluate and alter its position on the issue of employer motive in constructive discharge cases. Requiring proof of the intent to cause the employee to quit is unnecessary and wrong.

II

CONSTRUCTIVE DISCHARGE UNDER THE NATIONAL LABOR RELATIONS ACT

Early in this century, the general movement toward increased protection of employee rights culminated in passage of the NLRA in 1935. Although the courts and Congress had previously recognized the right of employees to organize, the NLRA was the first comprehensive scheme enacted to deal with day-to-day labor relations.

The Board decisions analyzed in this paper focus on alleged employer violations of employees' section 7 rights. These rights include the right to organize, to bargain collectively, and to engage in concerted activities. It is in relation to these rights that the employer may commit various unfair labor practices as defined in section 8(a). For purposes of this paper, section 8(a)(3) is most relevant. Specifically, section 8(a)(3)


[Labor unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer.


8. As originally enacted in 1935, § 7 provided:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.


9. As originally enacted in 1935, the relevant unfair labor practices were defined, in part, as follows:

Sec. 8. It shall be an unfair labor practice for an employer—
prohibits the employer from acting to encourage or discourage membership in labor organizations. It is in the context of charges alleging employer unfair labor practices in violation of section 8(a)(3) that the concept of the constructive discharge has developed.

A. Labor Board Decisions During the Early Years

Although the earliest cases decided by the Labor Board did not use the term constructive discharge, the Board accepted and used the concept from the start. This is demonstrated in the 1936 case of Canvas Glove Manufacturing Works, Inc. Following a strike, the employer placed reinstated employees in inferior, unfamiliar jobs, and pressured them to join a company union. One illiterate employee, who had previously relied upon assistance from other employees, was told that she would be required to do all her own writing. When she was also told to leave her union and join the company's, she quit. The Board held that although the worker had left and was not discharged, the employer had violated the Act by changing working conditions and impermissibly pressuring the employee to withdraw from her union. She therefore was entitled to reinstatement. This case was typical of the many early Board decisions that employed the concept of constructive discharge without explicitly using the term.

Aside from the change in the section designations, from 8(a) to 8(a)(3), the language has remained the same. Section 8(b) was added in 1947 as an amendment to the NLRA by the Labor Management Relations Act or Taft-Hartley Act. This section defines and proscribes unfair labor practices by labor organizations, e.g., restraint or coercion of employees, causing or attempting to cause an employer to discriminate against employees, secondary boycotts, etc. For purposes of this paper, however, only violations of § 8(a)(3) will be considered.

10. Under the National Industrial Recovery Act (NIRA) of 1933, 48 Stat. 213, pursuant to a joint resolution of Congress, President Roosevelt established the first National Labor Relations Board to handle controversies arising under § 7(a) of the NIRA. Several of the reported decisions of that first Board addressed the issue of whether an employer violated § 7 by requiring employees to choose between loss of employment or abandonment of statutory rights, a Hobson's choice. Other decisions involved intolerable working conditions. The Board consistently held that either type of employer behavior was violative of § 7(a) and ordered reinstatement. Portland Cleaning Works, 2 N.L.R.B. (NIRA) 420 (1935) (employees struck when work conditions made difficult for those who signed union authorization paper); Globe Gabbe Corp., 2 N.L.R.B. (NIRA) 60 (1934) (not joining a union as condition of employment); San Francisco Call-Bulletin, 2 N.L.R.B. (NIRA) 1 (1934) (refusal to honor vacation time forced resignation); Johnson Bronze Co., 1 N.L.R.B. (NIRA) 105 (1934) (discriminatory demotion caused resignation); The Jos. S. Wernig Express Co., 1 N.L.R.B. (NIRA) 51 (1934) (remove union buttons or leave); Tamaqua Underwear Co., 1 N.L.R.B. (NIRA) 10 (1934) (join company union or be locked out). Therefore, the first NLRB recognized the concept of constructive discharge although the term was not used.

11. 1 N.L.R.B. 519 (1936).

12. Id. at 524-25.

13. Chicago Apparatus Co., 12 N.L.R.B. 1002, 1019-20 (1939), enforced, 116 F.2d 753 (7th
The first NLRB decision to use the term did so in a rather offhanded manner and cited no authority for holding the employer liable. In Sterling Corset Co., employees had been compelled to leave their jobs by the constant harassment of their employer. As the Board noted, "[t]he management made it clear that employees engaged in union activities were not wanted. . . ." The plant manager had stated that "she would not have a union in the shop, that she would not discharge union members, but would 'make it so hot' for them that they would be compelled to quit." The Board found that those employees who had left had been constructively discharged.

B. The Basic Constructive Discharge Scenarios

A review of numerous Board decisions since 1936 shows that there are two basic scenarios in the constructive discharge cases brought under section 8(a)(3) of the NLRA: the Hobson's choice case and the "intolerable conditions" case. Each scenario presents a different factual setting and different proof requirements.

1. The Hobson's Choice Scenario

The Hobson's choice scenario is exemplified by Atlas Mills. There, the employees were forced to make a choice: either forego their organizing rights guaranteed by section 7 or lose their jobs. Atlas Mills, a textile company, had refused to bargain collectively, and had discharged many employees for joining the union. When the employees went out on strike, the company conditioned reinstatement on leaving the union. The Board held that "[t]o condition employment upon the abandonment by the employees of the rights guaranteed them by the Act is equivalent to discharging them outright for union activities." Thus, although the

Cir. 1940) (employer-created working conditions caused resignation); Waggoner Ref. Co., 6 N.L.R.B. 731, 757 (1938), amended on other grounds, 7 N.L.R.B. 78, dismissed on other grounds, 8 N.L.R.B. 789 (1938) (resignation rather than accepting demotions valid); Highway Trailer Co., 3 N.L.R.B. 591, 611 (1937), enforced, 95 F.2d 1012 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939) ("forced resignation tantamount to a discharge"); American Potash &Chem. Corp., 3 N.L.R.B. 140, 158-59 (1937), enforced, 98 F.2d 488 (9th Cir. 1938) (demotion of union activist "tantamount to a discharge"); Atlas Mills, Inc., 3 N.L.R.B. 10, 17 (1937) (impermissible to condition continued employment on giving up § 7 rights); Clark & Reid Co., Inc., 2 N.L.R.B. 516, 522, 526 (1936) (accepting reinstatement during a strike had adverse effect on union membership).
14. 9 N.L.R.B. 858 (1938).
15. The employer bombarded the employees with warnings and questions about their union activities, and subjected them to surveillance by the police.
16. 9 N.L.R.B. at 870.
17. Id. at 866.
18. 3 N.L.R.B. 10 (1937).
19. Id. at 17. The Board noted that since the strike had been precipitated by the employer's unfair labor practice, the striking workers still were to be considered employees and entitled to relief. Id. See also NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938).
Board never used the term constructive discharge, the facts focused upon by the Board and the language used in the decision embody the concept. The Board cited no legal authority for the proposition that forcing an employee to make such a choice would violate section 8(3). The language of the section, however, suggests that the illegality of requiring such a choice is implicit in the statute. The employer acted "to . . . discourage membership in any labor organization" and did so by "discrimination," i.e., non-union employees alone would be reinstated. By dictating these conditions, the employer violated section 8(a)(3).

2. The "Intolerable Conditions" Scenario

The second basic scenario is somewhat different. The employer does not explicitly require the employee to choose between the job or the protected activity, as was true in Atlas Mills. Rather, in response to the employee's protected activity, the employer creates or acquiesces in working conditions that are so "intolerable" that they compel the employee to leave.

_American Potash & Chemical Company,_ a 1937 Board decision, is typical of this second scenario. Mr. Ivers, a union activist and officer, had been employed by the company as a foreman at the rate of eighty cents an hour. As he was about to leave on vacation, Ivers’s superior told him that when he returned, Ivers would no longer be a foreman, but could have a position as general helper at fifty cents an hour. Ivers "considered this tantamount to a discharge, left . . . and did not return." The Board sanctioned Ivers’ action, found the employer to be in violation of sections 8(3) and (1) of the Act, and ordered full relief. The demotion with its dramatic drop in pay was an intolerable condition. The Board easily drew the inference that the employer subjected Ivers, a known union advocate, to the demotion as a reprisal for his ties with the union.

C. Establishing an Unfair Labor Practice Under Section 8(a)(3)

Presentation of an overview of the Board's general approach to section 8(a)(3) actual discharge cases would be helpful to understanding the Board's use of the concept of constructive discharge. In actual discharge cases, most Labor Board decisions explicitly or implicitly focus on four elements: (1) whether the employee was engaged in or sympathetic to union or protected activity; (2) whether the employer knew of or sus-
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pected the employee's section 7 activity;\(^23\) (3) whether the employer discharged the employee; and (4) whether the employer's conduct was motivated by an anti-union purpose.\(^24\)

Only occasionally does the General Counsel have difficulty in establishing the first three elements of a section 8(a)(3) discharge. Since the charge of an unfair labor practice generally is filed by an employee who


In addition to the presence of these four basic elements, numerous factors color Board's decisions. These factors and typical cases include the following: (1) A pattern or history of employer anti-union animus, S.E. Nichols of Ohio, Inc., 258 N.L.R.B. 1, 1 n.3 (1981), enforced, 704 F.2d 921 (6th Cir.), cert. denied, 104 S. Ct. 275 (1983); (2) the timing of the change in terms or conditions of employment, Block-Southland Sportswear, Inc., 170 N.L.R.B. 936, 938 (1968), enforced sub nom. Amalgamated Clothing Workers v. NLRB, 420 F.2d 1296 (D.C. Cir. 1969); Holly Bra of Cal., Inc., 164 N.L.R.B. 1112, 1123 (1967), enforced, 405 F.2d 870 (9th Cir. 1969); (3) the timing of the employee's claim of constructive discharge, St. Joseph Lead Co., 65 N.L.R.B. 439, 440-41 (1946); (4) the type and degree of the change in terms or conditions, B.N. Beard Co., 248 N.L.R.B. 198, 209-10 (1980); (5) the degree of the employee's union involvement, Association of Apartment Owners, 255 N.L.R.B. 127, 133-34 (1981); (6) the difference in treatment in comparison with employees not engaged in union activity, Newport News Shipbuilding & Dry Dock Co., 253 N.L.R.B. 543, 548-49 (1980); (7) the employer's established practices and procedures, Overnite Transp. Co., 254 N.L.R.B. 132, 134 (1981); (8) the credibility of the witnesses, Ortiz Funeral Home Corp., 250 N.L.R.B. 730, 742 (1980), enforced, 651 F.2d 136 (2nd Cir. 1981), cert. denied, 455 U.S. 946 (1982); (9) the employer's reaction to the employee's announcement of quitting, e.g., attempted to dissuade the employee not to quit, Big G Supermarkets, Inc., 219 N.L.R.B. 1098, 1106 (1975); Central Credit Collection Control Corp., 201 N.L.R.B. 944, 949-50 (1973); (10) the employer's promise of benefits if employee leaves the union, Great S. Constr. Inc., 266 N.L.R.B. 364 (1983); (11) the stated reason as a pretext or sham, City Serv. Insulation Co., 266 N.L.R.B. 654, 659-60 (1983); Maywood, Inc., 251 N.L.R.B. 979 (1980); (12) the employee's quitting in anticipation of being discharged, Com-General Corp., 251 N.L.R.B. 653, 657-58 (1980), enforced, 684 F.2d 367 (6th Cir. 1982); (13) the employee's condoning the harassment, Becton-Dickinson Co., 189 N.L.R.B. 787 (1971); and (14) the employee's predisposition to quit, Acute Sys., Ltd. 214 N.L.R.B. 879, 888-90 (1974).

The types of changes in terms or conditions of employment are nearly as numerous as the number of employers who create or acquiesce in the conditions. Several of these conditions include: (1) a transfer to a different position or work shift, Lipman Bros., Inc., 147 N.L.R.B. 1342, 1345 (1964), enforced, 355 F.2d 15 (1st Cir. 1966); (2) a reduction in pay, in hours, or in overtime, Bilmax, Inc., 266 N.L.R.B. 442, 453-55 (1983); (3) closer supervision or increased surveillance, Sterling Corset Co., 9 N.L.R.B. 858, 870, (1938), modified on other grounds, 18 N.L.R.B. 402 (1939); (4) a transfer to a different job, Magnolia Manor Nursing Home, Inc., 260 N.L.R.B. 377, 387 (1982); (5) a continuation of the employer's past history of unfair labor practices, K & E Bus Lines, Inc., 255 N.L.R.B. 1022 (1981); (6) the denial of a leave or vacation, Maywood, Inc., 251 N.L.R.B. 979, 991-92 (1980); (7) the imposition of new rules, Fidelity Tel. Co., 236 N.L.R.B. 166, 171-72 (1978); (8) threats of physical harm, Maidaeville Coal Co., 257 N.L.R.B. 1106, 1133-34 (1981), rev'd on other grounds, 693 F.2d 1119 (4th Cir. 1982), aff'd, 718 F.2d 658 (4th Cir. 1983) (en banc), cert. denied, 104 S. Ct. 1441 (1984); (9) interrogation of the employee, Granite City Journal, Inc., 262 N.L.R.B. 1153 (1982); (10) the employer's knowledge that the change would be difficult for the employee, Coating Prods. Inc., 251 N.L.R.B. 1271, 1278-79 (1980); (11) threats of closing down the business, Fred Lewis Carpets, Inc., 260 N.L.R.B. 843, 849-50 (1982); (12) the demotion of an employee, Plymouth Locomotive Works, Inc., 261 N.L.R.B. 595, 604 (1982); (13) requiring employees to give up union representation, Redlands Constr. Co., 265 N.L.R.B. 586, 590-91 (1982); and (14) a sudden, unilateral change in working conditions, Fall River Sav. Bank, 260 N.L.R.B. 911 (1982).
was active in organizing and was fired, the first and third elements usually are easy to establish. Proving that the employer knew of the protected activity can be somewhat more difficult. Showing that the employer was motivated by the desire to discourage union activity, the crucial fourth element, frequently is the most difficult aspect of a discharge case. The latter two elements could be proven by direct evidence or by drawing inferences from the record as a whole.

Even if the General Counsel were to establish all four elements and therefore a prima facie case of a violation of section 8(a)(3), however, the employer still might avoid being adjudicated a violator by demonstrating either that the "discharge was motivated without regard to discriminatory considerations," or that the employee would have been discharged for a legitimate business reason even in the absence of protected conduct. In either situation, the employer's defense may not be enough to rebut the presumption of a violation of section 8(a)(3). Specifically, if the General Counsel establishes that the so-called "non-discriminatory considerations" were merely a pretext or cover-up for an unfair labor practice, the defense fails. Or, if the General Counsel establishes that anti-union animus or motive played a role in the employer's action, the employer's "legitimate business purpose" defense would fail unless the employer can prove that its behavior would have been identical in the absence of an anti-union motive.

D. Employer Motive in Section 8(a)(3) Cases

Of the four elements needed to establish a prima facie case of a violation of section 8(a)(3), it is proving the fourth element, the employer's illegitimate motive, which presents the greatest difficulties. The motive aspect, therefore, has received the greatest share of attention in Board and judicial decisions as well as in scholarly commentary. Further, as

25. There is no requirement that the discouragement actually occurred, but rather that discouragement was a foreseeable consequence of the employer's conduct. Radio Officers Union v. NLRB, 347 U.S. 17 (1954).
27. Coral Gables Convalescent Home, Inc., 234 N.L.R.B. 1198 (1978) (case presented both direct and inferential evidence). Employer knowledge may be inferred under the "small plant" doctrine, i.e., from evidence that the protected activities "were carried on in such a manner, or at times that in the normal course of events, Respondent must have noticed them." Id. at 1199, quoting Friendly Markets, Inc., 224 N.L.R.B. 967, 969 (1976). See also Wiese Plow Welding Co., Inc., 123 N.L.R.B. 616 (1959).
31. Transportation Management, 103 S. Ct. 2469.
32. See, e.g., Christensen & Svanoe, Motive and Intent in the Commission of Unfair Labor
noted above, the employer is likely to defend against a section 8(a)(3) unfair labor practice charges by asserting a legitimate business reason or motive. Thus, understanding the role of motive in section 8(a)(3) cases is essential to an appreciation of the case law as it has developed.

1. Wright Line and Employer Motive

In *Wright Line, Inc.*, a 1980 decision, the Board discussed at length the role of motive in section 8(a)(3) cases in the context of the allocation of burdens of proof. Although the case did not involve a constructive discharge, the discussion of motive and burdens of proof have relevance to this paper.

The Board employed a test of causation modeled after the approach taken by the Supreme Court in *Mount Healthy City Board of Education v. Doyle*:

First, . . . the General Counsel [must] make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The employer's asserted justification or legitimate business reason is likened to an affirmative defense which must be proven by a preponderance of the evidence. If the employer's evidence is insufficient, the inference of an unlawful cause or motive remains. It is unclear why the Board chose to focus its discussion on cases involving both legal and illegal motives. *Wright Line* involved a single illegal motive and an asserted "legal" defense which the Board held to be pretext for the employer's true motive: to discourage protected activity. Thus, the company violated sections 8(a)(3) and (1) of the Act.

2. Transportation Management: An Affirmation of the Wright Line Approach

The Supreme Court recently affirmed the *Wright Line* approach in
NLRB v. Transportation Management Corp., 38 another single motive/pretext case. Although this case involved an actual rather than a constructive discharge, the Court held that allocation of the burden of proof would apply to any unfair labor practices charge. Santillo, a bus driver who had been employed by Transportation Management for several years, discussed the possibility labor organizing with a union and some fellow drivers. His supervisor learned of these activities and discharged Santillo within a few days, ostensibly for leaving keys in his bus and taking unauthorized work breaks.

The Board held that the employer's asserted reasons were pretextual. 39 The employer had not even known about the bus keys until after Santillo had been terminated. Further, leaving keys and taking breaks during work were common practices among the drivers and none had ever been disciplined for these acts. Finally, the employer's custom was to issue three written warnings before discharging an employee; Santillo had not been warned about his infractions or of the possible consequences. Applying the test enunciated in Wright Line, the Board concluded that the company had "failed to meet its burden of overcoming the General Counsel's prima facie case by establishing by competent evidence that Santillo would have been discharged, even absent his union activities." 40

The First Circuit Court of Appeals, which had previously rejected the Wright Line test, 41 remanded the case stating that the Board had placed too great a burden on the employer. 42 The Supreme Court granted certiorari, recognizing the split among the Circuits on the issue of placing a burden of proof on the employer in section 8(a)(3) cases. 43

The Court first noted that if an employer discharges an employee solely because of union activities or if the proffered reasons are pretextual, the employer has committed an unfair labor practice. If, however, "any anti-union animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause," the employer has not violated the Act. 44 This latter category includes the cases in which the employer establishes an affirmative defense by proving by a preponderance of the evidence that regardless of the prohibited motive or animus, "the employer would have taken the same action for wholly permissible reasons." 45 The General Counsel may have established success-

40. Id. at 102.
41. NLRB v. Wright Line, Inc., 662 F.2d at 904-07. Although the court rejected the Board's approach, it enforced the decision.
42. NLRB v. Transportation Management Corp., 674 F.2d 130, 131 (1st Cir. 1982).
43. 103 S. Ct. at 2472 n.3.
44. Id. at 2472.
45. Id. at 2473 (citations omitted).
fully the existence of an anti-union motive on the part of the employer; but if the employer could prove that the action would have been taken against the employee for legitimate reasons, the Act would not have been violated. An impermissible motive does not necessarily equal a section 8(a)(3) violation.\(^{46}\)

*Transportation Management* is a troublesome decision. It is unclear why the Court addressed the issue of mixed motives. Given the facts of the case, it would have been better to characterize the situation as a pretextual rather than a mixed motive discharge. In fact, there were no mixed motives and hence no need for the discussion of cases involving the more complex problem.\(^{47}\)

It is difficult to assess how great an impact the Court’s recognition of an affirmative defense in dual motive cases may have in section 8(a)(3) cases. To establish the defense, the employer actually has a dual burden. The employer must prove first, that there was a legal motive behind the action taken against the employee, and second, that the illegal motive did not color or affect in any way the legal one. The Court viewed this approach as appropriate.

The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.\(^{48}\)

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46. Speaking for a unanimous Court, Justice White found permissible the construction which would allow the employer an affirmative defense, but notes two other possible constructions of the NLRA:

> We assume that the Board could reasonably have construed the Act in the manner insisted on by the Court of Appeals. We also assume that the Board might have considered a showing by the employer that the adverse action would have occurred in any event as not obviating a violation adjudication but as going only to the permissible remedy, in which event the burden of proof could surely have been put on the employer.

*Id.* at 2474-75.

I suggest that although the Board’s construction is permissible, *id.* at 2475, the Board has not chosen the construction which would best effectuate the policy underlying the Act. If the General Counsel proves that “the employee's protected conduct was a substantial or motivating factor in the adverse action,” *id.* at 2474, a violation has been established. But at the same time, if the employer proves that the adverse action would have occurred regardless of the impermissible motive, reinstatement would be an inappropriate remedy. The employer’s defense should not be a total defense to a finding of a violation, but rather should be used to address the remedy available to the Board.

47. Indeed, two of the three cases cited by the Court in support of its decision arguably do not do so. In Borden Mills, Inc., 13 N.L.R.B. 459 (1939), the Board found that the employee’s union activity alone was the motivation behind the employer’s action. It was only in dicta that the Board indicated that an employer *might* be able to defend against the charge by proving “that the discharge would have taken place without consideration of the [union activity].” *Id.* at 474-75. Similarly, in Robbins Tire and Rubber Co., 69 N.L.R.B. 440 (1946), *enforced*, 161 F.2d 798 (5th Cir. 1947), the Board found the employer's explanations for its conduct to be pretextual; “the respondent's anti-union animus, rather than its asserted reason, was the motivating factor which led to [the] discharge.” *Id.* at 441. It was only in a footnote that the hearing officer had suggested the employer’s possible defense. *Id.* at 454 n.21 (citation omitted).

48. 103 S. Ct. at 2475. In *Wright Line*, the Board suggested a similar attitude with respect to
Since it is the employer's conduct which creates the problem of separation, it is fair that he or she bear the risk of a failure to distinguish legal from illegal motives.

3. The Effect of the Wright Line/Transportation Management Approach on Constructive Discharge Cases

The Wright Line/Transportation Management approach to burdens of proof will have an impact on constructive discharge cases. The issue of mixed motives is more likely to arise in constructive discharge cases involving the intolerable working conditions scenario than in those presenting a Hobson's choice. When an employee is required to choose between a job or a protected activity, the illegitimate motive is obvious and it would be difficult for an employer reasonably to advance an additional legitimate motive. Intolerable conditions cases, however, are more ambiguous and normally require affirmative proof of employer motive in order to establish a section 8(a)(3) violation.

The following example illustrates the increased burden of proof that the General Counsel carries in "intolerable conditions" cases. The Zero Company has a vacant position on the "4 p.m. to midnight" shift. The usual practice is to fill vacancies by transferring an experienced worker from the day shift. The later shift pays a premium and therefore is considered to be desirable by some workers. Management has made it clear that the company is antiunion; the supervisor has told several employees that the company would rather close down than unionize.

The supervisor knows that one particular employee has been a leader in the attempt to organize the plant, and wants to remove her from the shift where she is known and would be most effective. She had previously told the supervisor that any shift but the day shift would create serious commuting problems for her and probably would force her to quit.

There are several employees who have requested consideration for openings on the better-paying, later shift, but only the union activist has had extensive experience with one of the machines that needs an operator on that shift. Other employees who have not requested the shift also are knowledgeable about the machine, but the supervisor selects the orga-

the propriety of placing the burden on the employer to prove that the same action would have occurred regardless of the protected activity.

In this regard we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.

251 N.L.R.B. at 1089 n.14.
nizer. In one move, the vacancy is filled with a qualified worker, and the union agitator is rendered less effective. Thus, the company has mixed motives, one legitimate and one illegitimate. When the employee learns that there were other qualified employees with less seniority who wanted to be transferred, that other experienced employees were not asked about their interest in the transfer, and finds that commuting is extremely difficult, she quits. She also files unfair labor practice charges with the Board.

At the hearing, the Administrative Law Judge applies the *Wright Line/Transportation Management* allocation of proof. The General Counsel establishes a *prima facie* case of unlawful discrimination and constructive discharge: the employer was antiunion and knew of the employee's organizing activity; less senior employees were not transferred; and the supervisor knew that the later shift would create problems for the employee and could reasonably be expected to force her to quit. These factors raise a strong inference of unlawful motive.

The employer then asserts its affirmative defense of lawful reasons for the transfer. The later shift needed an additional worker who could run an important piece of machinery. This employee had worked with that machine and was the most qualified worker. The company has no written seniority policy since it is not a unionized plant. Regardless of company antiunion animus, the company would have and did transfer the worker for wholly permissible reasons.

Under the *Wright Line/Transportation Management* method of analysis, without further evidence to establish that the proffered reasons were pretexts for discrimination or that the employer's decision was affected by the knowledge of the difficulties presented by the change in shifts for the worker, the Judge probably would conclude that the company had not violated the Act. The employer had legitimate reasons for the transfer, an affirmative defense. Thus, the practical effect of this approach is that the General Counsel is unlikely to prevail in intolerable conditions cases in which the company is able to establish any non-pretextual legitimate reason for its conduct. Thus, the *Wright Line/Transportation Management* approach is likely to have a particularly strong impact on constructive discharge decisions.

III

THE SPECIAL ROLE OF MOTIVE IN CONSTRUCTIVE DISCHARGE CASES

In considering constructive discharge cases, the Labor Board usually requires proof of the same type of employer motive required in other cases alleging an unfair labor practice in violation of section 8(a)(3): that the employer discriminated to encourage or discourage protected activ-
ity. What makes constructive discharge cases unique, however, is that the Board frequently requires proof of a second type of employer motive: that the employer also discriminated to cause the employee to quit.

In most unfair labor practice cases, the Board's analysis generally focuses on the propriety of the employer's conduct. Improper conduct raises a presumption of an unlawful motive. The burden of persuasion then shifts to the employer. If the employer were to fail to explain its conduct, the presumption would remain; if the employer were to provide evidence of a legitimate reason for its conduct, the presumption would fail and an affirmative showing of motive to encourage or discourage protected activity would be required.

In constructive discharge cases, however, this often is insufficient. Frequently, a stricter standard of proof is required, including evidence that the employer's conduct was intended to cause the employee to quit. Under this approach, if the employer's motive were to interfere with union activity while keeping the employee working, the employee could not leave without having the resignation treated as voluntary. No constructive discharge would be found.

A constructive discharge case which expressly illustrates this additional motive requirement is *J. W. Mays, Inc.* In *Mays*, the employer reacted to organizing activities in several ways: unlawful firings, promises, and transfers of suspected activists. Of particular note was the transfer of one employee, Richardson, to another office.

The Board agreed that the employer's motive at the time of the transfer “was to impede Richardson's union activity by removing her from contacts with old associates who would be most receptive to her proselytizing efforts and transplanting her to a 'new and unfamiliar milieu,'” but found that the transfer was not intended to force her resignation. The Board stated that “[i]n such circumstances, we do not believe that an employee is entitled to abandon employment promptly upon the commission of such an unfair labor practice and claim the benefits of a constructive discharge.” Since the employer had committed another unfair labor practice, however, the Board ordered reinstatement without backpay to “effectuate the policies of the Act.”

The Second Circuit refused to enforce the Board's order of reinstatement, in effect holding that Richardson should have refused to accept the transfer and awaited a discharge. This would have established the company's unlawful motive. Her "own suspicion of company intent

49. 147 N.L.R.B. 942 (1964), enforced as modified, 356 F.2d 693 (2d Cir. 1966).
50. *Id.* at 943.
51. *Id.* at 943-44.
52. *Id.* at 944.
[was] not enough.” Only by rejecting the transfer and forcing the company to fire her would she have been entitled to reinstatement. The court was unwilling to accept Richardson’s (and the Board’s) evaluation of the employer’s motive for the transfer, i.e., to remove a union activist, and demand more positive proof.

But why Richardson’s “suspicion” was not enough is unclear. The employer knew of her protected activity; the transfer was designed to thwart that activity; the Company’s acts toward other employees both before and after the transfer were clear indications of strong antiunion animus; Richardson reasonably could have predicted an eventual discharge; and had the transfer been to a job that the court deemed to be less desirable, the court probably would have found a violation of section

54. Id. at 698.

55. The strongest reason for finding an unlawful motive for Richardson’s transfer was noted but apparently not relied upon by the Second Circuit. The company claimed that Richardson had been transferred because of a recent deterioration in her work, while she maintained that the “shortcomings in her job were not of recent development.” Id. at 697. The Trial Examiner did not believe the employer and credited Richardson’s testimony. Since the Board and the court should have accorded deference to the examiner’s credibility determinations, Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951), the disbelieved explanation should have been held to be a pretext for the true reason, illegal discrimination.

In light of the coincidence in timing between Richardson’s union activity and the transfer, the manifestation of antiunion hostility, the commission of several other unfair labor practices, and the implausibility of the Company’s explanation, a better decision would have been to find the transfer discriminatory and a violation of §§ 8(a)(3) and 8(a)(1). The requisite intent to discriminate should have been inferred. No legal motive existed.

But even if the court were to have found an improper motive, under the Board’s recent approach an additional intent issue would still have to be addressed: whether the employer also intended to cause Richardson to leave. Only if the General Counsel established this second prong of employer motive could the Board find that Richardson had been constructively discharged. In contrast to the Second Circuit, the Board followed this bifurcated approach. The Board found that although the employer’s “purpose in effecting the transfer was to impede Richardson’s union activity . . .,” 147 N.L.R.B. at 943, an illegal act, the Company did not intend to force her resignation. The Board reasoned that Richardson had not been led to believe that she had to abandon her protected activities or lose her job. Id. Further, the new working conditions could not be considered “intolerable” in the abstract sense.

Yet even the Board’s reasoning ignores the fact that the purpose behind the transfer was impermissible. There was no credible legitimate reason for the transfer. Therefore, the transferred employee reasonably could have received the message that the sole reason for the transfer was her union activities, and that she either should conform to the employer’s wishes by abandoning her attempts to organize or should quit.

56. 147 N.L.R.B. at 943.

57. Several employees, who attended a union meeting and/or circulated union authorization cards, were discharged. A supervisor made offers to another employee contingent on his abandoning the picket line. Still another employee “was told her work was unsatisfactory, and that she was being transferred. She refused, and eventually was discharged.” 356 F.2d at 695.

58. Because the other transferred employee, who refused the transfer, was not discharged until after Richardson quit, the court found that Richardson “could not reasonably predict discharge.” Id. at 698. Yet the pervasive unlawful treatment of fellow employees coupled with the subsequent firing of the person who refused the transfer should have been sufficient to support a finding of unlawful motive.
The court's reasoning suggests that where the employer intends only to discourage union activity, and does not intend to compel employee resignation, there can be no constructive discharge. Because the transfer was one to an equally desirable location, and the employer did not explicitly compel Richardson to choose between transferring or quitting, there was no employer intent to force a resignation; thus Richardson either had to accept the transfer and file charges or had to refuse the transfer and wait to be fired. Such a result is contrary to the spirit and letter of the Act. The employer had discriminated to discourage protected activity, a section 8(a)(3) violation regardless of whether the company wanted to force Richardson to quit.

Central Credit Collection Control Corp. provides another example of this additional proof requirement and points out the unwarranted and improper burden placed on the General Counsel in cases involving constructive discharge. The Board found that the employer had committed

59. See, e.g., NLRB v. Monroe Auto Equip. Co., 392 F.2d 559 (5th Cir.), cert. denied, 393 U.S. 934 (1968) (transferred to more arduous work); Becton-Dickinson Co., 189 N.L.R.B. 787 (1971) (transferred twice to work that adversely affected employee's health); Big Y Supermarkets, 173 N.L.R.B. 405 (1968) (dicta because issue of constructive discharge neither alleged nor litigated).

60. A few years earlier the Board had focused on the impetus for the change in terms or conditions of employment. That is, if the change were "based upon the fact or absence of union membership or designation," it was "discriminatory within the meaning of the Act. To decide otherwise would, in effect, allow an employer who wished to get rid of an employee for antiunion reasons to do so by offering the employee an alternative of a promotion or a discharge. . . ." South Bay Daily Breeze, 130 N.L.R.B. 61, 62 (1961), enforced as modified sub nom. NLRB v. Southern Cal. Newspapers, 299 F.2d 677 (9th Cir. 1962). Although South Bay also involved an employee discharged for rejecting a transfer, the underlying principle remains the same. To change the terms or conditions of employment because of protected activity is discriminatory within the meaning of § 8(a)(3).


a variety of unfair labor practices in violation of section 8(a)(1), including improper interrogation, faked surveillance, and threats about salaries. From the evidence of these unlawful practices, the administrative law judge "inferred" that the employer intended "to compel the resignation of union advocates." The judge also found that the resignation of three employees was directly caused by the unlawful practices. Yet despite the finding of causation, the hearing officer held that the employer had rebutted the inference of improper intent: "[T]he record contains clear, direct evidence that [the employer-owner] did not intend to force any employee to quit his or her employment," and repeatedly urged the workers to stay. 62 The judge stated, "This case presents the common situation where an employer's unfair labor practice is designed to thwart its employees' union activity while retaining them as employees. In such circumstances, voluntary abandonment of employment is not a constructive discharge." 63 There was no violation of section 8(a)(3).

In making this decision the Board erred in two ways. First, the primary consideration should have been whether the employer discriminated to discourage protected activity. In light of all the evidence of improper conduct, the Board should have held that the employer had violated section 8(a)(3). The employer subjected the employees to unlawful conditions. Second, once the Board found that the employer discriminated to discourage union activity, the next consideration should have been to determine whether the employees quit work in response to the illegal conduct. Protests by the employer that the company wanted to keep the workers should be irrelevant to the determinations of whether section 8(a)(3) was violated and whether the employees were constructively discharged. The employer had an improper motive for its conduct. Under the language of the Act, that is sufficient.

The Board's approach is troublesome for other reasons as well. By requiring proof that the employer intended to cause the employee to quit, the Board ignores numerous decisions of its own which have held that an employer may be liable for a constructive discharge when a resignation is a reasonable response to or consequence of the employee's being subjected to unfair labor practices. 64 The employer may intend only to discourage protected activity and not to encourage a resignation, but so long as the unfair labor practices are intended, the employer's conduct contravenes section 7 rights. If resignation were reasonable, the employee's quitting should be treated as a constructive discharge in violation of sec-

62. Id. at 949 (emphasis in original).
63. Id. at 949-50.
tion 8(a)(3).  

The Board apparently has allowed its concern about the propriety of the potential remedies of reinstatement and backpay for a particular employee to overshadow primary substantive concerns. As remedies, reinstatement and back pay may be more appealing if the employer intended not only to discourage protected activity but also intended to compel resignation. However, as a substantive matter, the Act prohibits discrimination designed to discourage union activity and proof of such discrimination should be sufficient to establish a violation of section 8(a)(3). The concern with the propriety of reinstatement and back pay and the attendant concern over the additional proof of motive are appropriate, if at all, only in the remedial phase, and should not influence the determination of a substantive violation.

It is doubtful that consideration of whether the employer intended to cause the employee to quit would be appropriate at all, even when making a determination about appropriate relief. If the General Counsel were to establish either that the employer intended to cause the employee to quit work or that the employer's unfair labor practice caused the employee to do so, then the Board should order full relief: a cease and desist order, reinstatement, and back pay. If, however, the General Counsel was unable to prove that the employer's conduct caused the employee to quit or that the resignation was reasonable, then the Board may wish to order limited relief. The employer may be ordered to cease and desist from its unfair labor practice, but the employee may be entitled to no individual relief.

The recent Sixth Circuit case of NLRB v. S.E. Nichols of Ohio, Inc., further illustrates the Board's undue concern with the employer's intent to have the employee quit. For over a decade, the company had been notorious for its unfair labor practices, and had already been held in contempt. In discussing the question of the alleged constructive discharge, both the Labor Board and the court focused on the motives behind the employer's conduct and found that the company's treatment

65. See Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 275 (1965) ("[A] partial closing [of a business] is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill unionism . . . and if the employer may reasonably have foreseen that such closing would likely have that effect.") Cf. Jennings v. D.H.L. Airlines, 34 Fair Empl. Prac. Cas. (BNA) 1423, 1425 (N.D. Ill. 1984) ("the focus of the question of sexual harassment [in a Title VII case] should be on the defendant's conduct, not the plaintiff's perception or reaction to the defendant's conduct.")


67. Arguably, the possibility of no individual relief could have the effect of lessening the impetus for the filing of a charge of unfair labor practices since no relief would be granted to employees who misjudged the employer's intent and quit when it was "not necessary." But no employee who files an 8(a)(3) charge knows with any certainty that he or she will prevail.


69. 258 N.L.R.B. at 1 n.3.

70. NLRB v. S.E. Nichols of Ohio, Inc., 592 F.2d 326 (6th Cir. 1979).
was "'designed to cause [the employee] to quit.'"\textsuperscript{71}

In determining whether the employer intended not only to interfere with protected activity, but also to cause the employee to quit, the Board generally has taken one of two approaches. Under the first approach, the Board has required no direct proof of the intent to cause the employee to leave. These are the cases involving employer conduct which is "inherently destructive" of protected rights and include the Hobson's choice cases\textsuperscript{72} and those in which working conditions are intolerable under anyone's standards.\textsuperscript{73} In either situation, the message is clear: the employee is no longer wanted. When the employee acts on that message and quits, the Board finds a constructive discharge.

In determining whether the employer intended not only to interfere with protected activity, but also to compel employee resignation, the Board has adopted a "reasonably foreseeable" standard. Under this standard, the Board will inquire as to whether the conditions were such that the employer should have known that employee resignation was likely: "when it is shown that the employer imposed onerous working conditions on an employee it knew had engaged in union activity, which it reasonably should have foreseen would induce that employee to quit, a \textit{prima facie} case of constructive discharge is established, requiring the employer to produce evidence of legitimate motivation."\textsuperscript{74}

In recent years, the Board has required increasingly onerous conditions before finding that the resignation was reasonably foreseeable or intentional, and therefore a constructive discharge under the "reasonably foreseeable approach."\textsuperscript{75} A comparison of two cases illustrates the Board's shift to this stricter standard. In \textit{East Texas Motor Freight}

\textsuperscript{71} 704 F.2d at 923, \textit{quoting} 258 N.L.R.B. at 9.
\textsuperscript{72} See, e.g., Fall River Sav. Bank, 260 N.L.R.B. 911, 914 (1982).
\textsuperscript{75} A second phenomenon of change appears to have occurred during this same period. An employee in 1938 was given the option of accepting a discriminatory demotion and filing charges or of refusing the demotion, resigning, and then filing charges. Waggoner Ref. Co., 6 N.L.R.B. 731, 757 (1938), \textit{amended on other grounds}, 7 N.L.R.B. 78 (1938), \textit{dismissed on other grounds}, 8 N.L.R.B. 789 (1938). By 1964, an employee who was discriminatorily transferred was not given that option. J.W. Mays, Inc., 147 N.L.R.B. 942 (1964), \textit{enforced as modified}, 356 F.2d 693 (2d Cir. 1966). This change in approach was objected to most strenuously by the dissenting opinion in Walker Elec. Co., 142 N.L.R.B. 1214 (1963): To accept the "alternative" of filing a charge, as a course of action which should be followed, rather than the abandonment of employment, strikes at the heart of the constructive discharge cases already decided. In any constructive discharge case, the discriminatee always has the "choice" of remaining silent, continuing to work, and filing a charge. The Board has not previously imposed on such a discriminatee the obligation to select that "choice."
\textit{Id.} at 1217 n.6 (Brown, Member, dissenting).
Lines, a 1943 decision, four new union members resigned from work when the manager indicated that his "hostility" towards unions would "adversely affect" their "future conditions of employment." Other than the manager's comments, no change in working conditions occurred. Yet the Board stated that a resignation under such circumstances was equivalent to a discharge. Ten years later, however, more than threats was required.

In J.C. Hamilton Co., the Board found that abusive comments toward employees were commonplace. Such comments had been made prior to the attempt to unionize and were directed at all employees. Furthermore, the employee in question had told other employees that she was looking for an excuse to quit and did not want to be reemployed. A review of the Trial Examiner's opinion, however, presents a different picture. With the advent of an organizing campaign, the company's attitude changed and the volume of abuse increased. Also, the alleged constructively discharged employee stated that she did not want her job back "if it ha[d] the same confusion as when [she] left," a reasonable response. The Board did not find a constructive discharge in part because abusive conditions were not enough.

A prime example of the Board's increased concern with the question of whether the resignation was "reasonably foreseeable" occurred in a case involving conditions so outrageous that a discussion of motive should not have been necessary. In Maidsville Coal Co., the employer had identified Richard Heller as a leading union advocate. He previously had been unlawfully discharged, and on his return, was subjected to constant undue pressure. The company unjustly assigned him to burdensome work, interrogated him, and threatened him physically, all to the point that Heller became very nervous and ill. The Board found Heller's resignation to be a reasonably foreseeable reaction to his working conditions.

I suggest that it is appropriate for the Board to consider outrageous conduct of this sort as inherently destructive of protected rights and sufficient to establish a violation of section 8(a)(3) regardless of the employer's evidence. Proof of motive to bring about a resignation or consideration of whether the resignation was reasonably foreseeable should have been irrelevant. Yet even in extreme cases, such as Maidsville Coal, the Board continues to require a showing that the employer intended to cause the employee to quit.

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76. 47 N.L.R.B. 1023 (1943), enforced, 140 F.2d 404 (5th Cir. 1944).
77. Id. at 1029.
78. 104 N.L.R.B. 737 (1953), enforced, 220 F.2d 492 (10th Cir. 1955).
79. Id. at 753 (emphasis added).
81. Id. at 1135.
Indeed as discussed above, the concern with employer’s intent to compel resignation and the consequent use of the reasonably foreseeable text is really irrelevant. 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. If the General Counsel establishes that it was the discriminatory conduct which led to the employee’s departure, the Board should order reinstatement with back pay as the appropriate remedy for the section 8(a)(3) violation.

IV
THE ROLE OF MOTIVE IN CASES INVOLVING INHERENTLY DESTRUCTIVE CONDUCT

Although employer motive always is a relevant consideration in section 8(a)(3) cases, under certain limited circumstances explicit proof of the employer’s motive is unnecessary. This holds true, for example, when the conduct is “so ‘inherently destructive of employee interests’ that it may be deemed proscribed without need for proof of an underlying improper motive.” In effect, such conduct raises a rebuttable presumption of improper motive, and the employer has the burden of “coming forward with counter explanations for his conduct.” Even then, “the Board may nevertheless draw an inference of improper motive from the conduct itself. . . .” An affirmative showing of improper motivation is required only when “the resulting harm to employee rights is . . . comparatively slight,” and “the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.”

Once the employer has done so, however, the case:

present[s] a complex of motives and preferring one motive to another is in reality the far more delicate task . . . of weighing the interests of the employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer’s conduct.

In deciding whether the General Counsel must establish employer anti-union motivation, the Board should use the same approach for section 8(a)(3) constructive discharge cases. In Hobson’s choice cases, the

84. Great Dane Trailers, Inc., 388 U.S. at 33.
85. Id. at 34 (citations omitted).
86. Erie Resistor Corp., 373 U.S. at 228-29 (footnotes omitted).
Board will rarely need to search for the employer's anti-union motive since these cases usually fall within the inherently destructive category. When an employer presents an employee with the option of either giving up a protected section 7 right or giving up a job, the motive of the employer is clear. This is literal "discrimination" within the meaning of section 8(a)(3).

Occasionally, the same type of inferred prohibited motive is found in cases involving intolerable working conditions, the second scenario. These include cases in which the employer singles out union activists or members for wage cuts, layoffs, etc. When union members alone are subjected to these conditions of employment, the anti-union motivation may be found in the "inherently destructive nature of the conduct itself." Despite an employer's protest to the contrary, and regardless of whether the employer's conduct also serves a legitimate business purpose, the Board should find that the employer's conduct violated section 8(a)(3). All employees, including those not subjected to intolerable conditions, would interpret the imposition of such conditions as a response by the employer to the employees' protected activity. The employer's conduct, therefore, would be likely to discourage union activity and, for that reason, the employer should be found to have so intended. An anti-union

87. See, e.g., City Serv. Insulation Co., 266 N.L.R.B. 654 (1983) (work in violation of union contract or not at all); Great S. Constr., Inc., 266 N.L.R.B. 364 (1983) (work guaranteed if employees left union); Granite City Journal Inc., 262 N.L.R.B. 1153 (1982) (spy on co-workers or lose job); Standard Fittings Co., 133 N.L.R.B. 928 (1961) (stop wearing union badges or leave); Ra-Rich Mfg. Corp., 120 N.L.R.B. 503 (1958), enforced, 276 F.2d 451 (2d Cir. 1960) (leave union or lose job); Marathon Elec. Mfg. Corp., 106 N.L.R.B. 1171 (1953), enforced sub nom. United Elec., Radio & Mach. Workers v. NLRB, 223 F.2d 338 (D.C. Cir. 1955), cert. denied, 350 U.S. 981 (1956), reh'g denied, 351 U.S. 915 (1956) (leave union or no future employment); John B. Shriver Co., 103 N.L.R.B. 23 (1953) (join union or lose job); Pinkerton's Nat'l Detective Agency, Inc., 90 N.L.R.B. 205 (1950), enforced, 202 F.2d 230 (9th Cir. 1953) (company and union jointly constructively discharged employee by forcing choice of maintaining union membership or losing former position); Pacific Plastics & Mfg. Co., 68 N.L.R.B. 52 (1946) (leave union and join company union); W.S. Watkins & Son, 53 N.L.R.B. 235 (1943) (join particular union or lose job); Star Publishing Co., 4 N.L.R.B. 498 (1937), enforced, 97 F.2d 465 (9th Cir. 1938) (leave union or be removed from old job); Highway Trailer Co., 3 N.L.R.B. 591 (1937), enforced, 95 F.2d 1012 (7th Cir. 1938) (join company union or lose seniority rights and higher pay); Atlas Mills, Inc., 3 N.L.R.B. 10 (1937) (give up strike and union or no reinstatement); Clark & Reid Co., Inc., 2 N.L.R.B. 516 (1936) (return to work and give up union membership or no reinstatement).

88. See, e.g., NLRB v. Saxe-Glassman Shoe Corp., 201 F.2d 238, 243 (1st Cir. 1953) ("discriminatory treatment calculated to make her job unbearable"); Fidelity Tel. Co., 236 N.L.R.B. 166, 196 (1978) ("must be held to have intended" the resignation); Marquis Elevator Co., 217 N.L.R.B. 461 (1975) ("knowingly [created] conditions"); Cavalier Olds, Inc., 172 N.L.R.B. 807, 812 (1968), enforced, 421 F.2d 1234 (6th Cir. 1970) ("changes were instituted as reprisals"); Chicago Apparatus Co., 12 N.L.R.B. 1002, enforced, 116 F.2d 753 (7th Cir. 1940). But see J.W. Mays, Inc., 147 N.L.R.B. 942, 943 (1964), modified, 356 F.2d 693 (2d Cir. 1965) ("intention at the time was not to force [employee's] resignation but to impede [her] union activity"); St. Joseph Lead Co., 65 N.L.R.B. 439, 440 (1946) ("discriminatory supervision . . . not of such a character that its application . . . should reasonably have been expected to result . . . in his resignation.")

89. NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963) (citations omitted). The same would hold true if the employer were to grant benefits only to union members.
motive is implicit in the employer's conduct itself. The result might be viewed as a "per se" violation of section 8(a)(3) in the sense that a natural consequence of the disparate treatment of union members would be the discouragement of union membership. No legitimate business interest could outweigh such an impact upon section 7 rights.

In *NLRB v. Haberman Construction Co.*, a constructive discharge case, the Fifth Circuit applied this approach to the question of employer motive. After the company had unilaterally stopped making payments for union benefits and had announced its intention to go "open shop," several employees resigned in response. In analyzing whether these company actions amounted to statutory violations, the court noted two categories of conduct inherently destructive of employee rights: (1) conduct that "jeopardizes the position of the union as bargaining agent or diminishes the union's capacity effectively to represent the employees in the bargaining unit," and (2) conduct that "directly and unambiguously penalizes or deters protected activity." Since the company's conduct fell within both categories, the court held that no additional proof of anti-union motive was necessary. Violations of sections 8(a)(3) and 8(a)(5) were established without consideration of the employer's reasons for its actions.

Although the court in *Haberman* found the employer's conduct to be inherently destructive of employee rights, one must recognize that such a finding is relatively rare in constructive discharge cases as it is in any section 8(a)(3) case. Employers have become more sophisticated and have learned from past errors. Employers do not make incriminating comments and almost always introduce evidence that the conduct being scrutinized was motivated by legitimate and substantial business reasons. Further, in a typical constructive discharge case only one or two employees are involved. It is difficult to argue successfully that one or two incidents are inherently destructive of protected employee rights in the same way that a plant-wide rule change would be. *Haberman* presented the unusual case in which the employer's conduct had direct and obvious effects upon the protected rights of all employees, not just upon those who resigned. In sum, the concept of "inherently destructive" discrimination, which obviates the necessity of proving motive, will rarely be applied in constructive discharge cases. Thus, the General Counsel normally will have to prove improper motive. Furthermore, as discussed above, the General Counsel must also establish that the employer intended to compel employee resignation, a secondary motive requirement.

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90. See Dura Corp. v. NLRB, 380 F.2d 970 (6th Cir. 1967).
91. 641 F.2d 351 (5th Cir. 1981).
92. *Id.* at 355.
93. *Id.* at 359.
which is not required by the plain language of section 8(a)(3) or prior cases construing the Act.

V

ADDITIONAL FACTORS WHICH AFFECT THE BOARD’S DECISIONS IN CONSTRUCTIVE DISCHARGE CASES

In deciding section 8(a)(3) constructive discharge cases, the Board often is influenced by the presence or absence of a variety of factors, any one of which may be relevant to the issue of motive. Although some factors obviously are more significant than others, each may contribute to the Board’s final determination.

A. Two Necessary Links in Constructive Discharge Cases

A frequent focal point of inquiry in constructive discharge cases is whether two connections can be established: (1) Is there a nexus between the employee’s protected activity and the employer’s conduct?; and (2) Is there a nexus between the employer’s conduct and the employee’s response?.

1. The Nexus Between the Employee’s Protected Activity and the Employer’s Conduct

For most of the constructive discharge cases considered by this paper, the Board has had no difficulty in finding a nexus between the employee’s protected activities and the impermissible conduct of the employer. Usually, employers discover quickly the identity of employees who are involved in organizing efforts. Still, before the Board will find that a person has been constructively discharged, there must be evidence that the employer created or condoned the impermissible conditions with knowledge of and in response to the employee’s protected conduct.

As noted earlier, the employer-imposed choice is the essence of the Hobson’s choice case: either forego the rights guaranteed under section 7 or leave. The employer obviously knows of the protected conduct and presents the choice in response to it. The question of whether there is

the requisite connection between the employer's conduct and the employee's rights, therefore, is most likely to arise as an issue in cases involving intolerable working conditions.

A relatively recent decision, *K & S Circuits, Inc.*, illustrates the Board's treatment of the link between the employee's activities and the employer's conduct. In *K & S Circuits*, the employer-imposed conditions were so onerous that the Board readily found that two employees had been constructively discharged. Among the group of employees who were recalled to work, it was only the employees who had previously signed union authorization cards who were subjected to greatly changed work conditions, including assignment to a newly created "graveyard" shift, loss of overtime, and a reduction of hours. The Board's decision stressed the need to establish that the employer imposed these burdens "because of the employees' union activities."

In applying the test to the facts of the case, the Board found that the onerous conditions were placed on recalled employees who previously had been discharged unlawfully, and the conditions were unfair labor practices in themselves. Further, it was because these employees had previously signed union authorization cards that the employer imposed the intolerable conditions.

In several constructive discharge cases the outcome has turned on the issue of whether the employer's conduct was a response to the employee's conduct. For example, in *Caddell-Burns Mfg. Co.*, the Board found no evidence that the company had unlawfully discriminated by choosing unusual or abnormal assignments for one particular worker, despite the suspicious timing and the absence of prior reprimands. In *Newport News Shipbuilding & Dry Dock Co.*, there was no evidence that

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96. The Board's decision focused on the intolerable conditions and the presence of union activity, but also noted the importance of the employer's motive for burdening the employees.
   To establish a constructive discharge, it must be proven that the burdens 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. It must also be shown that these burdens were imposed because of the employee's union activities.
   *Id.* (footnote omitted) (emphasis added).
97. The administrative law judge had rejected the finding of constructive discharge because the employee had not explained the reasons for quitting. The Board still found a constructive discharge. The pervasive anti-union atmosphere and numerous unfair labor practices obviously contributed to that finding.

Throughout this consideration of the connection between the employee's protected activity and the employer's response, one should remember that even in some cases in which the employer obviously has taken certain actions against an employee because of his or her activities, the employer may still escape liability for a constructive discharge if it is not established that the employer intended not only to discourage the exercise of § 7 rights, but also to cause the employee to quit. See, e.g., *Crystal Princeton Ref. Co.*, 222 N.L.R.B. 1068 (1976); *Big G Supermarkets, Inc.*, 219 N.L.R.B. 1098, 1106 (1975); *supra* notes 49-81 and accompanying text.
98. 222 N.L.R.B. 488 (1976), enforced, 551 F.2d 399 (2nd Cir. 1976).
the employer knew of the employee's union support at the time of the questioned transfer. The Board decided that there was no constructive discharge in either case.

A sequence of events may be sufficient to establish the requisite connection. When the most productive mechanic in a shop is given less work once he becomes active in the union, the nexus is demonstrated.\textsuperscript{100} Similarly, when the employer's treatment of an employee significantly changes after a union election and the employee is a known union activist, the timing of the change establishes the nexus.\textsuperscript{101} But even suspicious timing may not be enough. Although harassment of an employee began immediately after a union election, the Board in \textit{United Supermarkets, Inc.}\textsuperscript{102} found no connection between the employee's union activities and the harassment. Finally, a lack of suspicious timing may be a factor in defeating a section 8(a)(3) claim that the employer was discriminating to discourage protected activity. When the allegedly discriminatory transfer occurs three months after the last union activity by the employee, the timing operates in favor of establishing a legal motive for the employer.\textsuperscript{103}

2. The Nexus Between the Employer's Conduct and the Employee's Response

Although the nexus between the employer's illegal conduct and the employee's quitting is not always an issue in constructive discharge cases, the presence or absence of this connection can be crucial. In the vast majority of the cases studied, the nexus is presumed. Working conditions or the choices being imposed upon the employee are such that the Board assumes that the employer's conduct caused the resignation.\textsuperscript{104} If, however, the employee chose to quit for reasons other than the conditions imposed by the employer, no constructive discharge will be found.\textsuperscript{105}

The usual presumption of a connection between the employer-imposed conditions and the employee's reaction also will not arise if the timing of the resignation is not what the Board considers appropriate. \textit{For example, in Centralia Container Corp.},\textsuperscript{106} where the employee gave

\begin{itemize}
\item \textsuperscript{100} Bilmax, Inc., 266 N.L.R.B. 442 (1983).
\item \textsuperscript{102} 261 N.L.R.B. 1291, 1312-13 (1982).
\item \textsuperscript{103} Delta Hosiery, Inc., 259 N.L.R.B. 1005, 1010-13 (1982).
\item \textsuperscript{104} \textit{See, e.g.}, NLRB v. Vacuum Platers, Inc., 374 F.2d 866, 867 (7th Cir. 1967); Cavalier Olds, Inc., 172 N.L.R.B. 807, 812 (1968), \textit{enforced}, 421 F.2d 1234 (6th Cir. 1970).
\item \textsuperscript{105} \textit{See, e.g.}, Interstate 65 Corp., 186 N.L.R.B. 248, 249-50 (1970), \textit{enforced in part}, 453 F.2d 269 (6th Cir. 1971).
\item \textsuperscript{106} 195 N.L.R.B. 650 (1972).
\end{itemize}
the company a week's notice to hire a replacement, the Board found that an employee who is forced to quit would not be "so considerate." Also, an employee who quits in anticipation of unlawful conduct is not protected under section 8(a)(3).107

If the employee does not state that the intolerable conditions are the reason for the resignation at the time he or she quits, evidence of the employer's discriminatory conduct alone may be insufficient to prove a violation of 8(a)(3). In St. Joseph's Lead Co.,108 the Board acknowledged that the employer imposed close, critical supervision to discourage union activities, a violation of section 8(a)(3), but found that the employee's failure to claim that those conditions were the reason for his resignation until a year after he left prevented a finding of constructive discharge.109 In contrast, the constructively discharged employee in K-Mart Corp.110 stated from the start that she was quitting because of the constant harassment and the working conditions.111

Since the requisite nexus between the employer's conduct and the employer's reaction was missing in Interstate 65 Corp.,112 the Board held that the employee voluntarily quit. When a new organization took over motel operations, employment at the motel was conditioned on the willingness of employees to work without a union, a violation of section 8(a)(1), which provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of [their protected] rights."

Although the motel employees previously had been represented by a union, the Board did not find constructive discharges in the case of two employees who rejected jobs. Of key importance was the failure of the General Counsel to establish that it was the change to a nonunion arrangement which caused the employees to refuse the work.113 The illegal conduct of the employer and the rejection of the job by the employee were not enough. Without the requisite response by the employees to the

108. 65 N.L.R.B. 439 (1946).
109. Also significant in the decision was evidence that the employer had refused to release the employee and had tried to persuade him to stay. Id. at 441. Since it had been lower level personnel who had asked the employee to stay and not the person who had harassed him, the factor should not have been considered. See also id. at 443 (Houston, Member, dissenting in part).
110. 255 N.L.R.B. 922 (1981), enforced, 676 F.2d 710 (9th Cir. 1982).
111. Id. at 928-29.
113. Id. at 249. This aspect of the case was not before the Sixth Circuit in the enforcement proceeding. Had the Board found that the change to a non-union arrangement was the reason for these employees refusing the jobs, the result probably would have been different.
employer's conduct, the Board could find only a violation of section 8(a)(1), not of section 8(a)(3).

In a 1974 decision, the Board held that there had been no constructive discharge when the requisite nexus between the employer's conduct and the effect on the employee was missing. In Acute Systems Ltd., the management of a fast food restaurant had become hostile toward one employee upon learning that she was pro-union. When her treatment changed, the employee concluded that she was going to be fired because of her union activities. It is unclear whether the woman quit or the manager fired her, or whether both events happened simultaneously. However, at the hearing the employee denied that management's hostility had played any role in her decision to leave. Given that denial and additional statements that she had considered quitting to devote more time to her studies, the Board's decision was inevitable. Management's hostile treatment of the concededly competent employee easily could have been intended to cause this union activist to quit. But when the employee herself denied any connection between the employer's conduct and her departure, the Board had to find that she voluntarily quit. Since the Board found neither a discharge nor adverse treatment of the employee, it held that there was no violation of section 8(a)(3) and no entitlement to relief.

In sum, in order to be assured of being protected by the doctrine of constructive discharge, the employee must respond promptly to the employer's illegal conduct by quitting work, and should so state. The slightest suggestion that any other factor contributed to the decision to quit, or the failure to act immediately in response to the illegal conduct, could result in a finding that the employee quit voluntarily. He or she might be without recourse to reinstatement or backpay.

B. Other Significant Factors in Constructive Discharge Cases

In addition to the key factors noted above, other factors frequently influence the Board's and the courts' determination of the employer's motive and whether the employee was constructively discharged. The additional factors which arise most frequently include: (1) the presence of an employer's anti-union animus, (2) the timing of the employer's con-

115. Id. at 887.
116. The mixed motive Wright Line/Transportation Management approach might have been used to analyze the employee's motivation for quitting. Did she have mixed motives? Would she quit regardless of the employer's conduct and anti-union animus? Or was the employer's illegally motivated treatment of the straw that broke the camel's back? Similarly, the employer should have had the burden of proving that the employee would have quit in any event and was motivated by reasons unrelated to the employer's actions.
duct and the employee's response, (3) the credibility of witnesses, and (4) the number of employees involved.

One factor that arises frequently and obviously affects the decision of the tribunal is the presence of the employer's antiunion animus. An employer's history of being antiunion can be taken as evidence relevant to the issue of the employer's motive in taking some action against employees.

In many cases, companies are hardly subtle in their antiunion attitudes. Employers threaten organizers with bodily harm,\(^{117}\) oppose all unions,\(^{118}\) question job applicants about their union affiliations,\(^{119}\) interrogate employees about their union bias, try to force company-sponsored or dominated unions on employees,\(^{120}\) and keep employees' union activities under surveillance, any and all of which may be illegal and may be interpreted by the Board as demonstrative of the hostility of the company toward protected activities, as well as raising an inference of impermissible motive in the company's conduct toward a particular employee.\(^{121}\)

If the case involves a company that conducted an extremely active and unlawful antiunion campaign, it is more likely that the Board will find that the employee who quit was constructively discharged.\(^{122}\) Conversely, if the company had no history of antiunion animus and if the incidents involving the complaining employee were isolated, the Board would be less inclined to find a constructive discharge or a violation of section 8(a)(3).

The presence of anti-union animus, however, may not be enough.\(^{123}\) The employer may have sought to have the particular employee continue working, or the employee may have had an unrelated reason for quitting. Still, when the animus is manifested in numerous unfair labor practices by the company, the employee who quits rather than acquiesce is more

118. NLRB v. Chicago Apparatus Co., 116 F.2d 753, 759 (7th Cir. 1940).
120. NLRB v. Saxe-Glassman Shoe Corp., 201 F.2d 238, 239 (1st Cir. 1953).
123. In Montgomery Ward & Co., Inc., 160 N.L.R.B. 1729, 1742 (1966), modified on other grounds, 385 F.2d 760 (8th Cir. 1967), despite evidence of anti-union animus, the employer's knowledge of the employee's strong pro-union bias, and the reassignment of the employee to less desirable work beneath his skill level, the Board held that the employee had left the job for reasons other than the "alleged discriminatory treatment." See also Price's Pic-Pac Supermarkets, Inc., 256 N.L.R.B. 742, 742 n.2 (1981), enforced, 707 F.2d 236 (6th Cir. 1983); Big G Supermarket, Inc., 219 N.L.R.B. 1098, 1101 (1975).
likely to be protected under section 8(a)(3).\textsuperscript{124}

In two distinct ways, timing may be relevant to the motives of the actors in constructive discharge cases: first, the timing of the employer's conduct in relation to the employee's protected activity, and second, the timing of the employee's quitting in response to the employer's conduct. When an employer engages in interrogation, intimidation, surveillance, and/or transfers immediately upon learning that an employee or group of employees is attempting to unionize its plant, the timing of such conduct raises and vigorously waves a red flag. The timing of the imposition of the Hobson's choice or of intolerable conditions on the employee is frequently taken to be a strong indication of the improper motive of the employer.\textsuperscript{125} When the employer's activities also include other types of unfair labor practices, the Board is much more likely to find a constructive discharge.\textsuperscript{126} If, however, the alleged discriminatory conduct occurs long after the last protected activity has taken place, the Board is less likely to find that the employer has violated section 8(a)(3).\textsuperscript{127}

The timing of the response by an employee to discriminatory treatment also can be crucial to a determination of whether the employee was constructively discharged. In the Hobson's choice cases, the employee almost always reacts quickly by quitting. An ultimatum has been given and the employee must decide and act.

The timing question in intolerable conditions cases, however, takes a different form. At what point do the conditions become so intolerable that the employee may quit and be considered a constructively discharged worker entitled to relief under section 8(a)(3)? Generally, if the conditions are intolerable at the time the employee quits, he or she is protected. If the employee either waits too long or acts prematurely, however, he or she probably will be found to have quit voluntarily. In

\textsuperscript{124} See, e.g., Liberty Mkts., Inc., 236 N.L.R.B. 1486 (1978).
\textsuperscript{126} That this is not always the case is illustrated in Caddell-Burns Mfg. Co., Inc., 222 N.L.R.B. 488 (1976). Although the timing of events was suspicious, timing alone was insufficient to support a prima facie case.

The timing of the employer's explanation for its action may also be evidence of pretext. Although an employee falsified his job application, the employer's failure to discharge the employee immediately upon discovering that fact and its raising the question for the first time later in the Board proceeding was held to demonstrate pretext for the employer's treatment of the employee. Jack Hodge Transp., Inc., 227 N.L.R.B. 1482 (1977).

\textsuperscript{127} Delta Hosiery, Inc., 259 N.L.R.B. 1005, 1010-13 (1982) (transferred to similar work three months after last union activity).
G.T.A. Enterprises, Inc.,\textsuperscript{128} for example, although the employee had been subjected to a course of insults, battery, and threats during an election campaign, the harassment had ended or significantly lessened two weeks before he quit. He waited too long and, thus, had not been constructively discharged.

An employee also can act too soon. In Marquis Elevator Company,\textsuperscript{129} the employee quit two months before an anticipated severance of the company's relationship with the union. The Board held that "[w]hile resigning in the face of the unlawful withdraw[al] of union recognition and termination of union benefits and membership is one thing, quitting in anticipation that such may take place later on is an entirely different matter."\textsuperscript{130} The employer's withdrawal of union recognition would be both a violation of the NLRA and an intolerable condition. Until the event actually occurs, however, the employee may not resign and rely upon the protections of the statute. The employee's right to a remedy must be based upon a violation of section 8(a)(3).

Another way in which timing may be important is the relation of the employee's resignation to a union election. As noted above, if the employer begins or increases its unfair labor practices prior to and in anticipation of a union representation election, the timing is relevant to consideration of the employer's improper motivation. Similarly, if a prime mover in the organizing campaign quits shortly after the union loses the election, the tribunal is more likely to conclude that the resignation was a response to the disappointment over the election results rather than to the employer's conduct.

This probable conclusion by the Board presents an obvious dilemma for the employee. The employer's illegal pre-election threats, interrogation, and promises amount to sufficiently "intolerable conditions" to warrant a finding of constructive discharge if the employee quits while the conditions continue. Yet, if the strong union advocate leaves, the union is less likely to win the election. Once the election is over, even despite continuing, albeit less extreme unfair labor practices, the employee realistically no longer can expect to be "constructively discharged." The Board will focus more on the employee's motive than on the employer's.

The case of Maywood, Inc.\textsuperscript{131} illustrates this dilemma. Of six employees who alleged a constructive discharge, three had the charges decided against them in large measure because of the timing of their

\textsuperscript{128} 260 N.L.R.B. 197 (1982).
\textsuperscript{129} 217 N.L.R.B. 461 (1975).
\textsuperscript{130} Id. See also Price's Pic-Pac Supermarkets, Inc., 256 N.L.R.B. 742, 749 (1981), enforced, 707 F.2d 236 (6th Cir. 1982); Com General Corp., 251 N.L.R.B. 653, 657-58 (1980), enforced, 684 F.2d 367 (6th Cir. 1982).
\textsuperscript{131} 251 N.L.R.B. 979 (1980).
quitting. The three, Pool, Edens, and Antel, were leading union advocates who quit the day after the union lost the election.

Despite the reassignment of Pool to a more onerous and less lucrative position, a transfer the Board found to have been motivated by union activity and a violation of the Act, the Board still dismissed her allegation of a constructive discharge. The change was not the “dominant” reason for the resignation; she had had mixed motives. Particularly significant was a discussion between Pool and Edens two or three months earlier. Both employees expected to quit if the union were defeated. When Pool did not return to work after the election, the defeat was considered to be the dominant reason for her quitting. Edens’ earlier conversation with Pool also influenced the Board’s finding that the union’s loss precipitated Edens’s leaving the company.

Although Antel had not been a party to the Edens-Pool conversation, her failure to return to work the day after the election coupled with her concession that she had often thought of quitting led the Board to find that the quitting was motivated mainly by the election and not working conditions. In contrast, the Board found a constructive discharge in the case of Roberts, who quit one week before the election and who was subjected to conditions no more intolerable than Pool had been. The timing difference obviously was of prime importance in the two different outcomes.

In constructive discharge cases, as in all labor cases, the credibility of the witnesses can be a significant factor in the ultimate determination. For example, when an employee gives uncontroverted testimony that he or she quit because the employer required choosing either the job or union affiliation, the hearing officer and, in turn, the Board may decide for or against the employee on the basis of his or her credibility. Further, if the uncontroverted testimony is inherently reasonable, it should stand; only if the testimony “conflict[s] with well supported or obvious inferences from the remainder of the record” should a court reverse a finding based upon the testimony.

When there are conflicting versions of the crucial events, credibility

132. Id. at 1002-03.
133. Id. at 1004-05. Again, the Board gave inadequate consideration to the question of whether Antel would have quit in the absence of the discriminatory working conditions. See supra text accompanying notes 118-120.
134. 251 N.L.R.B. at 999-1000.
137. Delchamps, Inc. v. NLRB, 588 F.2d 476, 480 (5th Cir. 1979) (citation omitted). See also Standard Dry Wall Prods., Inc., 91 N.L.R.B. 544 (1950), enforced, 188 F.2d 362 (3rd Cir. 1951).
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is a most important consideration. Who is to be believed? In such cases, the demeanor of the witnesses can make or break the case. Credibility findings can color other findings, including those related to motive. For example, when the supervisor is found not to be credible, his or her testimony as to the employer’s reason for a transfer is more likely to be discounted or held to be a pretext for discrimination.

The number of employees involved in the charges also may affect the Board’s decisions on employer motive and whether a particular employee was constructively discharged. If several employees are involved in union organizing, but only one of the less prominent union supporters is reassigned to a different shift, union animus is less likely to be found to have been the reason for the change. If, in contrast, only one employee is transferred to a different shift and quits while many other union supporters are treated improperly, the treatment of the others lends credence to the argument that the one employee was constructively discharged.

Thus, the determination of motive in section 8(a)(3) cases can be affected by a variety of factors; the more factors that are present in any given case, the more likely it is that the fact finder will determine that the employer had an improper motive and that the employee was constructively discharged. No one factor is paramount. Still, certain considerations, such as the employer’s antiunion animus and the connection between the employer’s conduct and the employee’s protected activity, obviously are more important and therefore more persuasive. Although there are exceptions, in most cases, it is the confluence of a variety of these factors that leads to a finding of constructive discharge.

VI
CONCLUSION

The Board has used the fiction of constructive discharge for five decades. During this period, the basic elements have remained fairly constant. An employer, who knows or suspects that an employee is engaged in protected activity, imposes or acquiesces in the imposition of discriminatory work conditions on the employee. When the employee reacts by quitting, he or she has been constructively discharged in violation of section 8(a)(3). Numerous other factors may affect the outcome in any


given case, but the presence of these basic factors consistently has been important.

When statutes such as the NLRA were passed, the rights and the bargaining power of the workers were greatly increased over what had previously existed. Since the new law protected employees from unfair labor practices committed by the employer, the decisions of the Board tended to focus on the actions of the employer. It was reasonable, therefore, to find that an employee who quit would not be protected under the law unless the resignation were integrally related to the employer's conduct. Since an ordinary discharge was the act of the employer, a constructive discharge must also have been—effectively—the "act" of the employer.

Section 8(a)(3) prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." The language is straightforward. Disparate treatment which is unlawfully motivated is an unfair labor practice. In constructive discharge cases, it is the employer's creation or acceptance of the discriminatory working conditions as well as the forcing of a choice between continued employment and protected activity which is the unfair labor practice. Therefore, it is the conduct of the employer, and not the response of the employee, which should be the focus of inquiry for the Board. Yet a study of reported cases demonstrates that the Board has placed increasing emphasis on the employee's response, the resignation, considering both whether it was a "goal" of the employer and whether it was an "appropriate response" by the employee.

As a result, it has become increasingly difficult to establish a violation of section 8(a)(3) through the constructive discharge doctrine. The Board requires two types of improper employer motive: an intent to discourage protected activity, and an intent to compel employee resignation. The first type of employer motive is the essence of an unfair labor practices charge under section 8(a)(3), and it should be sufficient to establish a violation. However, because of an apparent concern about the propriety of reinstatement and backpay as remedies for a substantive violation, the Board has required proof of the second type of employer motive. The unfortunate result is that an employer, whose motive is to discourage protected activity but not to cause the employee to resign, is likely to escape being adjudicated a violator altogether.

When confronted with a constructive discharge case, it would be more appropriate for the Board to determine whether the employer discriminated to discourage protected activity. If such is the case, he or she violated section 8(a)(3). Once a violation is found, the Board should then

consider the appropriate relief. It is only at this point that the question of the propriety of the employee's response might become relevant. Until the Board adopts the proposed approach, however, litigants must be cognizant of the particularly important role that employer motives play in constructive discharge cases.