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# Constructive Discharge Under the ADEA: An Argument for the Intent Standard

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# CONSTRUCTIVE DISCHARGE UNDER THE ADEA: AN ARGUMENT FOR THE INTENT STANDARD

## INTRODUCTION

The Age Discrimination in Employment Act of 1967, as amended (ADEA),[1] prohibits employers[2] from discriminating on the basis of age against individuals forty years of age or older.[3] An employer may not discharge[4] an employee within the protected group based on his age,[5] except as provided by law.[6] In addition, the ADEA recognizes the doctrine of constructive discharge,[7] which occurs when the employer creates working conditions so intolerable that a reasonable employee would be

1. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-34 (1982 & Supp. III 1985)), *as amended by* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986).

2. The ADEA covers employers of twenty or more employees in industries affecting commerce, including employer agents, states, political subdivisions and their agencies or instrumentalities. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 11(b), 81 Stat. 602, 605 (1967), *as amended by* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §§ 28(a)(1), (2), 88 Stat. 55, 74 (1974) (codified as amended at 29 U.S.C. § 630(b) (1982)).

3. 29 U.S.C. § 631 (1982), *as amended by* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342, 3342 (1986). As first enacted, the ADEA prohibited discrimination against individuals at least 40 years of age but less than 65 years of age. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607 (1967) (codified as amended at 29 U.S.C. § 631 (1982 & Supp. III 1985)). In its statement of findings and purpose, Congress expressed concern about the job security, unemployment and morale problems that are prominent among older workers. Pub. L. No. 90-202, § 2(a)(1), 81 Stat. 602, 602 (codified at 29 U.S.C. § 621(a)(1) (1982)). In 1978, the upper age limit was raised from age 65 to age 70. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189, 189 (1978) (codified at 29 U.S.C. § 631 (1982 & Supp. III 1985)). In 1986, the upper age limit was eliminated entirely. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342, 3342 (1986).

4. *See infra* note 18 and accompanying text.

5. 29 U.S.C. § 623(a)(1) (1982).

6. The ADEA recognizes a number of exceptions to its nondiscrimination provisions. *See* 29 U.S.C. § 623 (f) (1982 & Supp. III 1985), *as amended by* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342, 3342 (1986). For instance, states, political subdivisions of states, and their agencies or instrumentalities may retire firefighters or law enforcement officers who have reached retirement age under state or local law. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 3(a)(i)(1), 100 Stat. 3342, 3342 (1986) (amending 29 U.S.C. § 623). The ADEA also permits the involuntary retirement of employees who, for two years prior to retirement, are in bona fide executive or high policy making positions and are entitled to an annual pension, or similar retirement benefits, of at least $44,000 from the employer. 29 U.S.C. § 631(c)(1) (Supp. III 1985). Finally, the ADEA contains an affirmative defense that allows the employer to discharge an individual based upon age "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1) (Supp. III 1985).

7. *See, e.g.*, Guthrie v. J.C. Penney Co., 803 F.2d 202, 207-08 (5th Cir. 1986); Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 560-63 (1st Cir. 1986); Williams v. Caterpillar Tractor Co., 770 F.2d 47, 49-50 (6th Cir. 1985).

compelled to resign.[8]

There is a split of authority concerning the elements that an ADEA plaintiff must prove in order to establish constructive discharge.[9] A majority of courts require the plaintiff to prove only that the employer deliberately created working conditions that were so intolerable that a reasonable employee would be compelled to resign.[10] This is known as

8. *See, e.g.*, Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) (quoting Holsey v. Armour & Co., 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985)), *cert. denied*, 106 S. Ct. 1461 (1986); Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983) (quoting Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975)); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981) (quoting Slotkin v. Human Dev. Corp., 454 F. Supp. 250, 255 (E.D. Mo. 1978)).

9. *See infra* notes 49-79 and accompanying text. This split in authority has been recognized in Bernstein v. Consolidated Foods Corp., 622 F. Supp. 1096, 1101 & n.3 (N.D. Ill. 1984). The similarities between the ADEA and Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e (1982)), in the constructive discharge context allows for parallel analysis of constructive discharge cases brought under each statute. *See infra* notes 35-46 and accompanying text. Courts have recognized the split in authority in Title VII cases as well. *See* Derr v. Gulf Oil Corp., 796 F.2d 340, 343 (10th Cir. 1986); Goss v. Exxon Office Sys., 747 F.2d 885, 887-88 (3d Cir. 1984); Clark v. Marsh, 665 F.2d 1168, 1173 & n.5 (D.C. Cir. 1981). The controversy also has been recognized by several commentators. *See* B. Schlei & P. Grossman, Employment Discrimination Law 611-12 (2d ed. 1983) [hereinafter Schlei & Grossman] and 1983-84 Cumulative Supplement 127-28 (1985) [hereinafter Schlei & Grossman Supplement]; Baxter and Farrell, *Constructive Discharge—When Quitting Means Getting Fired*, 7 Employee Rel. L. J. 346, 349-52 (1981-82); Casey, *Constructive Discharge Under Title VII in Institutions of Higher Education*, 9 J. C. & U. L. 191, 193 (1982-83); Note, *Choosing a Standard for Constructive Discharge in Title VII Litigation*, 71 Cornell L. Rev. 587, 587-88 (1986) [hereinafter *Choosing a Standard*]; Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U. Chi. L. Rev. 561, 562 (1986) [hereinafter *Constructive Discharge*]; Case Note, *LABOR LAW—Employment Discrimination—Employer that Knowingly Permits Acts of Discrimination So Intolerable that Reasonable Employee Subject to Them Would Resign May Be Liable for Constructive Discharge Under Title VII*, Goss v. Exxon Office Systems (1984), 30 Vill. L. Rev. 1028, 1030-31 (1985) [hereinafter *Liability for Constructive Discharge*].

10. Courts that currently follow this standard include the Courts of Appeals for the First Circuit, *see* Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 561 (1st Cir. 1986), the Second Circuit, *see* Martin v. Citibank, N.A., 762 F.2d 212, 221 (2d Cir. 1985); Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983), the Third Circuit, *see* Goss v. Exxon Office Sys., 747 F.2d 885, 888 (3d Cir. 1984), the Fifth Circuit, *see* Downey v. Southern Natural Gas Co., 649 F.2d 302, 305 (5th Cir. Unit B June 1981); Bourque v. Powell Elec. Mfg., 617 F.2d 61, 65 (5th Cir. 1980); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975), the Ninth Circuit, *see* Satterwhite v. Smith, 744 F.2d 1380, 1381 (9th Cir. 1984); Nolan v. Cleland, 686 F.2d 806, 812-13 (9th Cir. 1982), the Tenth Circuit, *see* Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986), the Eleventh Circuit, *see* Lewis v. Federal Prison Indus., 786 F.2d 1537, 1542 n.4 (11th Cir. 1986); Buckley v. Hospital Corp. of Am., 758 F.2d 1525, 1530 (11th Cir. 1985) and the D.C. Circuit, *see* Bishopp v. District of Columbia, 788 F.2d 781, 789-90 (D.C. Cir. 1986); Clark v. Marsh, 665 F.2d 1168, 1173-74 (D.C. Cir. 1981). The Equal Employment Opportunity Commission also uses this standard. *See* EEOC Dec. No. 86-6, 40 Fair Empl. Prac. Cas. (BNA) 1890, 1892 (1986); EEOC Dec. No. 84-1, 33 Fair Empl. Prac. Cas. (BNA) 1887, 1891-92 (1983); *see also* Schlei & Grossman Supplement, *supra* note 9, at 128 (noting that the EEOC uses the objective standard).

the "reasonable person"[11] standard, or the "objective"[12] standard. A minority of courts require the plaintiff to prove both intolerable working conditions and the employer's intent to compel the employee's resignation.[13] This is known as the "employer intent" standard.[14]

Part I of this Note describes the two standards, with particular emphasis on ADEA cases. Part II presents arguments in favor of the employer intent standard based on general principles of employment discrimination law from both the ADEA and Title VII of the 1964 Civil Rights Act (Title VII). Part III argues that the employer intent standard is particularly appropriate in constructive discharge cases brought under the ADEA.

## I. BACKGROUND ON THE ADEA AND THE TWO STANDARDS FOR ESTABLISHING CONSTRUCTIVE DISCHARGE

### A. *Constructive Discharge in General*

Section 623(a)(1) of the ADEA prohibits employers from unlawfully discharging workers because of their age.[15] The plaintiff in an ADEA discharge case must prove that he was discharged because of his age.[16] Similarly, constructive discharges based on age are prohibited by section

11. *See* Bernstein v. Consolidated Foods Corp., 622 F. Supp. 1096, 1101 (N.D. Ill. 1984).

12. *See* Derr v. Gulf Oil Corp., 796 F.2d 340, 343 (10th Cir. 1986). Although these terms are used interchangeably, for purposes of this Note the term "objective standard" will be used.

13. Courts that currently follow this standard are the Courts of Appeals for the Fourth Circuit, *see* Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 1461 (1986); Holsey v Armour & Co., 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985); EEOC v. Federal Reserve Bank, 698 F.2d 633, 672 (4th Cir. 1983), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984), the Sixth Circuit, *see* Easter v. Jeep Corp., 750 F.2d 520, 522-23 (6th Cir. 1984) and the Eighth Circuit, *see* Craft v. Metromedia, Inc., 766 F.2d 1205, 1217 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981); Thompson v. McDonnell Douglas Corp., 552 F.2d 220, 223 (8th Cir. 1977).

Based on its holding in Held v. Gulf Oil Co., 684 F.2d 427 (6th Cir. 1982), there is some question concerning the standard used by the Court of Appeals for the Sixth Circuit. For a discussion of this issue, see *infra* note 67.

14. *See, e.g.*, *Constructive Discharge*, *supra* note 9, at 566-67.

15. 29 U.S.C. § 623(a)(l) (1982).

16. *See* O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1549 (11th Cir. 1984); Pena v. Brattleboro Retreat, 702 F.2d 322, 323 (2d Cir. 1983); Rizzo v. Means Servs., Inc., 632 F. Supp. 1115, 1127 (N.D. Ill. 1986) (quoting La Montagne v. American Convenience Prods., 750 F.2d 1405, 1409 (7th Cir. 1984)); Real v. Continental Group, Inc., 627 F. Supp. 434, 439-40 (N.D. Cal. 1986); *see also* Sutton v. Atlantic Richfield Co., 646 F.2d 407, 411 (9th Cir. 1981); Cebula v. General Elec. Co., 614 F. Supp. 260, 265 (N.D. Ill. 1985); Bertrand v. Orkin Exterminating Co., 454 F. Supp. 78, 81 (N.D. Ill. 1978). "An ADEA plaintiff is not required to show that age was the sole motivating factor in the employment decision, but only that age was also a reason, and that age was the factor that made a difference." Cockrell v. Boise Cascade Corp., 781 F.2d 173, 179 (10th Cir. 1986).

623(a)(1).[17] Constructive discharges must be distinguished from actual discharges. An actual discharge occurs when the employer directly terminates the employment relationship.[18] A constructive discharge results "when the employer, rather than acting directly, 'deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation.' "[19] To be treated as a constructive discharge, the employee actually must have resigned.[20] Further, the plaintiff must establish underlying discrimination, that is, an unlawful basis for the constructive discharge,[21] such as age discrimination.[22] The failure to establish unlawful discrimination is fatal to a constructive discharge claim.[23]

17. *See* Cockrell v. Boise Cascade Corp., 781 F.2d 173, 177-78 (10th Cir. 1986); Henn v. National Geographic Soc'y, 40 Fair Empl. Prac. Cas. (BNA) 1186, 1186-87 (N.D. Ill. 1986), *aff'd*, 43 Fair Empl. Prac. Cas. (BNA) 1620 (7th Cir. 1987); Rotert v. Jefferson Fed. Sav. & Loan Ass'n, 623 F. Supp. 1114, 1117-18 (D. Conn. 1985).

18. "An actual discharge occurs when an employer fires, dismisses, releases, ousts, lets go, terminates, sacks, gets rid of, gives the gate to, cans, axes, bounces, or gives walking papers to an employee resulting in the severance of the entire employment relationship." Frazer v. KFC Nat'l Management Co., 491 F. Supp. 1099, 1105 (M.D. Ga. 1980), *aff'd without opinion*, 636 F.2d 313 (5th Cir. 1981).

19. Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983) (quoting Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975)).

20. *See* Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650, 652 (5th Cir.) ("These facts do not fit the normal constructive discharge case because [plaintiff] never resigned; he was fired."), *cert. denied*, 449 U.S. 891 (1980); Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 564 (8th Cir.) (court rejects constructive discharge claim because plaintiff did not resign), *cert. denied*, 434 U.S. 966 (1977).

21. *See, e.g.*, Craft v. Metromedia, Inc., 766 F.2d 1205, 1217 (8th Cir. 1985) ("Our conclusion that [plaintiff] was not subject to sex discrimination . . . effectively determines the outcome of her claim of constructive discharge."), *cert. denied*, 106 S. Ct. 1285 (1986); Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 428 (8th Cir. 1984) (Plaintiff "has not established the underlying illegality necessary to support a constructive discharge claim."); Loftin-Boggs v. City of Meridian, 633 F. Supp. 1323, 1327-28 (S.D. Miss. 1986) (constructive discharge established, but complaint dismissed because Title VII violation not established).

If the plaintiff prevails on the underlying discrimination claim, he is entitled to a remedy for that discrimination, regardless of the court's determination on the constructive discharge claim. *See* Muller v. United States Steel Corp., 509 F.2d 923, 930 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975).

22. *See, e.g.*, Guthrie v. J.C. Penney Co., 803 F.2d 202, 206-08 (5th Cir. 1986) (harassment, criticism, repeated inquiries concerning retirement); Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 563 (1st Cir. 1986) (repeated inquiries concerning retirement, demotion, threat of onerous work schedule); Williams v. Caterpillar Tractor Co., 770 F.2d 47, 50 (6th Cir. 1985) (demotion to a job plaintiff was not physically capable of performing).

23. *See supra* note 21.

The following two ADEA cases illustrate typical constructive discharge situations. In Real v. Continental Group, Inc., 627 F. Supp. 434 (N.D. Cal. 1986), the court found sufficient evidence to support the jury's finding of constructive discharge. *See id.* at 443. The plaintiff was demoted after being passed over for promotion. *See id.* Thereafter, the employer, which had been undergoing consolidation, *see id.* at 438, denied the plaintiff's requests for other promotions and relocation benefits. *See id.* at 443. When the plaintiff was offered another demotion, he resigned. *See id.* at 439. It was clear by the time of plaintiff's resignation that he could not maintain his previous status with the company,

A court's determination of constructive discharge is significant for several reasons. At trial, in cases using the tripartite order of proof[24] under which the plaintiff must first establish a prima facie case[25] of a Title VII[26] or ADEA violation,[27] constructive discharge is an element of the plain-

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and that he had lost all hope of career advancement. *See id.* at 443. Finding that the employer subjected the plaintiff to a continuous pattern of discriminatory treatment over a period of time, the court held that the plaintiff was justified in resigning. *See id.* at 443-44.

Alternatively, in Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 1461 (1986), the Court of Appeals for the Fourth Circuit reversed the district court's judgment for the plaintiff on his constructive discharge claim. *See id.* at 1252. The employer assigned the plaintiff to manage what the plaintiff considered a difficult district with unique problems. *See id.* at 1253. The employer criticized the plaintiff for his financial irresponsibility. *See id.* The plaintiff retired following a financial dispute with his supervisor, *see id.* at 1254, and failed in his efforts to rescind his resignation. *See id.* The court held that these facts failed to establish constructive discharge. *See id.* at 1255-56.

24. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court established a three stage order of proof to be used in disparate treatment cases brought under Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e (1982)). *See McDonnell Douglas Corp.*, 411 U.S. at 802-04. In stage one, "[t]he complainant . . . must carry the initial burden . . . of establishing a prima facie case of . . . discrimination." *Id.* at 802. In stage two, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the . . . [action]." *Id.* In stage three, the complainant must "be afforded a fair opportunity to show that [employer's] stated reason . . . was in fact pretext." *Id.* at 804. In Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Supreme Court confirmed that the burden that shifts to the employer in the second stage is a burden of production, not a burden of persuasion. *See id.* at 254-55; *infra* notes 104-11 and accompanying text for a more detailed discussion of disparate treatment.

25. In ADEA discharge cases, the prima facie case typically consists of the following elements: "(1) membership in the protected class; (2) qualification for the position; (3) replacement by a younger worker; and (4) discharge." Williams v. Caterpillar Tractor Co., 770 F.2d 47, 49 (6th Cir. 1985); *see also* Lewis v. Federal Prison Indus., 786 F.2d 1537, 1542 (11th Cir. 1986); Spear v. Dayton's, 771 F.2d 1140, 1142-43 (8th Cir. 1985).

"Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Burdine*, 450 U.S. at 254. Once a prima facie case has been established, judgment should be entered for the plaintiff unless the employer overcomes the presumption. *See id.* Of course, establishment of a prima facie case is not a guarantee that the plaintiff will prevail. *See* Christensen v. Equitable Life Assurance Soc'y, 767 F.2d 340, 343 (7th Cir. 1985) (plaintiff established prima facie case that was then successfully rebutted), *cert. denied*, 106 S. Ct. 885 (1986).

26. 42 U.S.C. § 2000e (1982). Both McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), *see supra* note 24, were Title VII cases. In *McDonnell Douglas*, the Court noted that, in a race discrimination hiring case, the complainant may establish a prima facie case

> by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802 (footnote omitted).

27. The establishment of a presumption of discrimination through use of the prima facie case has been recognized in ADEA cases. *See, e.g.*, Lewis v. Federal Prison Indus., 786 F.2d 1537, 1542 (11th Cir. 1986); Spear v. Dayton's, 771 F.2d 1140, 1142-43 (8th Cir. 1985); Williams v. Caterpillar Tractor Co., 770 F.2d 47, 49 (6th Cir. 1985). The

tiff's prima facie case.[28] A determination of constructive discharge entitles the plaintiff to the same remedies as if he were discharged.[29] When adjudicating claims of constructive discharge, the court may consider evidence of events that otherwise are time-barred in their own right,[30] such

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prima facie case required in ADEA cases is similar to that required in comparable Title VII cases. In both instances, the plaintiff is required to establish that he is a member of the statute's protected class. *See, e.g.*, Guthrie v. J.C. Penney Co., 803 F.2d 202, 206-07 (5th Cir. 1986); *Lewis*, 786 F.2d at 1542; *Spear*, 771 F.2d at 1142-43; *Williams*, 770 F.2d at 49.

Courts are flexible in applying variations of the prima facie case set out in *McDonnell Douglas*. *See, e.g.*, Hedrick v. Hercules, Inc., 658 F.2d 1088, 1093-94 (5th Cir. Unit B Oct. 1981); McCorstin v. United States Steel Corp., 621 F.2d 749, 752-54 (5th Cir. 1980); Kneisley v. Hercules Inc., 577 F. Supp. 726, 730-31 (D. Del. 1983).

28. *See, e.g.*, Lewis v. Federal Prison Indus., 786 F.2d 1537, 1542 (11th Cir. 1986); Williams v. Caterpillar Tractor Co., 770 F.2d 47, 49 (6th Cir. 1985); Christensen v. Equitable Life Assurance Soc'y, 767 F.2d 340, 343 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 885 (1986).

Although sometimes discussed by courts merely as an element of the plaintiff's prima facie case, constructive discharge is often considered as a separate liability issue accompanying other discrimination claims. *See, e.g.*, Bristow v. Daily Press, Inc., 770 F.2d 1251, 1252, 1254 (4th Cir. 1985) (constructive discharge claim accompanying claim of unlawful denial of promotion), *cert. denied*, 106 S. Ct. 1461 (1986); Martin v. Citibank, N.A., 762 F.2d 212, 221 (2d Cir. 1985) (constructive discharge claim accompanying harassment claim); Downey v. Southern Natural Gas Co., 649 F.2d 302, 305 (5th Cir. Unit B June 1981) (constructive discharge claim accompanying claim of unlawful demotion, denial of transfer request).

29. *See, e.g.*, Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975). Examples of these remedies include back pay for the post-resignation period, *see* Satterwhite v. Smith, 744 F.2d 1380, 1381 n.1 (9th Cir. 1984); Muller v. United States Steel Corp., 509 F.2d 923, 930 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975), reinstatement, *see* Derr v. Gulf Oil Corp., 796 F.2d 340, 342 (10th Cir. 1986), and front pay in lieu of reinstatement, *see* Goss v. Exxon Office Sys., 747 F.2d 885, 888-90 (3d Cir. 1984). For a discussion of front pay under the ADEA, see Note, *Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act*, 53 Fordham L. Rev. 579 (1984) [hereinafter *Front Pay Under ADEA*].

30. The ADEA statute of limitations period is generally two years. *See* 29 U.S.C. § 626(e) (1982), incorporating the statute of limitations period of the Portal to Portal Act of 1947, ch. 52, § 6, 61 Stat. 84, 87 (1947) (codified as amended at 29 U.S.C. §§ 251, 255 (1982)). Under this statute, if a violation of the ADEA is "willful," the statute of limitations period is three years. *See id.*; *see also infra* notes 199-232 and accompanying text for a discussion of willfulness under the ADEA.

Under the ADEA, the complainant must file a charge with the Equal Employment Opportunity Commission within 180 days of the allegedly unlawful practice. 29 U.S.C. § 626(d)(1) (1982). The ADEA provides that when an alleged violation occurs in a state that has an agency empowered to grant or seek relief from such alleged violation, an individual may not bring suit to address the ADEA violation until 60 days after commencement of the proceedings, unless the state proceedings were terminated earlier. 29 U.S.C. § 633(b) (1982). In states that have such such an agency, the filing period may be extended to 300 days after the allegedly discriminatory practice, or within 30 days of notice of termination of state proceedings, whichever is earlier. 29 U.S.C. § 626(d)(2) (1982). "Most courts have held that the 180/300-day filing requirement is akin to a statute of limitations, which can be tolled for equitable reasons." Schlei & Grossman, *supra* note 9, at 490.

In ADEA constructive discharge cases, courts have considered evidence of events that were time-barred in their own right. *See* Downey v. Southern Natural Gas Co., 649 F.2d

as the employer's demotion of the employee[31] or denial of the employee's transfer request.[32] The constructive discharge doctrine also is significant in non-trial contexts, such as when victims of discrimination resign and then seek unemployment insurance benefits.[33] The doctrine also may be relevant to employees' entitlement to company benefits, such as severance pay.[34]

### B. *The Connection between the ADEA and Title VII in Constructive Discharge Cases*

The doctrine of constructive discharge has proved to be a useful device in labor law. It originated in cases brought under the National Labor Relations Act (NLRA)[35] and subsequently was expanded and applied in employment discrimination cases under Title VII.[36] Later, the doctrine was applied in ADEA cases, with little modification from its application under Title VII.[37]

Although Title VII and the ADEA cannot be considered completely interchangeable, there are many similarities between the two statutes. The Supreme Court has noted that Congress essentially incorporated the substantive prohibitions of Title VII into the ADEA.[38] When an ADEA

302, 305 (5th Cir. Unit B June 1981) (time-barred events "should be allowed as evidence on the question of whether [plaintiff] was constructively discharged"); Allen v. Colgate-Palmolive Co., 539 F. Supp. 57, 68 (S.D.N.Y. 1981) (time-barred events will "be allowed as evidence on the questions whether plaintiff was constructively discharged and whether age was a factor"). *But see* Pierce v. Green Giant Co., 26 Fair Empl. Prac. Cas. (BNA) 1683, 1686 (N.D. Tex. 1981) (time-barred acts, consistent with the 180 day rule, cannot be considered to determine whether the plaintiff's later working conditions compelled him to resign).

31. *See* Downey v. Southern Natural Gas Co., 649 F.2d 302, 305 (5th Cir. Unit B June 1981); Allen v. Colgate-Palmolive Co., 539 F. Supp. 57, 67-68 (S.D.N.Y. 1981).

32. *See* Downey v. Southern Natural Gas Co., 649 F.2d 302, 305 (5th Cir. Unit B June 1981).

33. *See* Note, *Unemployment Compensation Benefits for the Victim of Work-Related Sexual Harassment*, 3 Harv. Women's L.J. 173, 175-76 & 175 n.14 (1980).

34. *See* Lojek v. Thomas, 716 F.2d 675, 680-81 (9th Cir. 1983); Devine v. Xerox Corp., 625 F. Supp. 603, 607-08 (D. Del. 1985); Donnelly v. Aetna Life Ins. Co., 465 F. Supp. 696, 697-98 (E.D. Pa. 1979).

35. 29 U.S.C. §§ 151-69 (1982 & Supp. III 1985); *see, e.g.*, Goss v. Exxon Office Sys., 747 F.2d 885, 887 (3d Cir. 1984); Bertrand v. Orkin Exterminating Co., 454 F. Supp. 78, 81 (N.D. Ill. 1978); EEOC Dec. No. 84-1, 33 Fair Empl. Prac. Cas. (BNA) 1887, 1891 (1983); *Choosing a Standard*, *supra* note 9, at 589; *Constructive Discharge*, *supra* note 9, at 566-67; *Liability for Constructive Discharge*, *supra* note 9, at 1029 n.3.

36. Title VII is codified at 42 U.S.C. § 2000e (1982). For examples of Title VII cases applying the constructive discharge doctrine, see Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650, 652 (5th Cir.), *cert. denied*, 449 U.S. 891 (1980); Muller v. United States Steel Corp., 509 F.2d 923, 929 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 143-44 (5th Cir. 1975).

37. *See, e.g.*, Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983); Downey v. Southern Natural Gas Co., 649 F.2d 302, 305 (5th Cir. Unit B June 1981); Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977). For a discussion of the similarity of treatment of constructive discharge under the two statutes, see *infra* notes 45-46 and accompanying text.

38. *See* Lorillard v. Pons, 434 U.S. 575, 584 (1978). The Supreme Court has noted

provision is traced to a complementary section of Title VII, the intent of Congress is that the two provisions be construed consistently.[39] Examples of situations in which Title VII and the ADEA are construed consistently include the burden and order of proof,[40] equitable tolling of statutes of limitations,[41] Rule 56 summary judgment analysis,[42] commencement of appropriate state proceedings as a prerequisite to suit in federal court[43] and the naming of the proper defendant[44].

The many similarities between Title VII and the ADEA allow for parallel analysis of constructive discharge cases brought under each statute.[45] Indeed, courts consistently rely on interpretations of one statute to

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that the elimination of workplace discrimination is the common purpose of both statutes. *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979); *Lorillard*, 434 U.S. at 584.

39. *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979); Romain v. Shear, 799 F.2d 1416, 1418 (9th Cir. 1986) (citing *Oscar Mayer*, 441 U.S. at 756), *cert. denied*, 107 S. Ct. 2183 (1987).

40. *See supra* note 27 and accompanying text. "The standards relating to burden and order of proof in Title VII cases apply as well to cases arising under the ADEA." Pena v. Brattleboro Retreat, 702 F.2d 322, 323 (2d Cir. 1983).

41. *See supra* note 30 and accompanying text. In Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), the Supreme Court held that the Title VII filing requirement is a statute of limitations subject to equitable tolling, waiver and estoppel. *See id.* at 393. Schlei & Grossman have noted that "there is little doubt but that the Age Act will be uniformly interpreted in a similar manner. The tendency of courts in ADEA cases to look to Title VII precedent to determine which equitable considerations will extend the filing period will undoubtedly continue." Schlei & Grossman, *supra* note 9, at 491.

42. *See* Rizzo v. Means Servs., Inc., 632 F. Supp. 1115, 1127 (N.D. Ill. 1986). The court noted that "the first step in [considering a motion for summary judgment under Fed. R. Civ. P. 56] is to establish the 'essential element(s)' of plaintiffs' case," *id.*, and found that although "the nature of the animus in ADEA and Title VII/Section 1983 cases differs, the essential element is the same." *Id.*

43. *See supra* note 30 and accompanying text; Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979). The Court noted that:

> Since the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace, since the language of [ADEA] § 14(b) is almost *in haec verba* with [Title VII] § 706(c), and since the legislative history of § 14(b) indicates that its source was § 706(c), we may properly conclude that Congress intended that the construction of § 14(b) should follow that of § 706(c).

*Id.*

44. *See* Romain v. Shear, 799 F.2d 1416, 1418 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 2183 (1987); Ellis v. United States Postal Serv., 784 F.2d 835, 838 (7th Cir. 1986); Gillispie v. Helms, 559 F. Supp. 40, 41-42 (W.D. Mo. 1983).

45. A treatise writer has advanced guidelines for determining whether Title VII authority may be applied by analogy to ADEA cases. Noting that there are similarities and differences in the language of Title VII and the ADEA, he states that "the significance of the differences in language, if any, and the significance of the different characteristics of age and racial discrimination must be considered with respect to the particular issue at hand." 1 H. Eglit, Age Discrimination, § 16.02, at 16-7 (1985) [hereinafter Eglit].

For example, the Equal Employment Opportunity Commission recently supplemented its compliance manual with a policy directive stating that "an employer has a duty under the ADEA to maintain a work environment free from *age* harassment." EEOC Directive on Age Harassment, § 615.11(a), as reported in Daily Lab. Rep. (BNA), No. 41, at A-1 (Mar. 4, 1987) (emphasis in original) [hereinafter EEOC Directive]. In its directive, the EEOC equates harassment based on age, unlawful under the ADEA, to harassment un-

support similar interpretations of the other.[46] Thus, given analogous treatment of constructive discharge under the two statutes, this Note refers to cases construing both Title VII and the ADEA.[47]

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lawful under Title VII, such as sexual harassment, *see* 29 C.F.R. § 1604.11 (1986), harassment based on national origin, *see* 29 C.F.R. § 1606.8 (1986) (EEOC Regulations concerning harassment based on national origin), race, color and religion, *see* 29 C.F.R. § 1604.11(a) at n.1 ("principles involved [in the sexual harassment guidelines] continue to apply to race, color, religion or national origin"). EEOC Directive § 615.11(a) at A-1. The EEOC states that an employer's duty under the ADEA to maintain a harassment-free work environment is similar to that imposed under Title VII. *See id.* Principles developed in Title VII cases may be borrowed and applied to the handling of age harassment cases. *See id.* Further, the EEOC recognizes the connection between age harassment and constructive discharge, noting that victims of age discrimination may resign and allege constructive discharge. *See id.* at § 615.11(b) and examples 4 & 5 at A-1 to A-2.

Of course, unique provisions exist in each statute. Part III of this Note establishes that a number of unique ADEA provisions and situations provide additional support for use of the employer intent standard in ADEA cases.

46. In adjudicating ADEA constructive discharge cases, courts consistently cite constructive discharge cases brought under Title VII. *See, e.g.*, Guthrie v. J.C. Penney Co., 803 F.2d 202, 207 (5th Cir. 1986) (citing Bourque v. Powell Elec. Mfg., 617 F.2d 61, 65 (5th Cir. 1980)); Cockrell v. Boise Cascade Corp., 781 F.2d 173, 177 (10th Cir. 1986) (citing Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975)); Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) (citing EEOC v. Federal Reserve Bank, 698 F.2d 633, 672 (4th Cir. 1983), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984)), *cert. denied*, 106 S. Ct. 1461 (1986); Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983) (citing Bourque v. Powell Elec. Mfg., 617 F.2d 61 (5th Cir. 1980) and Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975)).

Conversely, courts adjudicating Title VII constructive discharge cases consistently cite constructive discharge cases brought under the ADEA. *See, e.g.*, Derr v. Gulf Oil Corp., 796 F.2d 340, 343 (10th Cir. 1986) (citing Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 1461 (1986)); Martin v. Citibank, N.A., 762 F.2d 212, 221 (2d Cir. 1985) (citing Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983)); Goss v. Exxon Office Sys., 747 F.2d 885, 887 (3d Cir. 1984) (citing Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983)); Smith v. Acme Spinning Co., 40 Fair Empl. Prac. Cas. (BNA) 1104, 1109 (W.D.N.C. 1986) (citing Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 1461 (1986)).

47. Although most employment discrimination constructive discharge cases are brought under the ADEA or Title VII, such claims also are actionable under § 16 of the Civil Rights Act of 1866, R.S. § 1977, derived from Act of May 31, 1870, ch. 144, 16 Stat. 140, 144 (1871) (codified as 42 U.S.C. § 1981 (1982)), *see, e.g.*, Martin v. Citibank, N.A., 762 F.2d 212, 221 (2d Cir. 1985); Satterwhite v. Smith, 744 F.2d 1380, 1381 (9th Cir. 1984); Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982), the Civil Rights Act of 1871, R.S. § 1979, derived from Act of April 20, 1871, ch. 22, 17 Stat. 13, 13 (1871) (codified as 42 U.S.C. § 1983 (1982)), *see, e.g.*, Kelleher v. Flawn, 761 F.2d 1079, 1086 (5th Cir. 1985); Satterwhite v. Smith, 744 F.2d 1380, 1381 (9th Cir. 1984); Parrett v. City of Connersville, 737 F.2d 690, 692 (7th Cir. 1984), *cert. dismissed*, 469 U.S. 1145 (1985), the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, Title I, § 502(a)(1)(B), 88 Stat. 829, 891 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 at § 1132(a)(1)(B) (1982 & Supp. III 1985)), *see, e.g.*, Crouch v. Mo-Kan Iron Workers Welfare Fund, 740 F.2d 805, 810 (10th Cir. 1984); Devine v. Xerox Corp., 625 F. Supp. 603, 607-08 (D. Del. 1985) and the Fair Labor Standards Act, § 15(a)(3) (codified as 29 U.S.C. § 215(a)(3) (1982)), *see, e.g.*, Ford v. Alfaro, 785 F.2d 835, 841 (9th Cir. 1986).

This Note does not consider the status of the constructive discharge doctrine under

### C. *The Two Standards for Establishing Constructive Discharge*

Although it is well recognized that constructive discharge is actionable under the ADEA, Title VII and other employment discrimination statutes, some disagreement exists regarding the elements required to establish the plaintiff's case.[48] Two lines of authority have developed: the objective standard and the employer intent standard.

#### 1. The Objective Standard

A majority of courts apply the objective standard,[49] which subjects the employer to liability for constructive discharge when it deliberately makes an employee's working conditions so intolerable that the employee is forced to resign.[50] The standard is considered objective because the

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state law wrongful discharge theories. Different state courts have accepted, *see* Beye v. Bureau of Nat'l Affairs, 59 Md. App. 642, 649-53, 477 A.2d 1197, 1201-03 (Ct. Spec. App.), *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984), and implicitly recognized, arguendo, *see* McCone v. New England Tel. & Tel. Co., 393 Mass. 231, 233-34, 471 N.E.2d 47, 49-50 (1984), the applicability of constructive discharge to a wrongful discharge situation. The federal statutory constructive discharge cases have been applied in state law wrongful discharge cases. *See Beye*, 59 Md. App. at 651-53, 477 A.2d at 1201-03.

48. *See supra* note 9 and accompanying text.

As noted by a supporter of the objective standard, in most cases the court's choice to use the objective standard or the intent standard will not be determinative of the underlying issue of constructive discharge. *See Choosing a Standard*, *supra* note 9, at 612. In most cases in which working conditions are found to be objectively intolerable, the plaintiff will be able to establish intent to compel resignation, in part by using the same evidence used to establish intolerable working conditions. *See id.* The use of one standard over another will be determinative only when an employer deliberately makes working conditions intolerable, but does not intend to compel resignation. *See id.* at 612-13. Although this scenario may be possible in a Title VII situation in which the employer has an economic interest in maintaining the employment relationship, such as one when an employer pays a female employee less for her work than a male employee, it is less likely in an ADEA situation, where older workers generally are higher paid than younger employees. *See infra* note 172. Accordingly, it is arguable that the use of one standard or the other will make less of a difference in an ADEA case than it would in a Title VII case.

49. *See supra* note 10 and accompanying text. The Seventh Circuit is said to have not directly addressed the issue of constructive discharge in ADEA or Title VII cases. *See* Bernstein v. Consolidated Foods Corp., 622 F. Supp. 1096, 1101 (N.D. Ill. 1984); Bailey v. Binyon, 583 F. Supp. 923, 929 (N.D. Ill. 1984). A district court in the Seventh Circuit has adopted the objective standard. *See* Henn v. National Geographic Soc'y, 40 Fair Empl. Prac. Cas. (BNA) 1186, 1187 (N.D. Ill. 1986), *aff'd*, 43 Fair Empl. Prac. Cas. (BNA) 1620 (7th Cir. 1987); Bernstein v. Consolidated Foods Corp., 622 F. Supp. 1096, 1101 (N.D. Ill. 1984); Bailey v. Binyon, 583 F. Supp. 923, 929 (N.D. Ill. 1984). An early Seventh Circuit constructive discharge case brought under a § 1983 due process theory, Parrett v. City of Connersville, 737 F.2d 690 (7th Cir. 1984), *cert. dismissed*, 469 U.S. 1145 (1985), did not adopt either standard explicitly. However, the court did cite a number of objective-standard cases. *See id.* at 694 (citing Clark v. Marsh, 665 F.2d 1168, 1175-76 (D.C. Cir. 1981); Bourque v. Powell Elec. Mfg., 617 F.2d 61, 65 (5th Cir. 1980)).

In Bartman v. Allis-Chalmers Corp., 799 F.2d 311 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1304 (1987), a recent ADEA case, the Seventh Circuit seemed to apply an objective-standard definition of constructive discharge. *See id.* at 314. However, the court used language of intent as well. *See id.* at 314-15. Accordingly, the status of the Seventh Circuit remains uncertain.

50. *See, e.g.*, Goss v. Exxon Office Sys., 747 F.2d 885, 888 (3d Cir. 1984); Pena v.

issue is whether the working conditions are intolerable from the viewpoint of a reasonable person.[51] The employer's intent to compel the resignation is irrelevant.[52]

Under the objective standard, the existence of discrimination, such as the failure to promote[53] or unequal pay for equal work,[54] does not by itself support a constructive discharge finding. To prevail, the employee must have resigned because of objectively intolerable working conditions.[55] A number of objective-standard courts require that the plaintiff prove "aggravating factors" to establish that working conditions were intolerable.[56] Aggravating factors may be proved by showing a continuous pattern of discriminatory treatment,[57] such as deprivation of career opportunities over several years,[58] or constant subjection to racial insults.[59] Although a pattern of discrimination normally is required,[60] a

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Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983); Meyer v. Brown & Root Constr. Co., 661 F.2d 369, 371-72 (5th Cir. Nov. 1981).

51. *See, e.g.*, Guthrie v. J.C. Penney Co., 803 F.2d 202, 207 (5th Cir. 1986); Kelleher v. Flawn, 761 F.2d 1079, 1086 (5th Cir. 1985).

52. *See, e.g.*, Guthrie v. J.C. Penney Co., 803 F.2d 202, 207 (5th Cir. 1986); Jett v. Dallas Indep. School Dist., 798 F.2d 748, 755 (5th Cir. 1986); Kelleher v. Flawn, 761 F.2d 1079, 1086 (5th Cir. 1985). Under the objective standard, the employer's role is described most often as " 'deliberately mak[ing] an employee's working conditions so intolerable that the employee is forced into an involuntary resignation.' " Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983) (quoting Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975)); *see also* Martin v. Citibank, N.A., 762 F.2d 212, 221 (2d Cir. 1985) (quoting *Pena*, 702 F.2d at 325, quoting *Young*, 509 F.2d at 144); Pittman v. Hattiesburg Mun. Separate School Dist., 644 F.2d 1071, 1077 (5th Cir. Unit A May 1981) (citing *Young*, 509 F.2d at 144).

53. *See, e.g.*, Wardwell v. School Bd. of Palm Beach County, 786 F.2d 1554, 1558 (11th Cir. 1986); Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982).

54. *See, e.g.*, Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982); Pittman v. Hattiesburg Mun. Separate School Dist., 644 F.2d 1071, 1077 (5th Cir. Unit A May 1981); Bourque v. Powell Elec. Mfg., 617 F.2d 61, 66 (5th Cir. 1980); Bailey v. Binyon, 583 F. Supp. 923, 929 (N.D. Ill. 1984).

55. *See supra* notes 50-51 and accompanying text.

56. *See, e.g.*, Bishopp v. District of Columbia, 788 F.2d 781, 790 (D.C. Cir. 1986); Satterwhite v. Smith, 744 F.2d 1380, 1381-82 (9th Cir. 1984); Nolan v. Cleland, 686 F.2d 806, 813-14 (9th Cir. 1982); Clark v. Marsh, 665 F.2d 1168, 1173-74 (D.C. Cir. 1981); Pittman v. Hattiesburg Mun. Separate School Dist., 644 F.2d 1071, 1077 (5th Cir. Unit A May 1981); Bourque v. Powell Elec. Mfg., 617 F.2d 61, 66 (5th Cir. 1980).

For example, in *Clark*, the plaintiff retired, claiming constructive discharge in violation of Title VII. *See id.* at 1170-71. The Court of Appeals for the D.C. Circuit held that "a finding that [the plaintiff] was constructively discharged must be justified by the existence of certain 'aggravating factors.' " *Id.* at 1174. Citing *Bourque*, 617 F.2d at 66, the court stated that a "Title VII plaintiff must, therefore, 'mitigate damages by remaining on the job' unless that job presents 'such an aggravated situation that a reasonable employee would be forced to resign.' " *Clark*, 665 F.2d at 1173. The *Clark* court held that the plaintiff established sufficient aggravating factors, *see id.* at 1174, based on the employer's failure to promote or laterally transfer plaintiff, and its deprivation of training opportunities from plaintiff. *See id.* at 1170, 1175-76.

57. *See, e.g.*, Satterwhite v. Smith, 744 F.2d 1380, 1382 (9th Cir. 1984); Nolan v. Cleland, 686 F.2d 806, 813 (9th Cir. 1982); Bailey v. Binyon, 583 F. Supp. 923, 929 (N.D. Ill. 1984).

58. *See* Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir. 1981).

59. *See* Satterwhite v. Smith, 744 F.2d 1380, 1382 n.2 (9th Cir. 1984); *see also* Taylor

constructive discharge finding may be predicated on an isolated incident of discrimination.[61]

Advocates of the objective standard claim that it simplifies the task for the fact finder by eliminating the requirement of proving intent to compel resignation,[62] provides a more equitable balancing of employer and employee interests and Title VII make-whole and deterrent objectives,[63] places a lighter burden on the plaintiff[64] and is consistent with well recognized principles of labor and employment law,[65] such as mitigation of damages.[66]

### 2. The Employer Intent Standard

A minority of the courts[67] require that the plaintiff prove not only

v. Jones, 653 F.2d 1193, 1198-99 (8th Cir. 1981) ("dismal" racial atmosphere warranted district court judgment for the plaintiff on her constructive discharge claim).

60. *See supra* note 57 and accompanying text.

61. *See* Meyer v. Brown & Root Constr. Co., 661 F.2d 369, 371-72 (5th Cir. Nov. 1981); Bailey v. Binyon, 583 F. Supp. 923, 934 (N.D. Ill. 1984); *see also* Bourque v. Powell Elec. Mfg., 617 F.2d 61, 66-67 (5th Cir. 1980) (Hatchett, J., dissenting) (although single violation necessarily does not support a constructive discharge finding, the facts therein warrant such a finding).

62. *See* Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986) ("We also believe the [objective] standard will simplify the task of the finder of fact in determining not only whether the employer discriminated against the employee but also whether the manner of discrimination rendered work conditions intolerable."); *Choosing a Standard, supra* note 9, at 614 ("Under the more stringent employer intent standard, employers will sometimes escape liability because of the difficulties that the plaintiff will encounter in proving that the employer had the requisite intent.").

63. *See Choosing a Standard, supra* note 9, at 615-16 (the Title VII deterrent and make-whole policies are better served by the objective standard); *Constructive Discharge, supra* note 9, at 573-74 (the make-whole and prophylactic Title VII objectives are best served by the objective standard).

64. *See* Derr v. Gulf Oil Corp., 796 F.2d 340, 343 (10th Cir. 1986) (objective standard is "less stringent" than the employer intent standard); *Choosing a Standard, supra* note 9, at 616 (employees have an easier task of proving constructive discharge when they do not have to prove intent to compel resignation); *see also id.* at 617 (objective standard relieves employee of the requirements of showing specific employer intent and staying on the job in the face of intolerable, aggravated conditions); *Constructive Discharge, supra* note 9, at 580 (The objective standard "does not place the additional and unnecessary burden on the employee of having to prove an employer's specific intent.").

65. *See Liability for Constructive Discharge, supra* note 9, at 1036-37.

66. *See Constructive Discharge, supra* note 9, at 575. For a discussion of mitigation of damages, see *supra* notes 135-37 and accompanying text.

67. *See supra* note 13 and accompanying text. *See supra* note 10 for a listing of the courts of appeals applying the majority objective standard.

Originally, the Court of Appeals for the Tenth Circuit used the intent standard. *See* Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982); Coe v. Yellow Freight Sys., 646 F.2d 444, 454 (10th Cir. 1981); Muller v. United States Steel Corp., 509 F.2d 923, 929 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975). Recently, however, the Court of the Appeals for the Tenth Circuit announced its "unqualified adoption of [the] objective standard." *See* Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986).

Some commentators have categorized the Court of Appeals for the Sixth Circuit as following the objective standard, *see* Schlei & Grossman, *supra* note 9, at 611 & n.40; *Choosing a Standard, supra* note 9, at 588 & n.10; *Liability for Constructive Discharge, supra* note 9, at 1035-36, based on its holding in Held v. Gulf Oil Co., 684 F.2d 427 (6th

intolerable working conditions,[68] as required by objective-standard courts,[69] but also the employer's deliberate action through which it intended to force the employee to resign.[70] The plaintiff must often prove the employer's intent by circumstantial evidence alone.[71] A number of intent-standard courts also have stated that an inquiry must be made into

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Cir. 1982). However, the facts of that case and the language used by the court make such a categorization less than certain.

In some ways, it appears that the court uses the objective standard. In support of its constructive discharge definition, the *Held* court cited Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977), an earlier Sixth Circuit case, as involving a test less strict than the intent-standard test used by Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975). *Held*, 684 F.2d at 432. The *Held* court noted that *Jacobs* was consistent with the Fifth Circuit's objective-standard rule. *See id.*

Other aspects of the *Held* case indicate that it used an intent standard. The *Held* court cited *Jacobs* for the proposition that "the constructive discharge issue depends upon the facts of each case and requires an inquiry into the intent of the employer and the reasonably foreseeable impact of the employer's conduct upon the employee." *Id.* Objective-standard courts normally consider the employer's intent to be irrelevant. *See supra* note 52. The statement by the *Held* court noting the consistency of *Jacobs* to the Fifth Circuit's rule could have been limited to the objectively intolerable working conditions element common to both standards.

The facts of the case do not clearly indicate that the employer intended to compel resignation. The holding in *Held* affirmed the lower court's judgment for the plaintiff. *See Held*, 684 F.2d at 433. The court found that the employer's discriminatory job assignment, sex-based opprobrium, plaintiff's exclusion from the supply terminal, lectures concerning her sex life and management's use of plaintiff to run errands "formed a continuous course of discriminatory conduct which was linked to plaintiff's initial job assignment and the consistent management belief that women and marketing shouldn't mix. Thus, an environment of sexual bias was tolerated and fostered by her employer." *Id.* at 432. Plaintiff was assigned as a self-serve marketer, rather than to a more desireable marketing position. Although not apparent, it is possible that the employer intended to compel the employee's resignation, consistent with its belief that women should not work in marketing.

68. *See* Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 1461 (1986); Craft v. Metromedia, Inc., 766 F.2d 1205, 1217 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1285 (1986); Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982).

69. *See* Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 1461 (1986).

70. *See id.*; Holsey v. Armour & Co., 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985); EEOC v. Federal Reserve Bank, 698 F.2d 633, 672 (4th Cir. 1983), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984); Coe v. Yellow Freight Sys., 646 F.2d 444, 454 (10th Cir. 1981); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981).

71. *See* Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) ("Intent may be inferred through circumstantial evidence, including a failure to act in the face of known intolerable conditions . . . ."), *cert. denied*, 106 S. Ct. 1461 (1986); Holsey v. Armour & Co., 743 F.2d 199, 209 (4th Cir. 1984) ("To act deliberately, of course, requires intent. But direct evidence of intent is unnecessary. Circumstantial proof suffices."), *cert. denied*, 470 U.S. 1028 (1985); *cf.* Rimedio v. Revlon, Inc., 528 F. Supp. 1380, 1389 (S.D. Ohio 1982) ("Intent to discriminate can be inferred from differences in treatment.").

The *Holsey* court provides an example of the proof, through circumstantial evidence, of intent to compel resignation. It noted that "[t]he fact that higher officials knew of [the employee's] untenable position and took no action to correct it supports the district

"the reasonably foreseeable impact of the employer's conduct upon the employee."[72] Adding to the confusion, some objective-standard courts also refer to reasonably foreseeable consequences to support their positions,[73] while some intent-standard courts use the aggravated-situation language more commonly used by objective-standard courts.[74]

Although the intent standard has been criticized by courts and commentators as too stringent[75] and, based on the requirement of determining the employer's state of mind,[76] difficult to apply,[77] its application is supported by strong policy arguments. The constructive discharge doctrine protects an employee from a calculated effort to compel his resignation by the employer's imposition of intolerable working conditions.[78] However, the employee is not guaranteed a stress-free work environment and, by resigning, cannot use the employment discrimination laws as a panacea to resolve work related difficulties.[79]

## II. ARGUMENTS FAVORING THE EMPLOYER INTENT STANDARD UNDER THE ADEA AND TITLE VII

### A. *Constructive Discharge Cases Brought under the NLRA*

The constructive discharge doctrine originated in cases brought under the NLRA.[80] These cases applied a standard requiring the intent to compel resignation.[81] The similarities between the discrimination prohibited by the NLRA and that prohibited by employment discrimination statutes such as the ADEA mandate the use of the NLRA intent to compel resignation requirement in cases brought under employment discrimination statutes.[82]

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court's finding that the employment conditions were 'imposed by the company.' This finding satisfies the requirement of deliberateness." 743 F.2d at 209.

72. Easter v. Jeep Corp., 750 F.2d 520, 522 (6th Cir. 1984); Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982); *see also* Coley v. Consolidated Rail Corp., 561 F. Supp. 645, 651 (E.D. Mich. 1982) (noting that " 'a man is held to intend the foreseeable consequences of his conduct' ") (quoting Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982)).

73. *See* Derr v. Gulf Oil Co., 796 F.2d 340, 344 (10th Cir. 1986); Clark v. Marsh, 665 F.2d 1168, 1175 n.8 (D.C. Cir. 1981).

74. *See* Henry v. Lennox Indus., 768 F.2d 746, 752 (6th Cir. 1985); Irving v. Dubuque Packing Co., 689 F.2d 170, 173 (10th Cir. 1982).

75. *See supra* note 64 and accompanying text.

76. *See supra* note 70 and accompanying text.

77. *See supra* note 62 and accompanying text.

78. *See* Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 1461 (1986).

79. *See id.*

80. *See supra* note 35 and accompanying text.

81. *See infra* notes 88-95 and accompanying text.

82. There is a strong connection between the NLRA and the ADEA. Both statutes focus on the facilitation of employer-employee relationships and industrial peace. *Compare* Kneisley v. Hercules Inc., 577 F. Supp. 726, 734 (D. Del. 1983) (NLRA) *with* 29 U.S.C. § 621(b) (1982) (ADEA); Macellaro v. Goldman, 643 F.2d 813, 815 (D.C. Cir. 1980) (quoting 29 U.S.C. § 621(b)). *But see Kneisley*, 577 F. Supp. at 734 (ADEA does

Under section 8(a)(3) of the NLRA, it is "an unfair labor practice for

not focus on employer-employee relations). In addition, both statutes focus on the rights of the individual. *Compare* § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1982) (the section of direct relevance to constructive discharge cases) *with Kneisley*, 577 F. Supp. at 734 (ADEA). The concept of constructive retirement is recognized under both statutes. *Compare* King Radio Corp. v. NLRB, 398 F.2d 14, 18 (10th Cir. 1968) (NLRA) *with* Sutton v. Atlantic Richfield Co., 646 F.2d 407, 408, 410 (9th Cir. 1981) (ADEA); Henn v. National Geographic Soc'y, 40 Fair Empl. Prac. Cas. (BNA) 1186, 1187-88 (N.D. Ill. 1986), *aff'd*, 43 Fair Empl. Prac. Cas. (BNA) 1620 (7th Cir. 1987) (ADEA); Kneisley v. Hercules Inc., 577 F. Supp. 726, 729, 738 (D. Del. 1983) (ADEA); EEOC v. Liggett & Meyers, Inc., 29 Fair Empl. Prac. Cas. (BNA) 1611, 1642-44 (E.D.N.C. 1982) (ADEA); Allen v. Colgate-Palmolive Co., 539 F. Supp. 57, 61-62 (S.D.N.Y. 1981) (ADEA).

Although the statutory schemes of the NLRA and the ADEA may differ, *see Kneisley*, 577 F. Supp. at 734, the discrimination each statute attempts to prohibit is similar. A review of fact situations in constructive discharge cases brought under each statute reveals great similarities. For instance, constructive discharge cases involving allegations of discriminatory job assignment have arisen under both the NLRA, *see* NLRB v. S.E. Nichols of Ohio, Inc., 704 F.2d 921, 922 (6th Cir.) (per curiam), *cert. denied*, 464 U.S. 914 (1983); Kaynard v. Palby Lingerie, Inc., 625 F.2d 1047, 1053 (2d Cir. 1980), and the ADEA, *see* Buckley v. Hospital Corp. of Am., 758 F.2d 1525, 1527 (11th Cir. 1985); Pena v. Brattleboro Retreat, 702 F.2d 322, 322, 325 (2d Cir. 1983). Allegations of harassment also are common to constructive discharge cases under the NLRA, *see* Maywood, Inc., 251 N.L.R.B. 979, 991-92 (1980); Galax Apparel Corp., 247 N.L.R.B. 159, 167-68 (1980), and the ADEA, *see* Lewis v. Federal Prison Indus., 786 F.2d 1537, 1538-39 (11th Cir. 1986); Pierce v. Green Giant Co., 26 Fair Empl. Prac. Cas. (BNA) 1683, 1686 (N.D. Tex. 1981).

Retaliation for engaging in protected activity is also a common factual situation. In NLRA situations, employers seek to rid themselves of employees engaged in protected activity, such as supporting union organizational drives. *See, e.g.*, Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 886-87 (1984) (employer reported undocumented aliens to Immigration and Naturalization Service in retaliation for their union activity after the employees voted for union representation); Kaynard v. Palby Lingerie, Inc., 625 F.2d 1047, 1053-54 (2d Cir. 1980) (reasonable cause to believe that the employee's union activity, not the quality of her work, motivated the employer's discriminatory job assignment); J.P. Steven[s] & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972) (the employer's attitude became hostile after it learned of the employee's support of the union). In Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977), a constructive discharge case brought under the ADEA, the plaintiff maintained throughout the period of his removal from flight status that the employer's actions violated the ADEA. *See id.* at 563. The court held that the plaintiff did not resign, but was discharged in retaliation for his "insistence upon his statutory rights under the Act." *Id.* at 564; *see also* Powell v. Rockwell Int'l Corp., 788 F.2d 279, 282-83 (5th Cir. 1986) (plaintiff claims employer terminated him in retaliation for filing an ADEA complaint with the EEOC and commencing suit). In ADEA situations, employers seek to compel the resignation or retirement of employees within the protected age group, for instance, to develop a younger image for the company. *See* Buckley v. Hospital Corp. of Am., 758 F.2d 1525, 1527-28 (11th Cir. 1985) (new hospital administrator "expressed surprise at the longevity of" hospital staff, noted "that he wanted to attract younger" medical personnel and "thought the hospital needed 'new blood' "); *see also* Downey v. Southern Natural Gas Co., 649 F.2d 302, 303 (5th Cir. Unit B June 1981) (employee was told that employer might discharge him because it did not want to employ him through his mandatory retirement age); Sutton v. Atlantic Richfield Co., 646 F.2d 407, 408-09 (9th Cir. 1981) (employee claims that employer was motivated improperly by his age in coercing his early retirement, alleging that employer's vice president wanted to replace older executives with younger ones).

A further connection to the NLRA is based on the frequency with which cases interpreting it are used for support in ADEA constructive discharge cases. *See* Bristow v.

an employer . . . by discrimination . . . to encourage or discourage membership in any labor organization."[83] Courts[84] and the National Labor Relations Board [NLRB][85] hold employers liable for constructive discharge under this section. The NLRB has used the doctrine of constructive discharge since 1936, without referring to it as such,[86] and first used

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Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) (quoting J.P. Steven[s] & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1982)), *cert. denied*, 106 S. Ct. 1461 (1986); Sutton v. Atlantic Richfield Co., 646 F.2d 407, 411 n.5 (9th Cir. 1981) (citing same); Jacobson v. American Home Prods., 36 Fair Empl. Prac. Cas. (BNA) 559, 561 (N.D. Ill. 1982) (citing NLRB v. Century Broadcasting Corp., 419 F.2d 771 (8th Cir. 1969) and NLRB v. Hertz Corp., 449 F.2d 711 (5th Cir. 1971)). NLRA constructive discharge cases also are used as support in Title VII constructive discharge cases, *see* EEOC v. Federal Reserve Bank, 698 F.2d 633, 672 (4th Cir. 1983) (citing J.P. Steven[s] & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972)), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984); Clark v. Marsh, 665 F.2d 1168, 1173 (D.C. Cir. 1981) (citing Retail Store Employees Union Local 880 v. NLRB, 419 F.2d 329, 332 (D.C. Cir. 1969)); Jacobs v. Martin Sweets Co., 550 F.2d 364, 369 (6th Cir.) (citing NLRB v. Tennessee Packers, Inc., 339 F.2d 203, 204-05 (6th Cir. 1964)), *cert. denied*, 431 U.S. 917 (1977); Muller v. United States Steel Corp., 509 F.2d 923, 929 (10th Cir.) (citing J.P. Steven[s] & Co. v. NLRB, 461 F.2d 490 (4th Cir. 1972), NLRB v. Century Broadcasting Corp., 419 F.2d 771 (8th Cir. 1969) and NLRB v. Tennessee Packers, Inc., 339 F.2d 203 (6th Cir. 1964)), *cert. denied*, 423 U.S. 825 (1975); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975) (citing five NLRA cases in support of its constructive discharge general rule).

Finally, the policy objectives of private, nonlitigious dispute resolution that are relevant to constructive discharge cases, *see infra* note 116 and accompanying text, are common to all three statutes. *See, e.g.*, Bourque v. Powell Elec. Mfg., 617 F.2d 61, 66 (5th Cir. 1980) ("[W]e believe that society and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships."); *see also infra* notes 136-37 and accompanying text concerning the duty to mitigate damages under the ADEA and Title VII. The National Labor Relations Board will dismiss, without prejudice, an unfair labor practice charge where the collective bargaining agreement has an arbitration clause and the employer is willing to arbitrate. *See* Collyer Insulated Wire, 192 N.L.R.B. 837, 839-43 (1971). Although the NLRB, at one point, had refused to defer to arbitration where individual rights were involved, *see* General Am. Transp., 228 N.L.R.B. 808-09 (1977), it recently has re-established its policy of deferring to arbitration even when individual rights are allegedly deprived. *See* United Technologies Corp., 268 N.L.R.B. 557, 559-60 (1984). The NLRB's deferral doctrine has received support from the Supreme Court, *see* William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12, 16-17 (1974), and other federal courts, *see* Columbus Printing Pressman Union 252 (R.W. Page Corp.), 219 N.L.R.B. 268, 268 (1975), *enforced*, 543 F.2d 1161 (5th Cir. 1976), for a list of opinions approving the *Collyer* deferral doctrine. The filing of a charge with the Equal Employment Opportunity Commission, with resultant efforts to resolve disputes in a nonlitigious manner through conciliation, is provided for under both Title VII, *see* 42 U.S.C. § 2000e-5(b) (1982), and the ADEA, *see* 29 U.S.C. §§ 626(b), (d) (1982). The intent standard encourages this objective. *See infra* notes 112-35 and accompanying text.

83. 29 U.S.C. § 158(a)(3) (1982).

84. *See, e.g.*, Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 894 (1984); NLRB v. S.E. Nichols of Ohio, Inc., 704 F.2d 921, 922-23 (6th Cir. 1983) (per curiam), *cert. denied*, 464 U.S. 914 (1983); Kaynard v. Palby Lingerie, Inc., 625 F.2d 1047, 1052-53 (2d Cir. 1980).

85. *See* Coating Prods., Inc., 251 N.L.R.B. 1271, 1278 (1980), *enforced*, 648 F.2d 108 (2d Cir. 1981); Maywood, Inc., 251 N.L.R.B. 979, 991-92 (1980); Galax Apparel Corp., 247 N.L.R.B. 159, 167-68 (1980).

86. *See* Lieb, *Constructive Discharge Under Section 8(a)(3) of the National Labor Re-*

the term "constructive discharge" in 1938.[87]

In constructive discharge cases, the NLRB requires proof that the employer intended to compel the employee to resign.[88] In *Crystal Princeton Refining Co.*,[89] the NLRB stated that two elements must be proved in constructive discharge cases.[90] First, the employer must have imposed a burden on the employee that causes, and was intended to cause, a change in his working environment that sufficiently is unpleasant to compel his resignation.[91] Second, the employer must have imposed the burdens because of the employee's protected activity.[92]

Many courts have spoken on the proper standard to be used in constructive discharge cases under the NLRA.[93] Regardless of their position regarding the proper standard under the ADEA and Title VII,[94]

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*lations Act: A Study in Undue Concern Over Motives*, 7 Indus. Rel. L.J. 143, 146 (1985) (citing Canvas Glove Mfg. Works, 1 N.L.R.B. 519 (1936)).

87. *See id.* at 147 (citing Sterling Corset Co., 9 N.L.R.B. 858 (1938)).

88. *See* Kogy's, Inc., 272 N.L.R.B. 202, 202 (1984); Crystal Princeton Refining Co., 222 N.L.R.B. 1068, 1069 (1976); *see also* Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) (citing J.P. Steven[s] & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972), for the proposition that the Fourth Circuit "decisions require proof of the employer's specific intent to force an employee to leave"), *cert. denied*, 106 S. Ct. 1461 (1986); Muller v. United States Steel Corp., 509 F.2d 923, 929 (10th Cir. 1975) (citing J.P. Steven[s] & Co. v. NLRB, 461 F.2d 490 (4th Cir. 1972), in support of its requirement that the plaintiff establish intent to compel resignation), *cert. denied*, 423 U.S. 825 (1975); Lieb, *supra* note 86, at 156.

89. 222 N.L.R.B. 1068 (1976).

90. *See id.* at 1069.

91. *See id.*

92. *See id.*

93. *See, e.g.*, NLRB v. Cable Vision, Inc., 660 F.2d 1, 7-8 (1st Cir. 1981) (employer assigned employee to standby duty knowing that he would be unavailable to perform it and would resign); Electric Mach. Co. v. NLRB, 653 F.2d 958, 964-66 (5th Cir. 1981) (no constructive discharge where employer urged employee to remain employed); Kaynard v. Palby Lingerie, Inc., 625 F.2d 1047, 1052-53 (2d Cir. 1980) (employer harassed employee to induce her resignation); Cartwright Hardware Co. v. NLRB, 600 F.2d 268, 270 (10th Cir. 1979) ("Such a forced resignation is a violation of section 8(a)(3) when it has been induced to discourage union activity or membership."); J.P. Steven[s] & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972) (court enforced NLRB order where NLRB accepted the Trial Examiner's finding that employee's "production rate 'was set at an artificially low level' for the purpose 'of causing [her] to resign' "); NLRB v. Holly Bra of California, Inc., 405 F.2d 870, 872 (9th Cir. 1969) ("causing working conditions to become intolerable as a means of terminating employment is forbidden conduct") (citation omitted); NLRB v. Tennessee Packers, Inc., 339 F.2d 203, 204-05 (6th Cir. 1964) (scheme to compel employee to resign); Steel Indus. v. NLRB, 325 F.2d 173, 179 (7th Cir. 1963) (no constructive discharge where there is no scheme "to get rid of" the employee).

94. Several of the courts of appeals decisions cited *supra* note 93 were issued by courts that currently use, or used at the time of those decisions, the intent standard in ADEA and Title VII constructive discharge cases. *See Cartwright Hardware*, 600 F.2d at 270 (Tenth Circuit); *J.P. Steven[s]*, 461 F.2d at 494 (Fourth Circuit); *Tennessee Packers*, 339 F.2d at 204-05 (Sixth Circuit). Without explaining the inconsistency in their positions, the other courts currently use the objective standard in ADEA and Title VII constructive discharge cases. *See Cable Vision*, 660 F.2d at 7-8 (First Circuit); *Electric Mach.*, 653 F.2d at 964-65 (Fifth Circuit); *Palby Lingerie*, 625 F.2d at 1052-53 (Second Circuit); *Holly Bra*, 405 F.2d at 872 (Ninth Circuit). The standard used by the Seventh Circuit

these courts hold that an intent to compel resignation must be established in constructive discharge cases under the NLRA.[95]

In *Sure-Tan, Inc. v. NLRB*,[96] the Supreme Court recognized the validity of the constructive discharge doctrine in the NLRA context.[97] Although the Court's enunciation of its standard was less than clear,[98] the Court apparently applied an intent to compel resignation requirement in its analysis, based on its citation of NLRA intent-standard cases decided by lower courts[99] and its analysis of the employer's state of

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Court of Appeals currently is uncertain. *See Steel Indus.*, 325 F.2d at 179 and *supra* note 49 and accompanying text.

95. *See supra* note 93 and accompanying text.

96. 467 U.S. 883 (1984).

97. *See id.* at 894. In *Sure-Tan*, an employer filed objections to the conduct of an NLRB representation election based on the fact that six of the seven eligible voters were undocumented aliens. *See id.* at 886-87. When the objections were overruled, the employer requested that the Immigration and Naturalization Service investigate the status of a number of its employees. *See id.* at 887. As a result of the investigation, five of the employees left the company to avoid deportation. *See id.* The Court affirmed the NLRB's determination that the employer had constructively discharged the employees. *See id.* at 894-98.

98. In reaching its holding in *Sure-Tan*, the Court did not announce a constructive discharge standard that would indicate directly whether an intent to compel resignation must be shown. The Court noted that

> [t]he Board, with the approval of lower courts, has long held that an employer violates [§ 8(a)(3)] not only when, for the purpose of discouraging union activity, it directly dismisses an employee, but also when it purposefully creates working conditions so intolerable that the employee has no option but to resign—a so-called 'constructive discharge.'

*Id.* at 894.

99. In support of its description of the NLRB constructive discharge standard, the Court cited five cases that, on the whole, indicate that intent to compel resignation must be established. *See id.* Three of these five cases directly support the requirement of establishing intent to compel resignation. *See* Cartwright Hardware Co. v. NLRB, 600 F.2d 268, 270 (10th Cir. 1979) ("Such a forced resignation is a violation of section 8(a)(3) when it has been induced to discourage union activity or membership."); J.P. Steven[s] & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972) (court enforced NLRB order where NLRB accepted the Trial Examiner's finding that employee's "production rate 'was set at an artificially low level' for the purpose 'of causing [her] to resign' "); NLRB v. Holly Bra of California, Inc., 405 F.2d 870, 872 (9th Cir. 1969) (court enforced NLRB's order, stating that "[a]n employer cannot do constructively what the act prohibits his doing directly, and causing working conditions to become intolerable as a means of terminating employment is forbidden conduct") (citation omitted).

The other cases cited in *Sure-Tan* lacked clear indication of whether proof of intent to compel resignation is required. In NLRB v. Haberman Constr. Co., 641 F.2d 351 (5th Cir. 1981), the Fifth Circuit found a constructive discharge, *see id.* at 359, citing NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) in support of its finding that the employer's conduct, refusing to pay vacation benefits to strikers while paying them to nonstrikers, was inherently destructive of important employee rights. *See id.* at 30. Accordingly, proof of anti-union motive was not required. *See Haberman Constr. Co.*, 641 F.2d at 360. In the final cited case, *In re* Atlas Mills, Inc., 3 N.L.R.B. 10 (1937), the NLRB did not state its standard explicitly when it found that the employer violated section 8(a)(3) by conditioning continued employment upon employees' abandonment of their strike. *See id.* at 17. The NLRB simply held that the employer's action was "equivalent to discharging [its employees] outright for union activities." *Id.*

mind.[100] *Sure-Tan* indicates that the intent to compel resignation is a requirement in NLRA cases. Thus, as the constructive discharge doctrine used in ADEA cases originated in the NLRA context,[101] and the same interests favoring use of the intent standard exist in both statutes,[102] the intent standard should be used in ADEA constructive discharge cases.[103]

### B. *The Employer Intent Standard in Disparate Treatment Cases*

Disparate treatment in an employment discrimination case exists when "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."[104] Proof of unlawful intent, either direct or indirect, is critical in disparate treatment cases.[105] Because most discriminatory discharge[106] and constructive dis-

100. It is clear from the facts of *Sure-Tan* that the employer intended to compel the termination of the employees. *Sure-Tan*, 467 U.S. at 895. By requesting the Immigration and Naturalization Service to investigate its undocumented alien employees, the employer must have known that any investigation would result in either the deportation or departure of the employees. *See id.*

101. *See supra* note 35 and accompanying text.

102. These interests include the facilitation of employer-employee relationships and industrial peace, the elimination of discrimination against individuals and the private, nonlitigious resolution of disputes. *See supra* note 82 and accompanying text.

103. Two district courts have rejected the argument that the intent to compel resignation element required in NLRA constructive discharge cases supports the application of the intent standard in ADEA and Title VII cases. In Bernstein v. Consolidated Foods Corp., 622 F. Supp. 1096 (N.D. Ill. 1984), an ADEA constructive discharge case, the court rejected the argument that the Supreme Court's holding in *Sure-Tan* compels adoption of the intent standard. *See id.* at 1101 n.3. In so doing, the court noted that subjective intent on the employer's part is a necessary element for a violation of NLRA section 8(a)(3). *See id.* In Bailey v. Binyon, 583 F. Supp. 923 (N.D. Ill. 1984), a Title VII constructive discharge case, the district court rejected the contention that the Seventh Circuit's use of the intent to influence union membership as an element in Jack Thompson Oldsmobile, Inc. v. NLRB, 684 F.2d 458, 463 (7th Cir. 1982), compels the use of the intent standard in Title VII cases. *See Bailey*, 583 F. Supp. at 929.

In both cases, the court focused on the wrong intent element. To establish constructive discharge under the NLRA, both the intent to encourage or discourage union activity and the intent to compel resignation must be established. *See supra* notes 90-92 and accompanying text. In both *Bernstein* and *Bailey*, the court focused on the element of intent to encourage or discourage union activity, an element not required under the ADEA or Title VII. *See supra* note 92 and accompanying text. It is the other intent element applied in NLRA constructive discharge cases, intent to compel resignation, which is just as important in ADEA and Title VII constructive discharge cases as it is in NLRA constructive discharge cases, that supports use of the intent standard in ADEA and Title VII constructive discharge cases.

104. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). Disparate treatment should be distinguished from disparate impact, which involves "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* at 336 n.15.

105. According to the Supreme Court, "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treat-

charge[107] cases are brought under a disparate treatment theory, proof of intent to compel resignation should be required in connection with findings of constructive discharge. Indeed, failure to require proof of intent in constructive discharge cases runs counter to the disparate treatment doctrine.

Compared to the objective standard, the employer intent standard more closely approximates the essence of the disparate treatment theory: that some employees are treated "less favorably" than others.[108] The constructive discharge plaintiff is protected only from unreasonably harsh conditions that are "in excess of those faced by his co-workers."[109] Hence, for the constructive discharge plaintiff to succeed under the intent standard, he must establish that the employer treated him less favorably than other employees.[110] No such showing is required under the objec-

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ment." *Id.* at 335 n.15. In contrast, "[p]roof of discriminatory motive . . . is not required under a disparate-impact theory." *Id.* at 336 n.15.

For a discussion of the three stage order of proof used in disparate treatment cases, see *supra* notes 26-27 and accompanying text. This three stage order of proof reflects the difficulty of obtaining direct evidence of an employer's motive. *See* Massarsky v. General Motors Corp., 706 F.2d 111, 117-18 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983).

Initially, the plaintiff must establish a prima facie case. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Although the plaintiff's discharge is an element of the prima facie case in discharge cases, *see supra* note 25 and accompanying text, the plaintiff's constructive discharge is an element of the prima facie case in constructive discharge claims. *See supra* note 28 and accompanying text. An actual discharge, of course, is an intentional act. *See supra* note 18 and accompanying text. A constructive discharge subjects the employer to the same liability as if it actually had discharged the employee. *See supra* note 29 and accompanying text. Accordingly, the burden on the plaintiff to establish a prima facie case should not be lightened in constructive discharge cases by allowing him to substitute his resignation, not compelled by the employer, for an intentional discharge.

The significance of the employer's intent to this three stage order of proof is evident. In stage two, the employer must articulate a legitimate, nondiscriminatory reason for its action. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). In stage three, the plaintiff has an opportunity to show that the employer's stated reason was pretextual. *See id.* at 804. In Cebula v. General Elec. Co., 614 F. Supp. 260 (N.D. Ill. 1985), an ADEA discharge case, the court noted that "pretext is demonstrated by evidence showing that [the employer] was more likely motivated by a discriminatory reason or that its justification is not credible." *Id.* at 263.

106. *See* Schlei & Grossman, *supra* note 9, at 594. Similarly, almost all ADEA cases are disparate treatment cases. *See id.* at 497.

107. *See, e.g.*, Guthrie v. J.C. Penney Co., 803 F.2d 202, 206-07 (5th Cir. 1986) (court applies *McDonnell Douglas* order of proof); Real v. Continental Group, Inc., 627 F. Supp. 434, 439-40 (N.D. Cal. 1986) (court applies a modified version of the *McDonnell Douglas* order of proof to determine discriminatory motive); Walter v. KFGO Radio, 518 F. Supp. 1309, 1313 (D.N.D. 1981) (court applies *McDonnell Douglas* order of proof). *But see* Coe v. Yellow Freight Sys., 646 F.2d 444, 448 (10th Cir. 1981) (allegations of both disparate impact and disparate treatment).

108. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

109. Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 1461 (1986).

110. *See id.*; Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981). In this case, the Court of Appeals for the Eighth Circuit affirmed the district court's holding that the plaintiff did not satisfy the requisite intent element. *See id.* The court noted that all

tive standard.[111]

By failing to consider whether the employer intended to compel the employee's resignation, courts applying the objective standard may find an employer liable for constructive discharge without a finding that the plaintiff was treated differently than other employees. By so doing, these courts contradict the essence of the disparate treatment theory.

### C. *The Intent Standard Encourages the Employee to Remain Employed*

Intent-standard courts consider whether the employer encouraged the employee to remain on the job[112] or urged him to resign,[113] an important element in determining whether the employer compelled the resigna-

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employees were treated identically, *see id.*, rebutting any inference that the employer intended to force the employee to resign. *See id.* The court reasoned that the employer did not wish to compel all of its employees to resign. *See id.*; *see also* Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) (citing *Johnson* for the proposition that when "all employees are treated identically, no particular employee can claim that difficult working conditions signify the employer's intent to force that individual to resign"), *cert. denied*, 106 S. Ct. 1461 (1986). Accordingly, the holding in *Johnson* is consistent with the disparate treatment requirement that the employer treat the employee less favorably than other employees. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Cockrell v. Boise Cascade Corp., 781 F.2d 173, 179 (10th Cir. 1986).

111. Both the *Bristow* and *Johnson* courts found the issue of identical versus disparate treatment of the constructive discharge plaintiff to be relevant to the issue of intent to compel resignation. *See* Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 1461 (1986); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981). Objective-standard courts do not require that plaintiffs establish that the employer intended to compel their resignation. *See supra* note 52 and accompanying text. They require the plaintiff to establish only that the working conditions were objectively intolerable. *See supra* note 55 and accompanying text. Presumably, under the objective standard, an employee who resigns based on working conditions that were objectively intolerable for all employees could prevail on a constructive discharge claim without establishing that he was treated differently than other employees.

112. *See, e.g.*, Craft v. Metromedia, Inc., 766 F.2d 1205, 1217 (8th Cir. 1985) (noting that plaintiff was urged to remain with employer), *cert. denied*, 106 S. Ct. 1285 (1986); EEOC v. Federal Reserve Bank, 698 F.2d 633, 672 (4th Cir. 1983) (evidence that employee's supervisor urged her not to quit contradicts claim that employer sought to force the employee to quit), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984); Irving v. Dubuque Packing Co., 689 F.2d 170, 174 (10th Cir. 1982) (evidence of constructive discharge weak where employer lied to employee concerning his pay in an effort to keep him on); *see also* Doscherholmen v. Walters, 575 F. Supp. 1552, 1553 (D. Minn.) (any inference of age discrimination is negated by defendant's alleged counseling of plaintiff against retirement), *aff'd without opinion*, 754 F.2d 377 (1984). One intent-standard court also has considered evidence that the employer made prompt efforts to secure the plaintiff's return to work, after her resignation, as running counter to the claim that the employer intended to compel her resignation. *See* Smith v. Acme Spinning Co., 40 Fair Emp. Prac. Cas. (BNA) 1104, 1109 (W.D.N.C. 1986); *see also* Cockrell v. Boise Cascade Corp., 781 F.2d 173, 178 (10th Cir. 1986) (reversing directed verdict for employer that did not encourage employee to remain).

113. *See* Wells v. North Carolina Bd. of Alcoholic Control, 714 F.2d 340, 342 (4th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984).

tion.[114] An employer that encourages the employee to remain is less likely to be held to have constructively discharged the plaintiff under the intent standard.[115] The statutory policy of resolving workplace disputes within the context of existing employment relationships[116] thus is preserved under the intent standard. Employees decrease their chances of finding comparable work by resigning from their jobs.[117] This difficulty in finding re-employment is acute particularly for older workers.[118] Therefore, the intent standard is preferable because it encourages employers and employees to maintain their employment relationship and discourages resignation by making constructive discharge more difficult to establish.

When an employee resigns, he takes away the employer's opportunity to use effective methods to resolve problematic situations.[119] Employers

114. *See supra* notes 112-13 and accompanying text; *see also* Clark v. Marsh, 665 F.2d 1168, 1175 n.8 (D.C. Cir. 1981) (while noting that "the employer's subjective intent is irrelevant," the court recognizes the connection between the employer's intent and encouragement of the employee to remain).

115. *See supra* notes 112-14 and accompanying text.

116. *See* Derr v. Gulf Oil Corp., 796 F.2d 340, 342 (10th Cir. 1986); Nolan v. Cleland, 686 F.2d 806, 813 (9th Cir. 1982); Clark v. Marsh, 665 F.2d 1168, 1173 (D.C. Cir. 1981); Bourque v. Powell Elec. Mfg., 617 F.2d 61, 66 (5th Cir. 1980).

117. According to a popular job search guide

> [i]f you have a choice, begin this [job search] homework while you are still gainfully, and somewhat happily, employed. *If you're employed, somebody wants you—and values you enough to say so, in the coin of the realm. If you're unemployed, there is just the breath of suspicion that perhaps no one wants you. And faced with this suspicion, many employers will choose to make no decision about you (i.e., not hire you) rather than take a gamble.*

R. Bolles, What Color is Your Parachute? 70-71 (1983) (emphasis in original).

118. In its ADEA statement of findings and purpose, Congress noted that "older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs." Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2(a)(1), 81 Stat. 602, 602 (1967) (codified as 29 U.S.C. § 621(a)(1) (1982)). The problems faced by older workers in finding suitable employment have been noted in other sources. According to one commentator, "once unemployed, older workers usually remain without work for longer periods than other age groups." R. Butler, Right to Work, Why Survive?—Being Old in America (1975), *reprinted in* A. Smith, Employment Discrimination Law 78 (1978). In addition, "[o]lder persons often become understandably discouraged in seeking jobs." *Id.* According to a study conducted by the federal government

> [o]nce an older worker loses his job, prospects for re-employment are dimmer than for younger workers. Older workers still face discrimination in hiring. In addition, their lower average level of educational attainment, and in some cases obsolescence of skills, make it more difficult for them to compete with younger workers. Many of those who do become re-employed find it necessary to accept a lower wage than they received on their previous job. The difficulty of learning new skills or of relocating in a new community add to the problem of re-employment.

Bureau of Labor Statistics, U.S. Dep't of Labor Bulletin 1721, The Employment Problems of Older Workers (1971), *reprinted in* A. Smith, Employment Discrimination Law 80 (1978).

119. Unlawful discrimination is best "attacked within the context of existing employment relationships." Bourque v. Powell Elec. Mfg., 617 F.2d 61, 66 (5th Cir. 1980).

should be encouraged to use such methods.[120] Moreover, employees should be discouraged from resigning when doing so deprives the employer of the opportunity to limit its liability by resolving the problems leading to the employee's resignation.[121] Because a constructive discharge finding subjects an employer to the same liability as if it actually had discharged the employee,[122] the court should allow the employer to establish that it never intended to terminate the employment relationship. One avenue available to the employer to do so under the intent standard is to encourage the employee to remain, and thereby minimize the chances that the employee will prevail on a constructive discharge claim.[123] Conversely, by not urging the employee to remain, the employer increases the employee's opportunity to establish intent to compel resignation.[124]

Most courts using an objective standard do not consider evidence concerning the employer's encouragement of the employee to remain or to resign. Those objective-standard courts that do consider evidence of encouragement,[125] however, do so only to determine whether working conditions were so intolerable that a reasonable employee would feel compelled to resign.[126] While encouragement of the employee to remain or resign negates or establishes directly the intent to compel resignation, such evidence does not negate or establish directly the existence of intol-

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There are a number of effective dispute resolution techniques that employers can use to resolve disputes and eliminate employment discrimination without severing the employment relationship. *See* Schlei & Grossman, *supra* note 9, at 605-08. When an employer discharges an employee, the employer eliminates the possibility of resolving the underlying problem within the existing employment relationship. When an employee resigns before allowing adequate opportunity for internal dispute resolution, it is he who eliminates the possibility of resolving the underlying problem within the existing employment relationship. However, the employer is subjected to the same liability for resignations deemed to be constructive discharges as if the employer had directly discharged the employee. *See supra* note 29 and accompanying text.

120. *See supra* note 116 and accompanying text.

121. *See supra* note 119 and accompanying text.

122. *See supra* note 29 and accompanying text.

123. *See supra* notes 112-14 and accompanying text.

124. *See supra* note 113 and accompanying text.

125. *See* Guthrie v. J.C. Penney Co., 803 F.2d 202, 208 (5th Cir. 1986) (employee encouraged to retire); Pena v. Brattleboro Retreat, 702 F.2d 322, 326 (2d Cir. 1983) (employee urged to remain); Pittman v. Hattiesburg Mun. Separate School Dist., 644 F.2d 1071, 1077 (5th Cir. Unit A May 1981) (employee was urged to remain); Anderson v. Montgomery Ward & Co., 650 F. Supp. 1480, 1483-85 (N.D. Ill. 1987) (employees urged to retire under early retirement plan); Scott v. Oce Indus., 536 F. Supp. 141, 146 (N.D. Ill. 1982) (employee encouraged to quit); *see also* Downey v. Southern Natural Gas Co., 649 F.2d 302, 303, 305 (5th Cir. Unit B June 1981) (employee told he might be discharged before his mandatory retirement age); *Choosing a Standard*, *supra* note 9, at 607.

126. *See* Guthrie v. J.C. Penney Co., 803 F.2d 202, 207-08 (5th Cir. 1986); Pena v. Brattleboro Retreat, 702 F.2d 322, 326 (2d Cir. 1983); Pittman v. Hattiesburg Mun. Separate School Dist., 644 F.2d 1071, 1077 (5th Cir. Unit A May 1981); Anderson v. Montgomery Ward & Co., 650 F. Supp. 1480, 1484-85 (N.D. Ill. 1987); *see also* Downey v. Southern Natural Gas Co., 649 F.2d 302, 305 (5th Cir. Unit B June 1981) (employee told he might be discharged).

erable working conditions.[127] Therefore, it is not certain that objective-standard courts will consider evidence of encouragement when such evidence does not directly implicate the intolerable working conditions element applied by these courts.[128] Because of this uncertainty, the objective standard provides less incentive for the employer to institute positive action than is provided under the intent standard.[129]

Arguments against considering evidence of encouragement fail under close scrutiny. One argument is that employers will use false, insincere persuasion to urge employees to remain on the job in order to avoid liability for constructive discharge. False persuasion, however, will be considered by the fact finder as a question of fact within the totality of the circumstances.[130] Further, under the intent standard, the employer is held to intend the reasonably foreseeable consequences of its actions.[131] Therefore, employers may not engage in conduct clearly indicative of the intent to compel resignation and avoid liability by falsely encouraging the employee to remain employed.

A second argument has been raised that employers should not be able to minimize their liability for constructive discharge by encouraging employees to remain in a discriminatory work environment.[132] A potential constructive discharge plaintiff, however, can remain employed and make efforts to resolve the discriminatory conditions, using litigation only as a last resort.[133] This result supports the nonlitigious dispute reso-

127. Urging an employee to remain employed directly negates the existence of an intent to compel resignation. *See supra* note 112 and accompanying text. Similarly, failure to encourage an employee considering resignation to remain, or urging an employee to resign, is direct evidence of an intent to compel resignation. *See supra* notes 112-13. The objectively determined intolerable working conditions element includes many diverse situations, such as unequal pay, *see, e.g.*, Bourque v. Powell Elec. Mfg., 617 F.2d 61, 65 (5th Cir. 1980), discriminatory job assignment, *see, e.g.*, Meyer v. Brown & Root Constr. Co., 661 F.2d 369, 372 (5th Cir. Nov. 1981), and deprivation of career opportunities, *see, e.g.*, Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir. 1981). Accordingly, the direct relationship that exists between encouragement to remain or resign and intent to compel resignation does not exist between encouragement to remain or resign and intolerable working conditions.

128. For instance, in Cazzola v. Codman & Shurtleff, Inc., 751 F.2d 53 (1st Cir. 1984), the employee was urged to remain with the employer. *Id.* at 55. However, the court did not refer to this fact in affirming the district court's judgment for the plaintiff on her constructive discharge claim. *Id.* at 55-56.

129. *See supra* notes 112-13 and accompanying text.

130. *See* Henry v. Lennox Indus., 768 F.2d 746, 751-52 (6th Cir. 1985); Easter v. Jeep Corp., 750 F.2d 520, 522 (6th Cir. 1984).

131. *See supra* note 72 and accompanying text.

132. A commentator who supports the objective standard contends that an employer who blatantly discriminates, but nonetheless wishes to retain the services of the employee, should be liable for constructive discharge. *See Choosing a Standard, supra* note 9, at 613. According to this argument, such an employer would be liable for constructive discharge under the objective standard, but not under the intent standard. *See id.*

133. The employee can complain to appropriate employer officials or file a charge with the Equal Employment Opportunity Commission, *see supra* note 30 and accompanying text, to resolve the underlying discrimination.

lution objective of the ADEA and Title VII.[134] Further, this position is consistent with the ability of an employer to toll the continued accrual of back pay liability by making an acceptable offer of employment or reinstatement to the discrimination victim.[135]

### D. *Offers of Reinstatement, Back Pay and Constructive Discharge*

Employer offers of reinstatement and constructive discharge have an analogous effect on back pay liability. The employer's intent is considered in the case of offers of reinstatement. Therefore, it should be considered in cases of constructive discharge.

The requirement that employees mitigate their damages is statutory under Title VII,[136] and is recognized under the ADEA.[137] Consistent with the employee's duty of mitigation,[138] the Supreme Court held in *Ford Motor Co. v. EEOC* that employers may toll continued accrual of post-discharge back pay by offering reinstatement to their former em-

134. *See supra* note 82 accompanying text.

135. *See infra* notes 136-40 and accompanying text.

136. Courts may award back pay under Title VII. According to 42 U.S.C. § 2000e-5(g) (1982), "[i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay." However, Title VII plaintiffs have a statutory duty to mitigate their damages. "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." *Id.*

Courts have enforced this statutory duty of mitigation. *See, e.g.*, Miller v. Marsh, 766 F.2d 490, 492 (11th Cir. 1985); Figgs v. Quick Fill Corp., 766 F.2d 901, 902 (5th Cir. 1985); Coley v. Consolidated Rail Corp., 561 F. Supp. 645, 651 (E.D. Mich. 1982).

This Title VII duty of mitigation has two desireable economic goals: the prevention of double recovery (both back pay and income from employment that the employee would not otherwise have) and the discouragement of "unjustified [plaintiff] idleness." *See* Thomas v. Resort Health Related Facility, 539 F. Supp. 630, 638 (E.D.N.Y. 1982).

137. The ADEA does not contain any express provision directly corresponding to 42 U.S.C. § 2000e-5(g). *See* Eglit, *supra* note 48, § 18.12, at 18.47 n.3. However, courts consistently apply the rule that income, earned by ADEA plaintiffs prevailing in discharge or refusal-to-hire cases that could not have been earned but for the discharge or failure to hire, will be deducted from the plaintiffs' back pay awards. *Id.* at 18-46. Although not all courts have addressed the issue of the plaintiff's obligation to mitigate damages, those that have uniformly hold that the ADEA plaintiff has a duty to mitigate damages under the ADEA. *Id.* at 18-46, 47; *see, e.g.*, O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1551 (11th Cir. 1984) (plaintiff's acceptance or rejection of offer of reinstatement relevant to mitigation of damages); EEOC v. Sandia Corp., 639 F.2d 600, 627 (10th Cir. 1980) ("wrongfully discharged claimants have an obligation to use reasonable efforts to mitigate" damages); Coates v. National Cash Register Co., 433 F. Supp. 655, 662 (W.D. Va. 1977) (ADEA plaintiffs required to mitigate damages); *see also* Schlei & Grossman, *supra* note 9, at 523 (in order to obtain back pay, ADEA plaintiffs must make reasonable efforts to mitigate damages).

138. *See supra* notes 136-37 and accompanying text. This duty of mitigation by seeking comparable work through reasonable diligence includes the duty to mitigate with the defendant employer. *See* O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1551 (11th Cir. 1984); Thomas v. Resort Health Related Facility, 539 F. Supp. 630, 638 (E.D.N.Y. 1982).

ployees,[139] thereby allowing them to obtain interim earnings.[140] To determine whether an offer of reinstatement tolls back pay liability, courts consider whether the employee was reasonable in rejecting the offer.[141]

139. Ford Motor Co. v. EEOC, 458 U.S. 219, 231-32 (1982). Once an employer makes an acceptable offer of reinstatement to an employee, and that offer is unreasonably rejected, the continued accrual of back pay is tolled. *See id.* In *Ford Motor Co.*, the Supreme Court held that, under Title VII, the accrual of back pay was tolled by the refusal of plaintiffs, who were unlawfully denied employment, to accept the employer's unconditional offer of employment, without retroactive seniority, in the job sought. *See id.* at 241. Acceptance of such an unconditional offer satisfies the plaintiffs' statutory duty to minimize damages while preserving their right to be made whole for pre-acceptance damages. *See id.* at 235.

Although *Ford Motor Co.* involves unlawful failure to hire, not unlawful discharge, the case has been cited by courts addressing the mitigation duty of discharged employees, *see, e.g.*, Figgs v. Quick Fill Corp., 766 F.2d 901, 902-03 (5th Cir. 1985), and employees who have resigned, *see, e.g.*, Miller v. Marsh, 766 F.2d 490, 492 (11th Cir. 1985).

Although *Ford Motor Co.* is a Title VII case, to the extent that the courts recognize an ADEA plaintiff's duty to mitigate, *see supra* note 137 and accompanying text, the principles discussed therein are relevant to cases brought under the ADEA. *Ford Motor Co.* has been cited in a number of ADEA cases. *See, e.g.*, Giandonato v. Sybron Corp., 804 F.2d 120, 123-25 (10th Cir. 1986) (ADEA constructive discharge case; by refusing his employer's offer of reinstatement employee did not comply with *Ford Motor Co.'s* mandate); Real v. Continental Group, Inc., 627 F. Supp. 434, 447 (N.D. Cal. 1986) (ADEA constructive discharge case; *Ford Motor Co.* discussed in connection with reasonableness of plaintiff's rejection of employer's offer of reinstatement); Cowen v. Standard Brands, Inc., 572 F. Supp. 1576, 1581 (N.D. Ala. 1983) (the *Ford Motor Co.* "rationale applies equally to ADEA cases"); Merkel v. Scovill, Inc., 570 F. Supp. 141, 144, 149 (S.D. Ohio 1983) (citing *Ford Motor Co.* as supporting propositions, first, that a secondary goal of the ADEA is to compensate victims of age discrimination and, second, that interim earnings must be deducted from back pay award where ADEA plaintiff accepts a non-comparable job).

The plaintiff who accepts an offer of reinstatement retains the right to receive a back pay award for the period preceding the effective date of the offer. *See Ford Motor Co.*, 458 U.S. at 238. Plaintiff's failure to accept the defendant's offer of reinstatement does not eliminate his entire cause of action retroactively. *See* Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806, 809 (8th Cir. 1982) (The employee "retains a right for damages accruing from the time of termination until the expiration of the offer of reinstatement.").

140. *See supra* notes 136-37 and accompanying text.

141. In order to determine the effect of offers of reinstatement on defendant's back pay liability, "court[s] must consider the circumstances under which the offer was made or rejected, including the terms of the offer and the reasons for refusal." Claiborne v. Illinois Cent. R.R., 583 F.2d 143, 153 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979); *see also* O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1550-51 (11th Cir. 1984) (quoting *Claiborne*, 583 F.2d at 153); Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 282 (8th Cir. 1983) (quoting Taylor v. Teletype Corp., 648 F.2d 1129, 1139 (8th Cir.), *cert. denied*, 454 U.S. 969 (1981), quoting *Claiborne*, 583 F.2d at 153); Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806, 808 (8th Cir. 1982) (quoting *Claiborne*, 583 F.2d at 153). For instance, the offer must be communicated adequately to plaintiff to toll continued accrual of back pay liability. *See* Morvay v. Maghielse Tool and Die Co., 708 F.2d 229, 232 (6th Cir.), *cert. denied*, 464 U.S. 1011 (1983). Although reasonable conditions accompanying an offer of reinstatement will not invalidate tolling effect on back pay, *see id.*, unreasonable conditions will do so. *See, e.g.*, Figgs v. Quick Fill Corp., 766 F.2d 901, 903 (5th Cir. 1985) (offer conditioned on plaintiff's agreement to compromise his discrimination claims need not be accepted to meet mitigation duty); *Morvay*, 708 F.2d at 232 (noting in dicta that offer of reinstatement is insufficient to terminate back pay liability where it is conditioned on plaintiff's abandonment of unfair labor prac-

Courts also consider evidence indicative of the employer's intent, such as whether the offer was made in good faith.[142]

The legal effect of such offers of reinstatement on the damages award, considered within the context of the employee's duty to mitigate, may be analogized to the back pay consequences of an employee's resignation in a constructive discharge case.[143] In both offer of reinstatement cases[144]

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tices claim or resignation of union steward); Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 757 (7th Cir.) (ADEA plaintiff was reasonable in refusing an offer of reinstatement conditioned on him taking and passing a physical examination detrimental to his discrimination claim), *cert. denied*, 464 U.S. 992 (1983). Back pay liability is not tolled where the plaintiff, an unsuccessful job applicant, refuses defendant's offer of a job not substantially equivalent to the job originally sought. *See Dickerson*, 703 F.2d at 282-83 (distinguishing *Ford Motor Co.* where the job offered was not substantially similar to the job sought).

A relevant inquiry is whether the plaintiff's rejection of the reinstatement offer was reasonable. *See O'Donnell*, 748 F.2d at 1550; *Dickerson*, 703 F.2d at 282; *Orzel*, 697 F.2d at 757; *Fiedler*, 670 F.2d at 808; Thomas v. Resort Health Related Facility, 539 F. Supp. 630, 638 (E.D.N.Y. 1982). The trier of fact must "weigh the evidence to determine whether a reasonable person would refuse the offer of reinstatement." *Fiedler*, 670 F.2d at 808; *see also O'Donnell*, 748 F.2d at 1551 (quoting *Fiedler*, 670 F.2d at 808); *Dickerson*, 703 F.2d at 282.

The reasonableness of a plaintiff's decision to reject an offer of reinstatement may be determined on an individualized basis. *See Fiedler*, 670 F.2d at 808; *Claiborne*, 583 F.2d at 153. In contrast, the reasonableness of an employee's decision to resign is considered on an objective basis. *See supra* notes 51 & 69 and accompanying text. Accordingly, the standard of reasonableness used by objective-standard courts to determine intolerable working conditions and, hence, liability for constructive discharge, may be distinguished from the standard of reasonableness used in the mitigation context.

142. Although the relevant inquiry appears to be whether the plaintiff's rejection of the reinstatement offer was reasonable under the circumstances, *see supra* note 141 and accompanying text, courts also consider the intent of the employer in connection with the offer of reinstatement. Courts consider whether an employer's offer of reinstatement is bona fide, or made in good faith, *see* Figgs v. Quick Fill Corp., 766 F.2d 901, 904 (5th Cir. 1985); Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806, 809 (8th Cir. 1982); Real v. Continental Group, Inc., 627 F. Supp. 434, 446 (N.D. Cal. 1986); EEOC v. Goodyear Tire & Rubber Co., 22 Fair Empl. Prac. Cas. (BNA) 786, 787 (W.D. Tenn. 1980); Coates v. National Cash Register Co., 433 F. Supp. 655, 662-63 (W.D. Va. 1977); *see also* Hedrick v. Hercules, Inc., 658 F.2d 1088, 1095 (5th Cir. Unit B Dec. 1981) (court considers whether post-verdict offer of reinstatement was "reasonable and made in good faith"). When employers place conditions on offers of reinstatement, courts may consider the employer's purpose in applying such conditions. *See* Morvay v. Maghielse Tool and Die Co., 708 F.2d 229, 232 (6th Cir.), *cert. denied*, 464 U.S. 1011 (1983). Finally, in order to determine whether the plaintiff's rejection of an offer of reinstatement was reasonable, courts consider evidence indicative of the employer's intent. For instance, in Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276 (8th Cir. 1983), an ADEA failure to hire case, the defendant offered the plaintiff a job that was not substantially equivalent to the job she originally sought. *See id.* at 279, 282. The court, noting that defendant knew plaintiff was not interested in the type of job offered, concluded that her rejection of the offer was not necessarily unreasonable. *Id.* at 282. Accordingly, plaintiff's rejection did not toll the accrual of back pay damages automatically. *See id.*

143. *See supra* note 29 and accompanying text.

144. The back pay issue in offer of reinstatement cases is whether the plaintiff is entitled to back pay for the period subsequent to the defendant's offer to re-establish the employment relationship or, in the case of a failure to hire, the defendant's offer to establish the employment relationship. *See, e.g.*, Claiborne v. Illinois Cent. R.R., 583 F.2d 143, 153 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979).

and constructive discharge cases,[145] the issue is the employee's entitlement to "back pay in spite of the employer's willingness to continue the employment relationship."[146] In both cases, discrimination is alleged, but not yet proved.[147] The employee may return to, or remain in, the employment relationship. The employer takes the actions necessary to re-establish, or directly does not take the actions to terminate, the employment relationship.[148] Unless underlying discrimination is established,[149] both constructive discharge and offers of reinstatement are irrelevant for back pay purposes. Reinstatement offers and constructive discharge determinations have a parallel impact on the employer's back pay liability. Both acceptable offers of reinstatement[150] and judgments for the employer on constructive discharge claims[151] cut off the employer's back pay liability.[152] Similarly, when an offer of reinstatement is unacceptable,[153] and when a constructive discharge is established,[154] the employer's back pay liability continues to run.[155] In either case, the essence of the issue is mitigation of damages.[156]

145. The back pay issue in constructive discharge cases is whether the plaintiff is entitled to back pay for the period subsequent to his resignation. *See, e.g.*, Satterwhite v. Smith, 744 F.2d 1380, 1381 n.1 (9th Cir. 1984); Muller v. United States Steel Corp., 509 F.2d 923, 930 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975).

146. *Constructive Discharge*, *supra* note 9, at 575.

147. In constructive discharge cases, the plaintiff typically resigns, and then brings suit against the employer for the underlying discrimination and constructive discharge. *See, e.g.*, Bristow v. Daily Press, Inc., 770 F.2d 1251, 1252 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 1461 (1986); Downey v. Southern Natural Gas Co., 649 F.2d 302, 304-05 (5th Cir. Unit B June 1981); Allen v. Colgate-Palmolive Co., 539 F. Supp. 57, 60 (S.D.N.Y. 1981).

In cases discussing the effect of offers of reinstatement upon the continued accrual of back pay liability, the plaintiff's retainment of an unfettered right to pursue his discrimination claim is often at issue. *See, e.g.*, Ford Motor Co. v. EEOC, 458 U.S. 219, 234, 238 (1982); Figgs v. Quick Fill Corp., 766 F.2d 901, 903 (5th Cir. 1985); Morvay v. Maghielse Tool & Die Co., 708 F.2d 229, 232 (6th Cir.), *cert. denied*, 464 U.S. 1011 (1983); Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 757 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983).

148. In constructive discharge situations, the employer does not take the direct action of discharging the employee. *See supra* notes 18-19 and accompanying text.

149. The constructive discharge claim is dependent on the plaintiff's establishment of underlying discrimination. *See supra* notes 21 & 23 and accompanying text. The issue of the tolling of continued back pay liability, of course, is relevant only when the plaintiff has established underlying discrimination, subjecting an employer to back pay liability.

150. See *supra* note 139 and accompanying text.

151. See *supra* note 29 and accompanying text.

152. See *supra* note 29 and accompanying text concerning constructive discharge, and *supra* note 139 and accompanying text concerning offers of reinstatement.

153. *See supra* notes 141-42 and accompanying text.

154. See *supra* notes 49-51 and accompanying text and *supra* notes 67-70 and accompanying text.

155. *See supra* note 29 and accompanying text concerning constructive discharge and *supra* note 139 and accompanying text concerning offers of reinstatement.

156. For cases illustrating the connection between constructive discharge and mitigation of damages, see Clark v. Marsh, 665 F.2d 1168, 1173-74 (D.C. Cir. 1981); Bourque v. Powell Elec. Mfg., 617 F.2d 61, 66 (5th Cir. 1980); Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977). For cases illustrating the connection between offers of reinstatement and mitigation of damages, see Miller v. Marsh, 766 F.2d 490, 492 (11th

The approach of intent-standard courts toward constructive discharge is consistent with the approach of courts toward offers of reinstatement. In both situations, factors related to both the reasonableness of the employee's action and the intent of the employer are considered.[157] In addition, the policy interests of dispute resolution within existing employment relationships,[158] employer self-correction of problems[159] and avoidance of windfalls to plaintiffs[160] are manifest in offer of reinstatement situations[161] as well as constructive discharge.[162] The consideration of both employer intent and employee reasonableness supports these objectives.

The objective standard is inconsistent with the ability of an employer to toll accrual of post-discharge back pay liability through an offer of reinstatement.[163] Independent of the standard used by courts to determine constructive discharge, courts consistently consider evidence of the employer's good faith in re-establishing the employment relationship through offers of reinstatement.[164] Courts applying the objective stan-

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Cir. 1985); O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1551 (11th Cir. 1984); Claiborne v. Illinois Cent. R.R., 583 F.2d 143, 153 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979).

157. See *supra* notes 67-70 and accompanying text concerning constructive discharge under the intent standard. In connection with the consideration of factors related to employee reasonableness and employer intent, *see* Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 282 (8th Cir. 1983); Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806, 808-09 (8th Cir. 1982); *see also* O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1550-51 (11th Cir. 1984) (considering whether the employee's refusal of the offer was reasonable as well as "the circumstances under which the offer was made or rejected, including the terms of the offer and the reasons for refusal") (quoting Claiborne v. Illinois Cent. R.R., 583 F.2d 143, 153 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979)); *Claiborne*, 583 F.2d at 153 (same).

158. *See, e.g.*, Ford Motor Co. v. EEOC, 458 U.S. 219, 241 (1982); Clark v. Marsh, 665 F.2d 1168, 1173 (D.C. Cir. 1981); Bourque v. Powell Elec. Mfg., 617 F.2d 61, 65-66 (5th Cir. 1980).

159. *See, e.g.*, Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2411 (1986) (Marshall, J., concurring) (existence of internal employee complaint procedure would be relevant to sexual harassment victim's constructive termination claim); Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982) (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)) (in discussion of an offer of employment, Court notes that cooperation and voluntary compliance are the preferred means of ending employment discrimination).

160. *See, e.g.*, Ford Motor Co. v. EEOC, 458 U.S. 219, 235 (1982) (plaintiffs made more than whole when they receive back pay after rejecting unconditional offers of comparable employment); Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) (constructive discharge; employee not guaranteed work environment free from stress), *cert. denied*, 106 S. Ct. 1461 (1986).

161. *See supra* notes 158-60 and accompanying text.

162. *See supra* notes 158-60 and accompanying text.

163. *See supra* note 142 and accompanying text.

164. *See supra* note 142 and accompanying text. Several of the decisions cited *supra* note 142 were issued by courts in circuit courts of appeals which use the intent standard in constructive discharge cases. *See* Morvay v. Maghielse Tool and Die Co., 708 F.2d 229 (6th Cir.), *cert. denied*, 464 U.S. 1011 (1983); Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276 (8th Cir. 1983); Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806 (8th Cir.1982); EEOC v. Goodyear Tire & Rubber Co., 22 Fair Empl. Prac. Cas. (BNA) 786 (W.D. Tenn. 1980); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D.

dard, however, do not consider the employer's intent to terminate the employment relationship by compelling resignation. Under the objective standard, an employer may be subjected to post-resignation back pay liability based on the reasonableness of the employee's actions alone,[165] despite the absence of intent to compel the resignation.[166] Under either standard,[167] an employer may toll back pay liability by expressing an intent to re-establish the employment relationship.[168] Accordingly, the employer should not be liable for additional damages for the termination of that relationship when it did not intentionally compel the termination.

## III. ARGUMENTS IN FAVOR OF THE INTENT STANDARD SPECIFIC TO THE ADEA

Part II of this Note focused on the common considerations of the ADEA and Title VII that suggest that the intent standard should be used under both statutes.[169] The following sections indicate that this standard is particularly applicable under the ADEA.

### A. *Voluntary and Involuntary Retirement under the ADEA*

Employers commonly offer employees enhanced benefits for voluntary early retirement.[170] The reasons for offering such incentives may include the desire to achieve enhanced efficiency,[171] save the additional costs associated with older workers[172] and create advancement opportunities for younger employees.[173] Retirement plans[174] that require or permit invol-

Va. 1977). The other decisions cited *supra* note 142 were issued by courts of appeals which use the objective standard in constructive discharge cases. *See* Figgs v. Quick Fill Corp., 766 F.2d 901 (5th Cir. 1985); Hedrick v. Hercules, Inc., 658 F.2d 1088 (5th Cir. Unit B Dec. 1981); Real v. Continental Group, Inc., 627 F. Supp. 434 (N.D. Cal. 1986).

165. *See supra* notes 49-52 and accompanying text.

166. *See supra* note 52 and accompanying text.

167. *See supra* notes 143 & 164 and accompanying text.

168. *See supra* note 139 and accompanying text.

169. *See supra* Part II.

170. "Early retirement is a common corporate practice utilized to prevent individual hardship. It is a humane practice well accepted by both employers and employees, and is purely voluntary." Coburn v. Pan Am. World Airways, Inc., 711 F.2d 339, 344 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983); *see also* 1 H. Eglit, Age Discrimination, § 16.39B, at 1S-194 (Supp. 1985) [hereinafter Eglit Supplement] ("It has become increasingly common for employers to offer incentives to employees to retire early.").

171. *See* Eglit Supplement, *supra* note 170, § 16.39B, at 1S-194.

172. *See* Cipriano v. Board of Educ., 785 F.2d 51, 54-55 (2d Cir. 1986); Coburn v. Pan Am. World Airways, Inc., 711 F.2d 339, 344 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983); Eglit Supplement, *supra* note 170, § 16.39B, at 1S-194.

173. *See* EEOC v. Home Ins. Co., 672 F.2d 252, 261-62 (2d Cir. 1982); Anderson v. Montgomery Ward & Co., 650 F. Supp. 1480, 1482 (N.D. Ill. 1987); Eglit Supplement, *supra* note 170, at § 16.39B, 1S-194; *see also* EEOC v. Westinghouse Elec. Corp., 632 F. Supp. 343, 369 (E.D. Pa. 1986) (voluntary early retirement plans "forestall layoffs of younger workers").

174. A typical early retirement plan may include supplementary payments to employees, calculation of retirement benefits without actuarial adjustment for early retirement and extra medical and life insurance coverage. *See* Henn v. National Geographic Soc'y,

untary retirement within the protected age group violate the ADEA,[175] but voluntary, enhanced-benefit early retirement plans generally have been approved by the courts.[176] Early retirement plans that are labelled voluntary, but in fact effectively force older workers to retire, violate the ADEA.[177]

Courts consider the intent of the employer as a factor in their analysis of voluntary early retirement plans.[178] Under section 4(f)(2) of the

40 Fair Empl. Prac. Cas. (BNA) 1186, 1186 (N.D. Ill. 1986), *aff'd*, 43 Fair Empl. Prac. Cas. (BNA) 1620 (7th Cir. 1987).

175. According to § 4(f)(2) of the ADEA, no pension plan "shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual." 29 U.S.C. § 623(f)(2) (1982). *See* Allen v. Colgate-Palmolive Co., 539 F. Supp. 57, 62 n.1 (S.D.N.Y. 1981) (quoting § 4(f)(2)).

176. *See, e.g.*, Cipriano v. Board of Educ., 785 F.2d 51, 55 (2d Cir. 1986) (additional incentive for early retirement generally is no more repugnant to the ADEA than other retirement plans); Patterson v. Independent School Dist. # 709, 742 F.2d 465, 468 (8th Cir. 1984) ("a *voluntary* early retirement plan is *a fortiori* permissible" and such a policy "is entirely compatible with § 623(f)(2)") (emphasis in original); EEOC v. Westinghouse Elec. Corp., 632 F. Supp. 343, 369 (E.D. Pa. 1986) (voluntary plans "which provide benefits to encourage early retirements . . . are permitted"); *see also* 29 C.F.R. § 1625.9(f) (1986) (not unlawful for plan to permit individuals to elect early retirement on a voluntary basis); Eglit Supplement, *supra* note 170, § 16.39B, at 1S-195 (generally courts approve early retirement plans).

177. *See* Eglit Supplement, *supra* note 170, § 16.39B, at 1S-194-95; *see also* EEOC v. Westinghouse Elec. Corp., 632 F. Supp. 343, 369 (E.D. Pa. 1986) (ADEA prohibition of mandatory retirement within the protected age group extends to forced retirement and "unlawfully induced 'voluntary' retirements"); Schlei & Grossman, *supra* note 9, at 519 (early retirement plans not unlawful if plan is truly voluntary; if pressure is used, liability may result).

Where the only inducement for early retirement was the enhanced retirement package, and the employer did not encourage the employee to accept the offer, there is no violation. *See* Henn v. National Geographic Soc'y, 40 Fair Empl. Prac. Cas. (BNA) 1186, 1187 (N.D. Ill. 1986), *aff'd*, 43 Fair Empl. Prac. Cas. (BNA) 1620 (7th Cir. 1987).

Courts distinguish between retirement plans or other employer actions that force an employee to retire at a given age from those that merely permit him to do so. *See, e.g.*, Cipriano v. Board of Educ., 785 F.2d 51, 58 (2d Cir. 1986); Britt v. E.I. DuPont de Nemours & Co., 768 F.2d 593, 594-95 (4th Cir. 1985); EEOC v. Home Ins. Co., 672 F.2d 252, 261 (2d Cir. 1982). In rejecting an employer's § 4(f)(2) defense, a district court noted that "the right to early retirement is one which the employee may elect with the consent of the Company. The Company has only the right to preclude it, not force it." EEOC v. Liggett & Meyers, Inc., 29 Fair Empl. Prac. Cas. (BNA) 1611, 1643 (E.D.N.C. 1982). The court indicated that had the plan authorized forced early retirement, it would have constituted a subterfuge under the facts of that case. *See id.*

178. To determine whether the employer's actions were a "subterfuge to evade the purposes of [the ADEA]," 29 U.S.C. § 623(f)(2), thereby invalidating the § 4(f)(2) defense, *see infra* note 180 and accompanying text, courts must consider evidence regarding the employer's motives. In EEOC v. Home Ins. Co., 672 F.2d 252 (2d Cir. 1982), the Court of Appeals for the Second Circuit vacated the district court's grant of defendant's summary judgment motion, *id.* at 253, noting that

> far from establishing as a matter of law that Home's action was *not* a subterfuge to evade the purposes of the Act, this 'reason' plainly indicates that it may very well have been Home's intent to eliminate older workers in favor of younger ones, a conclusion that would require the entry of judgment against Home.

*Id.* at 262 (emphasis in original).

The intent to induce voluntary early retirement, by itself, is not unlawful. *See infra*

ADEA,[179] employers have a defense against charges of ADEA violations if they "observe the terms of a bona fide . . . employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the ADEA]."[180] To determine whether the employer's actions were a "subterfuge to evade the purposes of" the ADEA, courts consider evidence of the employer's motives.[181] For instance, an intent to eliminate older workers in favor of younger workers is unlawful.[182] The intent to induce employees to retire voluntarily early, by itself, is not unlawful.[183] Courts do not find violations when employ-

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note 183. Further, an employer does not violate the ADEA when it intentionally compels an employee to retire for reasons other than age. *See* Sutton v. Atlantic Richfield Co., 646 F.2d 407, 410 n.4 (9th Cir. 1981) (no violation where employer offered employee enhanced retirement benefits because it was dissatisfied with his work). The employee "must prove that [defendant's] motivation in desiring his termination was based on illicit age criteria." *Id.*

179. As originally enacted, § 4(f)(2) stated that

> [i]t shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the ADEA], except that no such employee benefit plan shall excuse the failure to hire any individual . . . .

Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4(f)(2), 81 Stat. 602, 603 (1967). The aim of this section was to promote the hiring of older workers by relieving employers of the economic burden of providing the same benefits for older and younger workers. *See* Age Discrimination in Employment Act of 1967, H.R. Rep. No. 805, 90th Cong., 1st Sess. 2, *reprinted in* 1967 U.S. Code Cong. & Admin. News 2213, 2217; *see also* Zinger v. Blanchette, 549 F.2d 901, 904 (3d Cir. 1977) (quoting H.R. Rep. No. 805), *cert. denied*, 434 U.S. 1008 (1978).

In United Air Lines v. McMann, 434 U.S. 192 (1977), the Supreme Court held that, under § 4(f)(2), involuntary retirement within the protected age group was permissible pursuant to a plan adopted before the enactment of the ADEA. *See id.* at 203.

Congress responded to the *McMann* decision in 1978 by amending the ADEA to prohibit involuntary retirement. *See* Betts v. Hamilton County Bd. of Mental Retardation, 631 F. Supp. 1198, 1205 (S.D. Ohio), *appeal dismissed*, 802 F.2d 456 (6th Cir. 1986); Schlei & Grossman, *supra* note 9, at 518. In addition to raising the protected age limit to seventy, Congress amended § 4(f)(2) to include the provision that "no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) [29 U.S.C. § 631(a)] of this Act because of the age of such individual." Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189, 189 (1978).

Although the 1978 amendment generally prohibited age-based involuntary early retirement within the age group protected by the ADEA, *see* Allen v. Colgate-Palmolive Co., 539 F. Supp. 57, 62 n.1 (S.D.N.Y. 1981), exceptions are recognized. *See supra* note 6 and accompanying text.

180. 29 U.S.C. § 623(f)(2) (1982).

181. *See, e.g.*, Cipriano v. Board of Educ., 785 F.2d 51, 58-59 (2d Cir. 1986); EEOC v. Home Ins. Co., 672 F. 2d 252, 261-62 (2d Cir. 1982).

182. *See id.*; *see also* Anderson v. Montgomery Ward & Co., 650 F. Supp. 1480, 1485-86 (N.D. Ill. 1987) (employer's summary judgment motion denied where it used separation plan, with disparate impact on older workers, in order to promote younger workers).

183. In Patterson v. Independent School Dist. # 709, 742 F.2d 465 (8th Cir. 1984), the Court of Appeals for the Eighth Circuit upheld a teachers' early retirement incentive plan. *Id.* at 469. The court noted that "[t]he new plan, it was hoped, would furnish an incentive for teachers to trigger or activate the general pension plan at an earlier age, by holding out the 'carrot' of 'an early retirement incentive . . .' if eligible for normal retire-

ees retire early to realize enhanced benefits,[184] even if the plans were drafted with that objective in mind.[185] Coercion is necessary: when "pressure, subtle or otherwise, is used to encourage 'voluntary' retirement, liability may result."[186]

The requirement that an ADEA plaintiff establish that the retirement plan in fact is coercive[187] supports the proposition that, in ADEA constructive discharge cases, the plaintiff must establish the intent to coerce his resignation. There is an established relationship between early retirement plans and constructive discharge.[188] Indeed, employees who retired under allegedly voluntary retirement plans have brought claims under a constructive discharge theory.[189]

To determine whether the employer violated the ADEA under early retirement[190] or constructive discharge[191] theories, the principal issue is whether the employee's retirement or resignation is based on the employee's own decision, or is attributable to the conduct of the employer. It is only when the employer's actions are coercive that the ADEA is violated.[192]

Employer coercion of early retirement is similar to constructive discharge by employers' intentional coercion of employees' resignations. Courts using the objective standard in constructive discharge cases consider only the nature of the working conditions,[193] which may be analogized to consideration of the terms of the early retirement plan. To

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ment at 55." *Id.* at 467-68; *see also* Britt v. E.I. DuPont de Nemours & Co., 768 F.2d 593, 595 (4th Cir. 1985) (severance pay offer designed exclusively to induce employees to retire early held lawful).

184. *See supra* note 176 and accompanying text.

185. *See supra* note 183 and accompanying text.

186. EEOC v. Westinghouse Elec. Corp., 632 F. Supp. 343, 369 (E.D. Pa. 1986) (quoting Schlei & Grossman, *supra* note 9, at 519).

187. *See supra* note 177 and accompanying text.

188. For instance, constructive discharge is an element of the prima facie case to be established by plaintiffs bringing ADEA challenges to their retirement under voluntary retirement plans. *See* Anderson v. Montgomery Ward & Co., 650 F. Supp. 1480, 1484-85 (N.D. Ill. 1987); Allen v. Colgate-Palmolive Co., 539 F. Supp. 57, 61, 62 n.3 (S.D.N.Y. 1981); *see also* Henn v. National Geographic Soc'y, 40 Fair Empl. Prac. Cas. (BNA) 1186, 1187 (N.D. Ill. 1986) (plaintiff who accepted early retirement must prove some adverse employment action, namely constructive discharge), *aff'd*, 43 Fair Empl. Prac. Cas. (BNA) 1620 (7th Cir. 1987). The alleged coercion of voluntary retirement has been analogized to constructive discharge. *See* Betts v. Hamilton County Bd. of Mental Retardation, 631 F. Supp. 1198, 1205 (S.D. Ohio), *appeal dismissed*, 802 F.2d 456 (6th Cir. 1986).

189. *See, e.g.*, Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 69 (6th Cir. 1982); Sutton v. Atlantic Richfield Co., 646 F.2d 407, 408 (9th Cir. 1981); Henn v. National Geographic Soc'y, 40 Fair Empl. Prac. Cas. (BNA) 1186, 1186-87 (N.D. Ill. 1986), *aff'd*, 43 Fair Empl. Prac. Cas. (BNA) 1620 (7th Cir. 1987); Allen v. Colgate-Palmolive Co., 539 F. Supp. 57, 61 (S.D.N.Y. 1981); *see also* Baxter and Farrell, *supra* note 9, at 357-58.

190. *See supra* notes 175 & 177 and accompanying text.

191. *See supra* notes 18-19 and accompanying text.

192. *See supra* notes 175 & 177 and accompanying text.

193. *See supra* note 51 and accompanying text.

determine whether a voluntary retirement plan is coercive, however, courts must look beyond the terms of the plan,[194] or by analogy, beyond the actual working conditions, to determine whether the employer in fact implemented the plan in a coercive manner.[195] Similarly, courts using the intent standard look beyond the actual working conditions[196] into the intent of the employer to coerce the employee's resignation.[197] This supports use of a strong intent requirement in the analogous situation of constructive discharge under the ADEA.[198]

### B. *Willfulness and Liquidated Damages under the ADEA*

Damages available under the ADEA include injunctive relief,[199] reinstatement,[200] back pay,[201] front pay[202] and reasonable attorney's fees and costs.[203] In addition, a finding that the employer willfully violated the Act results in an award of liquidated, or double, damages.[204] The statutory basis of these liquidated damages awards derives from the incorporation of the remedial provisions of the Fair Labor Standards Act[205] into the ADEA.[206]

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194. Employer coercion of employees to retire early is required in order to prove a violation. *See supra* notes 175 & 177 and accompanying text.

195. *See id.*

196. *See supra* notes 68-69 and accompanying text.

197. *See supra* note 70 and accompanying text.

198. In determining whether an employee's decision to retire under the terms of an early retirement plan may be attributed to the employer as a violation of the ADEA, courts require coercion. *See supra* notes 175 & 177 and accompanying text. The employee's uncoerced decision, alone, is not sufficient to establish employer liability. *See id.* Similarly, liability for an employee's resignation should not be placed on the employer unless the employer intentionally compelled the resignation.

199. 29 U.S.C. § 626(b) (1982).

200. *Id.*

201. *Id.* Awards of back pay include damages for lost wages, pension benefits, insurance benefits, profit sharing benefits and accrued sick leave. *See* Schlei & Grossman, *supra* note 9, at 522 & nn.215-19.

202. *See, e.g.*, O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1551 (11th Cir. 1984); EEOC v. Prudential Fed. Sav. & Loan Ass'n, 741 F.2d 1225, 1232 (10th Cir. 1984), *vacated on other grounds*, 469 U.S. 1154 (1985); Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982). *See generally Front Pay Under ADEA*, *supra* note 29.

203. 29 U.S.C. § 216(b) (1982).

204. If a willful violation is established, the employer is liable for liquidated damages in an amount equal to the unpaid minimum wages or unpaid overtime compensation. *See* 29 U.S.C. § 216(b). In other words, the employer is liable for double damages. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985).

205. 29 U.S.C. §§ 201-19 (1982).

206. Amounts owed based on violations of the ADEA "shall be deemed to be unpaid minimum wages or unpaid overtime compensation" under the Fair Labor Standards Act, 29 U.S.C. § 626(b). According to this section of the ADEA, "liquidated damages shall be payable only in cases of willful violations." *Id.*

The Supreme Court has noted that "the rights created by the [Age Discrimination in Employment] Act are to be 'enforced in accordance with the powers, remedies, and procedures' of the Fair Labor Standards Act." Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985) (quoting Lorillard v. Pons, 434 U.S. 575, 579 (1978)). However, the

A determination that the employer's violation is willful has two consequences: the availability of liquidated damages[207] and application of a three year statute of limitations period[208] instead of the standard two year period.[209] Only the former consequence is of relevance here.

The Supreme Court clarified the standard of willfulness for ADEA liquidated damages purposes in *Trans World Airlines, Inc. v. Thurston*.[210] The Court held that the airline violated the ADEA by permitting those disqualified from serving in a captain's capacity for reasons other than age to transfer automatically to flight engineer positions, but not affording this privilege to those disqualified from captain positions because of age.[211] The Court of Appeals for the Second Circuit had applied a standard whereby an ADEA violation was " 'willful' if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' "[212] The Court held that this willfulness standard was acceptable,[213] but that the Second Circuit had misapplied the standard in finding that the employer's violation was willful.[214] The Court stated that the employer "acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA."[215]

By requiring proof of intent to compel resignation for constructive discharge liability,[216] intent-standard courts consider the employer's state of mind. Objective-standard courts do not require evidence of the employer's state of mind to find constructive discharge.[217] Although intentional violations of the ADEA may not be equated with willful

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Court noted that the remedial provisions of the ADEA and the Fair Labor Standards Act are not identical, stating that "§ 16(b) of the FLSA [29 U.S.C. § 216(b)], which makes the award of liquidated damages mandatory, is significantly qualified in ADEA § 7(b) [29 U.S.C. § 626(b)] by a proviso that a prevailing plaintiff is entitled to double damages 'only in cases of willful violations.' " *Id.*

207. *See supra* note 206 and accompanying text.

208. 29 U.S.C. § 626(e) (1982), incorporating the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 255(a), 259 (1982); *see* EEOC v. Westinghouse Elec. Corp., 632 F. Supp. 343, 371 (E.D. Pa. 1986); Kneisley v. Hercules Inc., 577 F. Supp. 726, 736 (D. Del. 1983). It is unclear whether the same willfulness standard applies to both statute of limitations and liquidated damages issues. In Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), the Supreme Court noted a split among the circuit courts of appeals concerning this issue, but declined to resolve this dispute. *See id.* at 128 n.21; *see also Westinghouse*, 632 F. Supp. at 371.

209. *See* 29 U.S.C. § 626(e) (1982), incorporating the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 255, 259 (1982).

210. 469 U.S. 111, 126 (1985).

211. *See id.* at 124-25.

212. *Id.* at 128 (quoting Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc., 713 F.2d 940, 956 (2d Cir. 1983), *aff'd in part, rev'd in part*, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)).

213. *See id.* at 128-29.

214. *See id.* at 129.

215. *Id.*

216. *See supra* note 70 and accompanying text.

217. *See supra* note 52 and accompanying text.

violations,[218] the employer's state of mind and good faith are considered to be relevant to a determination of willfulness by both intent-standard courts and objective-standard courts.[219] This willfulness determination

218. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 126 n.19 (1985); EEOC v. Westinghouse Elec. Corp., 632 F. Supp. 343, 371-72 (E.D. Pa. 1986); Real v. Continental Group, Inc., 627 F. Supp. 434, 444-45 (N.D. Cal. 1986).

219. Willfulness is an issue of fact. *See* EEOC v. Westinghouse Elec. Corp., 632 F. Supp. 343, 372 n.22 (E.D. Pa. 1986); Slenkamp v. Borough of Brentwood, 603 F. Supp. 1298, 1302 (W.D. Pa. 1985); Marshall v. American Motors Corp., 475 F. Supp. 875, 883 (E.D. Mich. 1979). For purposes of determining liability for liquidated damages, the burden of proof of willfulness is on the plaintiff. *See* Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1184 (6th Cir. 1983); Kelly v. American Standard, Inc., 640 F.2d 974, 979 (9th Cir. 1981); *Westinghouse*, 632 F. Supp. at 372 n.22.

The Supreme Court has indicated that, while an intentional violation may not be equated with a willful violation, the employer's intent, and evidence indicative of that intent, are relevant to a determination of willfulness. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 129 (1985).

Courts have recognized the close relationship between willfulness and the employer's mental state and intent. *See, e.g.*, Brock v. Richland Shoe Co., 799 F.2d 80, 82 (3d Cir. 1986); Spear v. Dayton's, 33 Fair Empl. Prac. Cas. (BNA) 267, 269 (D. Minn. 1983), *rev'd on other grounds*, 733 F.2d 554 (8th Cir. 1984); Allen v. Colgate-Palmolive Co., 539 F. Supp. 57, 66 (S.D.N.Y. 1981). For example, in *Richland Shoe*, a Fair Labor Standards Act case, the Court of Appeals for the Third Circuit applied the *Thurston* willfulness standard. *Richland Shoe*, 799 F.2d at 83. The court noted the close relationship between willfulness and intent, stating that "[a]lthough the meaning of willful is not fixed and determinate, it is clear that willfulness is akin to intentionality. A willful act requires a deliberate effort, more than mere negligence." *Id.* at 82; *see also* Wehr v. Burroughs Corp., 619 F.2d 276, 283 (3d Cir. 1980) (willful violation established by discharge that was voluntary, not accidental or inadvertent). *Spear* (Eighth Circuit) was decided in a circuit court of appeals which uses the intent standard in constructive discharge cases, while *Brock* (Third Circuit), *Wehr* (Third Circuit) and *Allen* (Second Circuit) were decided in circuits which use the objective standard in constructive discharge cases.

The issue of the employer's knowledge of the legality of its actions is significant. *See, e.g., Thurston*, 469 U.S. at 128-29; *see also Richland Shoe*, 799 F.2d at 83 (applying the *Thurston* standard); *Westinghouse*, 632 F. Supp. at 372 (employer had the resources to attempt compliance with the ADEA but resisted compliance).

The employer's good faith, an aspect of its state of mind, also is relevant to a determination of willfulness. The Supreme Court noted that Congress did not incorporate the Portal-to-Portal Act good faith defense, 29 U.S.C. § 260 (1982), to a Fair Labor Standards Act liquidated damages award, 29 U.S.C. § 216(b) (1982), into the ADEA. *Thurston*, 469 U.S. at 128 n.22 (1985); Lorillard v. Pons, 434 U.S. 575, 581 n.8 (1978). Yet, the Court believes that "the same concerns are reflected in the proviso to § 7(b) [29 U.S.C. § 626(b) (1982)] of the ADEA." *Thurston*, 469 U.S. at 128 n.22. Thus, although "good faith is not a defense to willfulness. . . . good faith is relevant to the issue of willfulness." *Westinghouse*, 632 F. Supp. at 373 n.23 (citation omitted).

By analogy, the *Wehr* court's treatment of the discharge as a willful violation provides support for use of the intent standard in ADEA constructive discharge cases. Courts applying the intent standard require proof of intent to compel the employee's resignation in order to establish employer liability for constructive discharge. *See supra* note 70 and accompanying text. Courts applying the objective standard consider evidence of the employer's intent to compel resignation irrelevant to the issue of constructive discharge, *see supra* note 52 and accompanying text, and to the additional liability resulting from the determination of constructive discharge. *See supra* note 29 and accompanying text. The Third Circuit Court of Appeals uses the objective standard in constructive cases. *See* Goss v. Exxon Office Sys., 747 F.2d 885, 888 (3d Cir. 1984). However, by holding the employer's violation to be willful based on the fact that the unlawful discharge was volun-

results in the employer's liability for additional damages resulting from the underlying ADEA violation.[220] When courts find constructive discharge, they are in fact assessing additional damages, particularly post-resignation back pay, for the underlying violation.[221] Therefore, courts should be consistent and examine the employer's state of mind in determining the employer's liability for constructive discharge.

A hypothetical situation illustrates this concept. Assume a victim of age discrimination resigned because of intolerable working conditions, but the resignation was not compelled intentionally by the employer and the violation was not willful.[222] The employer would be subject to liability for the underlying discrimination,[223] but apparently would not be subject to liability for liquidated damages.[224] However, such a resignation could constitute a constructive discharge under the objective standard,[225] resulting in liability to the employer for both damages for the underlying discrimination[226] and additional damages for post-resignation back pay.[227] Consistent with the courts' application of the willfulness standard,[228] such a resignation would not be considered a constructive discharge under the intent standard without evidence of improper intent on the part of the employer.[229] As with a violation of the ADEA that is not found to be willful,[230] the employer would be liable in damages for the intolerable working conditions that, according to the plaintiff, resulted in his resignation,[231] but not for any additional damages above and beyond those damages.[232] Therefore, consideration of the requirements necessary to subject an employer to liability for liquidated damages lends support for use of the analogous intent standard in ADEA constructive discharge cases.

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tary on the employer's part, the *Wehr* court explicitly used evidence to subject the employer to additional liability for a willful violation in a situation closely analogous to constructive discharge, where it considers such evidence to be irrelevant.

220. *See supra* note 204 and accompanying text.

221. *See supra* note 29 and accompanying text.

222. *See supra* note 212 and accompanying text.

223. *See supra* notes 199-203 and accompanying text.

224. Assuming that the employer here did not act in reckless disregard concerning the legality of its actions, the employer's actions will not be considered willful under the standard applied in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128-29 (1985).

225. Under the objective standard, courts consider only the objective intolerability of working conditions to determine constructive discharge. *See supra* notes 50-51 and accompanying text. The employer's intent is irrelevant. *See supra* note 52 and accompanying text.

226. *See supra* note 21 and accompanying text.

227. *See supra* note 29 and accompanying text.

228. *See supra* notes 212-13 and accompanying text.

229. This is based on the requirement under the intent standard that the plaintiff establish that the defendant intended to compel his resignation. *See supra* note 70 and accompanying text.

230. *See supra* note 212 and accompanying text.

231. *See supra* notes 21-23 and accompanying text.

232. *See supra* note 29 and accompanying text.

## CONCLUSION

Two different standards of proof for constructive discharge cases brought under the ADEA and Title VII currently are used by the federal courts of appeal. The majority view requires only that the plaintiff establish that working conditions were so objectively intolerable that the employee had no choice but to resign. The minority view requires the additional showing that the employer intended to compel the employee's resignation.

The intent standard is more appropriate in ADEA cases for several reasons inherent in both general principles of employment discrimination law and factors specific to the ADEA. The interests favoring use of the intent standard in NLRA cases, where the doctrine of constructive discharge originated, also support the use of the intent standard in employment discrimination cases. Additionally, the intent standard is consistent with the disparate treatment theory under which most actual discharge and constructive discharge cases are brought. By considering evidence of the employer's encouragement of the employee to resign or remain employed, the intent standard supports employer efforts to encourage employees to remain. Further, consideration of the employer's intent to compel resignation is consistent with the effect of employer offers of reinstatement on back pay liability.

A number of arguments favoring use of the intent standard particularly are appropriate in the context of ADEA constructive discharge cases. The intent standard is consistent with the law concerning voluntary and involuntary retirement under the ADEA. Finally, consideration of employer intent to compel resignation is consistent with the willfulness standard used to determine liability for liquidated damages under the ADEA. Courts should consider these arguments in determining the proper, uniform standard to be applied in ADEA and Title VII constructive discharge cases.

*Ira M. Saxe*