CONSTRUCTIVE DISCHARGE AND THE EMPLOYER'S STATE OF MIND: A PRACTICAL STANDARD

Steven D. Underwood†

When an employer discharges an employee, the employer may be exposed to a variety of liabilities. If the discharge was not "for cause," the employee may be entitled to collect unemployment insurance benefits. This, in turn, may expose the employer to an increase in the payments that must be made to the unemployment insurance fund. If the employee is a member of a labor union, the union may demand reinstatement if the discharge is held to be unjustified. If the employee is discharged for a discriminatory reason, or in retaliation for exercising a protected right, the employer may be liable for a violation of federal or state law. The employer may also be liable for breach of an actual or implied employment contract. Some employers have attempted to circumvent such liabilities by not actually discharging[1] an unwanted employee, but instead by creating an environment so uncomfortable for the employee that he or she is compelled to resign. An employee forced to resign under these conditions is said to have been constructively discharged.[2]

The concept of constructive discharge originated in the 1930s in the context of cases arising under the National Labor Relations Act (NLRA).[3]

---

† B.S. 1987, M.S. 1991, Ph.D. 1995, University of Alabama at Birmingham; J.D. Candidate 1998, University of Pennsylvania Law School. The author wishes to thank Professor Clyde W. Summers for his invaluable insights and comments.

1. "'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.'" Ira M. Saxe, Note, *Constructive Discharge under the ADEA: An Argument for the Intent Standard*, 55 FORDHAM L. REV. 963, 966 n.18 (1987) (quoting Frazer v. KFC Nat'l Management Co., 491 F. Supp. 1099, 1105 (M.D. Ga. 1980)).

2. In recent years the doctrine has been expanded to include not only situations where the employer wished the employee would resign, but also those situations where the employee was forced to resign because working conditions were made intolerable through harassment or other discrimination, without any indication that the employer intended the employee's resignation. In sexual harassment cases, for example, the employer may have a strong desire for the employee to stay so that the harassment may continue.

3. 29 U.S.C. §§ 151-169 (1982) (originally enacted as Act of July 5, 1935, ch. 372, §

The concept eventually was applied in almost every context in which wrongful actual discharges had been found.[4] In federal courts, the doctrine is most commonly applied in cases involving alleged violations of the NLRA, Title VII of the Civil Rights Act of 1964 (Title VII),[5] or the Age Discrimination in Employment Act of 1967 (ADEA).[6]

Although most of the circuits initially adopted, at least nominally, the same standard for Title VII and ADEA cases that the National Labor Relations Board (NLRB or "the Board") had developed for NLRA cases, the circuits gradually began to diverge, until by the mid-1980s there were at least three different standards being applied by the various circuits.[7] To complicate matters further, state courts had also adopted the concept of constructive discharge and had developed their own standards.[8] Consequently, at least five standards have recently been applied in various jurisdictions. The purpose of this comment is to try to clarify the current situation with respect to which standards are being applied in which jurisdictions, to evaluate the relative merits of the various standards, and finally to recommend the adoption of a slightly modified version of one of those standards.

I. ORIGIN AND EVOLUTION OF THE CONCEPT OF CONSTRUCTIVE DISCHARGE

The concept of constructive discharge seems to have originated in the

---

1, 49 Stat. 449).

See Roslyn C. Lieb, *Constructive Discharge under Section 8(a)(3) of the National Labor Relations Act: A Study in Undue Concern over Motives*, 7 INDUS. REL. L.J. 143, for a detailed history of the NLRB's treatment of constructive discharge.

4. *See, e.g.*, Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126 (4th Cir. 1995) (Title VII, national origin); Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985) (ADEA violation); Martin v. Citibank, N.A., 762 F.2d 212 (2d Cir. 1985) (42 U.S.C. § 1981 violation); Lojek v. Thomas, 716 F.2d 675 (9th Cir. 1983) (ERISA); Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981) (Title VII, racial discrimination); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980) (Title VII, gender discrimination); Alicea Rosado v. Garcia Santiago, 562 F.2d 114 (1st Cir. 1977) (First and Fourteenth Amendments); Beye v. Bureau of Nat'l Affairs, 477 A.2d 1197 (Md. Ct. Spec. App. 1984) (retaliatory discharge).

5. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991).

6. 29 U.S.C. §§ 621-634 (1988 & Supp. III 1991).

7. Although a plaintiff may be subject to a different constructive discharge standard depending on the jurisdiction, the same standard usually applies regardless of the statute under which his claim arises. For example, courts have not hesitated to use their Title VII constructive discharge standard in ADEA cases. *See, e.g.*, Saxe, *supra* note 1, at 969.

8. *See, e.g.*, Turner v. Anheuser-Busch, Inc., 876 P.2d 1022 (Cal. 1994); Brady v. Elixir Indus., 242 Cal. Rptr. 324 (Ct. App. 1987); Slack v. Kanawha County Hous. and Redevelopment Auth., 423 S.E.2d 547 (W. Va. 1992) (citing a long list of other state cases at 556-57); *Beye*, 477 A.2d 1197.

decisions of the NLRB concerning alleged violations of Section 8(a)(3)[9] of the NLRA.[10] Under Section 8(a)(3), it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." As the Supreme Court noted in *Sure-Tan, Inc. v. NLRB*,[11]

> [t]he Board, with the approval of lower courts, has long held that an employer violates this provision 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."[12]

To understand why this seemingly simple concept gives rise to so much discussion, it is important first to examine what issues the NLRB considers when an actual discharge is alleged to violate Section 8(a)(3). The Board must decide: "(1) whether the employee was engaged in or sympathetic to union or protected activity; (2) whether the employer knew of or suspected the employee's Section 7 activity;[13] (3) whether the employer discharged the employee; and (4) whether the employer's conduct was motivated by an anti-union purpose."[14] When the discharge is alleged to be constructive and not actual, the Board must determine not only whether the employer intended to interfere with union or other protected activity, but also whether the employer intended to compel the employee's resignation.[15] This standard will be referred to as the "NLRB standard."[16]

---

9. This section was originally designated 8(a).

10. The concept was first employed in a 1936 decision. *See* Canvas Glove Mfg. Works, Inc., 1 N.L.R.B. 519 (1936); Lieb, *supra* note 3, at 146. The first decision to invoke the term "constructive discharge" was handed down in 1938. *See* Sterling Corset Co., 9 N.L.R.B. 858 (1938); Lieb, *supra* note 3, at 147.

11. 467 U.S. 883 (1984).

12. *Id.* at 894.

13. Under section 7 of the NLRA, employees have, among other rights, "the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157 (1994).

14. Lieb, *supra* note 3, at 148-49.

15. *Id.* at 161.

16. In recent years, the NLRB has adopted a "reasonably foreseeable" standard which it uses when considering whether the employer intended the resulting resignation. The inquiry has become

> whether the conditions were such that the employer should have known that employee resignation was likely, "when it is shown that the employer imposed onerous working conditions on an employee it knew had engaged in union activity, which it reasonably should have foreseen would [induce] that employee to quit, a prima facie case of constructive discharge is established,

The concept of constructive discharge was subsequently adopted by the federal courts in cases arising under both Title VII and the ADEA.[17] In the earliest Title VII cases, the circuits purported to adopt the same standard as that endorsed by the NLRB. For example, in *Muller v. United States Steel Corp.*,[18] the Tenth Circuit approved use of the NLRB standard for constructive discharge cases under Title VII.[19]

A second example illustrates the divergence of the standards adopted by the various circuits. In *Young v. Southwestern Sav. & Loan Ass'n*,[20] the court stated that: "if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge."[21] The *Young* court purported to recite the same standard as that embraced by the Tenth Circuit in *Muller*—the NLRB standard.[22] But note that, with the phrasing of the *Young* court, the standard becomes ambiguous. Under the *Young* standard, the word "deliberately" can be taken to apply *only* to the creation of the working conditions; that is, although the employer must still intend to create the intolerable working

---

requiring the employer to produce evidence of legitimate motivation."

Lieb, *supra* note 3, at 161. The current standard, then, requires that the onerous conditions were intentionally created ("imposed") by the employer, but does not require that the employer intended or desired the employee's resignation, as long as the resignation was a reasonably foreseeable consequence of the imposed conditions.

However, throughout this comment, the term "NLRB standard" will be used to refer to the old standard, which required that (a) the employee's working conditions were intolerable; (b) the employer intentionally created the conditions; and (c) the employer's actual intent (motive) was to cause the employee's resignation.

This terminology will be used, despite the fact that the NLRB currently uses a "resonably foreseeable consequence" standard, because the old standard was the one used by the NLRB prior to 1970 (see the cases cited in Muller v. Unites States Steel Corp., 509 F.2d 923, 929 (10th Cir. 1975)). Therefore, the old standard is the one referred to by courts like the one in *Muller* when referring to the "NLRB standard." Thus, to minimize confusion, this comment uses the same terminology as that used in *Muller*.

17. "The Equal Employment Opportunity Commission (EEOC) adopted the doctrine of constructive discharge before any courts of appeals had passed on the question." Martin W. O'Toole, Note, *Choosing a Standard for Constructive Discharge in Title VII Litigation*, 71 CORNELL L. REV. 587, 591 n.29 (1986).

18. 509 F.2d 923 (10th Cir. 1975).

19. In each of [the NLRB] cases there was extrinsic evidence to establish that an effort had been made to render the job so unattractive and unpleasant as to justify the finding that the resignation was a constructive firing.... Similarly, in the present case, there is a dearth of evidence to show a deliberate effort to make things difficult for the employee so as to bring about his separation. Hence, the proof of constructive discharge fails.

Muller v. United States Steel Corp., 509 F.2d 923, 929 (10th Cir. 1975).

20. 509 F.2d 140 (5th Cir. 1975).

21. *Id.* at 144.

22. *Id.* (citing an extensive list of NLRB decisions).

conditions, the employer is not required to have intended to force the employee to resign. Under the NLRB standard, on the other hand, the employer must also intend to cause the resignation of the employee.

Had the *Young* court fully stated and applied the NLRB standard, however, the plaintiff would not have prevailed. Martha Young, an atheist, had quit her job after being informed that attendance was mandatory at a monthly office meeting which involved a brief religious exercise. There was no evidence that her employer, or even her immediate supervisor, intended that she resign. Nonetheless, the *Young* court apparently felt that equity demanded Young be granted relief, and construed the standard accordingly.

The occurrence, or nonoccurrence, of analogous situations in the various circuits, usually in Title VII or ADEA cases, was the primary factor leading to the subsequent divergence of standards among the circuits, which reached its peak in the 1980s and early 1990s.[23] A second factor that contributed to the divergence of standards was careless reading—or possibly intentional misconstruction—by one court attempting to adopt the standard of another.[24] For example, *Bourque v. Powell Elec. Mfg. Co.*[25] is frequently cited by courts and commentators as the seminal decision which abandoned the *Young* and NLRB standards in favor of an "objective" standard which does not look at the employer's state of mind.[26] This objective standard only considers whether a reasonable employee in the plaintiff's position would have been compelled to resign.[27] However, the *Bourque* court explicitly stated that the *Young* standard applied:

> The general rule is that if the employer *deliberately makes an employee's working conditions so intolerable* that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge . . . . [The assertion] that in order to constitute a constructive discharge, the imposition of intolerable working conditions must be with the purpose of forcing the employee to resign . . . is inconsistent with authority in this Circuit and . . . with the realities of modern employment[28]. . . . To find constructive discharge we believe that

23. *See, e.g.*, Hukkanen v. International Union of Operating Eng'rs, 3 F.3d 281 (8th Cir. 1993); *Martin*, 48 F.3d at 1343; *see also infra* notes 32-72 and accompanying text.

24. Several commentators have been guilty of the same behavior. *See e.g., infra* note 30.

25. 617 F.2d 61 (5th Cir. 1980).

26. "*Bourque* has become the leading case on the subject of constructive discharge under Title VII." Derr v. Gulf Oil Corp., 796 F.2d 340, 343 n.3 (10th Cir. 1986).

27. *Id.* at 65.

28. The question of what the court may have meant by "the realities of modern employment" and the various applicable standards are addressed *infra* in the text accompanying note 103.

> 'the trier of fact must be satisfied that the . . . working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'[29]

The context of the last sentence indicates that the court was merely establishing a threshold a plaintiff must pass before continuing to the next part of the test.[30] The court did not need to delineate the standard in full because the plaintiff had not met the initial burden of showing that the conditions would be intolerable to a reasonable employee in her position. Strangely, most courts and commentators citing *Bourque* as an authority for the objective standard consistently ignore both the context of the last sentence in the above quote and the *Bourque* court's clear endorsement of the *Young* standard. These authorities simply quote the last sentence as if the *Bourque* court had held that the plaintiff need *only* meet the "reasonable employee" condition in order to prevail on a claim of constructive discharge.[31]

Before proceeding further into the maze of "standards" created by the circuits, it is useful to pause do what too few courts and commentators have done—actually spell out what a plaintiff must show in order to

---

29. *Bourque*, 617 F.2d at 65 (citing *Alicea Rosado*, 562 F.2d at 119 (emphasis added)).

30. The court in *Alicea Rosado* had made the same statement in a similar context; the point the court was making was that the plaintiff had not shown that the conditions were intolerable, not that that condition was the only one which needed to be satisfied. Unfortunately, that quote has been taken out of context almost as often as the quote from *Bourque*. *See, e.g.*, Stacey E.T. Aasland, *Civil Rights—The Constructive Discharge Doctrine and its Applicability to Sexual Harassment Cases: Does it Matter what the Employer Intended Anymore?*, 71 N.D. L. REV. 1067, 1073 (1995) (author asserts that the *Alicea Rosado* court rejected the NLRB standard and held that a plaintiff *only* needs to show that working conditions were objectively intolerable).

31. *See, e.g., Lojek*, 716 F.2d at 681; Nolan v. Cleland, 686 F.2d 806, 813 (9th Cir. 1982); Aasland, *supra* note 30, at 1074 ("The *Bourque* court stated that a constructive discharge exists . . . when 'working conditions [are] so difficult or unpleasant that a reasonable person in the employee's shoes [feels] compelled to resign.'").

The Ninth Circuit's misreading of *Bourque*, in *Nolan*, appears to be the source of its current standard, which as stated does not even consider whether the employer was aware of the intolerable conditions.

In Derr v. Gulf Oil Corp., 796 F.2d 340 (10th Cir. 1986), the court states:

> What *Bourque* has done for the problem of proof is to cut through the details and difficulty of analyzing the employer's state of mind and focus on an objective standard. . . . Our position, then, is that the question on which constructive discharge cases turn is simply whether the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign.

Derr, 796 F.2d at 344. As articulated, this standard is not strictly objective regardless of the position the court claims to adopt. Although the court purportedly ignores the employer's state of mind, it uses the words "illegal discriminatory acts" and "made . . . conditions difficult," which arguably reincorporate the need to consider the employer's state of mind.

prevail on a claim of constructive discharge once conditions have been found intolerable, under the NLRB standard and the *Young* standard.

Under the NLRB standard,[32] a plaintiff must show: (a) that his or her working conditions were so intolerable that a reasonable employee in the same situation would feel compelled to resign;[33] (b) that the employer intended to create those conditions; and (c) that the employer intended that the plaintiff resign. If strictly applied, this standard has the potential to be somewhat harsh in its result, but courts have tended to use two techniques for arriving at equitable solutions. Either they have simply discarded condition (c)[34] and sometimes (b),[35] or they have redefined the words so that a wronged plaintiff prevails.[36] The *Young* standard results from the discarding of condition (c). Discarding condition (b) from the *Young* standard results in the Ninth Circuit's standard.[37] The majority of the federal circuits have adopted the *Young* standard.[38]

The second approach, that of redefining the terms used in the NLRB standard, has been adopted by the Fourth and Eighth Circuits. The Eighth Circuit staunchly supported the NLRB standard from its inception until about 1993.[39] Faced with a difficult case, the court backed away from the harshness of the NLRB standard. The plaintiff in *Hukkanen v. International Union of Operating Eng'rs*[40] was forced to resign because of sexual harassment. The defendant employer argued that there was no constructive discharge under the Eighth Circuit's NLRB standard[41] because

---

32. This standard has also been referred to as the "subjective-intent standard," *Derr*, 796 F.2d at 343, and the "specific intent" standard, Sheila Finnegan, Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U. CHI. L. REV. 561, 566 (1986).

33. The sort of conditions that courts consider intolerable varies, depending on what type of claim the plaintiff has made (e.g., Title VII sexual discrimination or ADEA). Since the intolerability condition is essentially the same in all jurisdictions, we are only concerned with the other conditions required for constructive discharge.

34. As did the *Young* court.

35. *See supra* note 31.

36. *See infra* notes 38-57 and accompanying text.

37. [T]he Ninth Circuit's formulation of constructive discharge makes no reference to employer knowledge or intent, but provides instead that: "A constructive discharge occurs when, looking at the totality of circumstances, 'a reasonable person in [the employee's] position would have felt that he was forced to quit because of intolerable and discriminatory working conditions.'"

Turner, 876 P.2d at 1026 (citing Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987) which quotes Satterwhite v. Smith, 744 F.2d 1380, 1381 (9th Cir. 1984)).

38. At least nominally. Most decisions are as poor as those previously cited in articulating exactly what a plaintiff must show in order to prevail on a claim of constructive discharge. For a circuit-by-circuit selection of representative cases, see Finnegan, *supra* note 32, at 564 n.15.

39. *See, e.g., Johnson*, 646 F.2d 1250.

40. 3 F.3d 281 (8th Cir. 1993).

41. As stated in *Johnson*, 646 F.2d at 1256.

the plaintiff's supervisor had clearly wanted her to remain at work so that he "could continue to harass her sexually."[42]

The court sensibly rejected the employer's argument as "bizarre"[43] and found for the plaintiff. To do so, however, the court had either to reject the NLRB standard or to interpret the standard in a way that would allow the plaintiff to prevail. The court chose the latter course and stated that, in reality, "intended" did not mean what it appeared to mean in condition (c) of the NLRB standard.[44] A plaintiff could now prevail merely by showing that conditions (a) and (b) were satisfied, and that the plaintiff's resignation was a "reasonably foreseeable consequence" of the employer's presumably deliberate actions.

The court did not elaborate on this "reasonably foreseeable" standard. A likely interpretation is that the resignation should have been foreseeable to a reasonable person in the employer's position. A tougher question is how foreseeable the resignation must be. There is always a possibility that an employee will resign due to some negative action by the employer. Is a fifty-fifty chance "foreseeable," or must it be more likely than not?

The court seems to have adopted a standard whose lack of clarity makes it adaptable enough to justify any desired outcome. The term "foreseeable" has an unclear meaning; the term "reasonable" is even more vague. The use of the two terms together allows the court to substitute its own judgment for that of either party.

One commentator has asserted that this "reasonably foreseeable" standard eliminates the distinction between the NLRB's current "reasonably foreseeable" standard[45] and the *Young* standard. According to the assertion, once a plaintiff establishes that a reasonable employee in his position would have been compelled to resign, the plaintiff has automatically shown that his resignation was reasonably foreseeable.[46]

---

42. *Hukkanen*, 3 F.3d at 284.

43. *Id.*

44. Our [statement in *Johnson*, that "the employer's actions must have been taken with the intention of forcing the employee to quit"] does not mean constructive discharge plaintiffs must prove their employers consciously meant to force them to quit. . . . When an employer denies a conscious effort to force an employee to resign, as the [employer does] in this case, the employer must necessarily be held to intend the reasonably foreseeable consequences of its actions . . . . Constructive discharge plaintiffs thus satisfy [*Johnson*]'s intent requirement by showing their resignation was a reasonably foreseeable consequence of their employers' discriminatory actions.

Id. at 284-85 (citations omitted).

45. *See supra* note 16.

46. *See* George D. Mesritz, *Constructive Discharge and Employer Intent: Are the Courts Split Over a Distinction Without a Difference?*, EMPLOYEE RELATIONS L.J., Spring 1996, at 91, 99.

Conversely, if the plaintiff can show that his resignation was reasonably foreseeable, then the plaintiff has shown that a reasonable employee in his position would have been compelled to resign.[47] Although this assertion may or may not be true in the abstract,[48] as long as courts continue nominally to apply different standards, it is not particularly useful. A court which feels bound to apply one standard is still unlikely to be swayed by arguments which are based on decisions which apply the other standard.

The current Fourth Circuit standard has an even richer history than that of the Eighth Circuit. The Fourth Circuit also began with the NLRB standard. By 1985, in *Bristow v. Daily Press, Inc.*,[49] the court was saying that although "[o]ur decisions require proof of the employer's specific intent to force an employee to leave, . . . [i]ntent may be inferred through circumstantial evidence, including a failure to act in the face of known intolerable conditions."[50] Intent, therefore, could now be inferred from inaction, according to the Fourth Circuit.

In 1989, in *Paroline* 1,[51] this standard was tentatively modified to the "reasonably foreseeable consequence" standard for reasons similar to those in *Hukkanen*.[52] In 1995, the facts in *Martin v. Cavalier Hotel Corp.*[53] caused the court to strongly endorse the "reasonably foreseeable" standard. Later in 1995, the court apparently softened the "reasonably foreseeable" consequence standard even further: in *Amirmokri v. Baltimore Gas & Elec. Co.*,[54] the court reiterated the standard[55] and re-asserted that intent could "be inferred from a failure [of the employer] to act in the face of known intolerable conditions."[56] The court went on to emphasize that "[a] complete failure to act by the employer is not required; an employer may not insulate itself entirely from liability by taking some token action in response to intolerable conditions. . . . [T]he employer's response must be

47. *Id.* at 97.

48. Mesritz cites three cases and argues that each case would be decided the same way under either the "reasonably foreseeable" standard or the *Young* standard. He also relies on a footnote in the dissent (later adopted as the *en banc* majority opinion) in Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989)(hereinafter *Paroline* 1), vacated in part on reh'g, 900 F.2d 27 (4th Cir. 1990)(en banc)(hereinafter *Paroline* 2) and dicta in *Hukkanen*. However, the author's claim is weakened by the fact that one condition looks at the situation from a reasonable employee's point of view, while the other condition looks at the situation from a reasonable employer's point of view. The facts in *Paroline* 1, discussed below, illustrate how much those perspectives can differ.

49. 770 F.2d 1251 (4th Cir. 1985).

50. *Id.* at 1255.

51. *See supra* note 48.

52. 3 F.3d 281.

53. 48 F.3d 1343 (4th Cir. 1995).

54. 60 F.3d 1126 (4th Cir. 1995).

55. *Id.* at 1132.

56. *Id.* at 1133.

reasonably calculated to end the intolerable working environment."[57] Under this standard, if the employer acts to correct the situation, but that effort is found to have been inadequate, the employer may still be found liable. The court, in effect, has redefined "intent" so that it clearly encompasses gross negligence and possibly even ordinary negligence.

The *Paroline* 1 case is one of the more interesting cases in the field of constructive discharge. The plaintiff, Elizabeth Paroline, was sexually harassed by her supervisor. She reported the harassment to upper management, which promptly reprimanded the supervisor, took away his access to an area which required a security clearance, and promised to obtain a security clearance for Paroline in the immediate future so that she would be able to work in an area separate from that of the harassing supervisor.[58] Other concessions were made to Paroline, including paid leave so that she could recover from her ordeal. However, management's apparently well-intentioned solution required increased contact with the harassing supervisor—at least from the plaintiff's perspective—until Paroline's security clearance could be obtained. Feeling that such contact would be intolerable, Paroline resigned.[59]

The Fourth Circuit is still wrestling with the facts in *Paroline* 1.[60] The

---

57. *Id.*

58. *Paroline* 1, 879 F.2d at 103.

59. *Id.* at 104.

60. *See Amirmokri*, 60 F.3d at 1133, especially the questionable assertion that "no evidence in *Paroline* [1] indicated that it was reasonably foreseeable that the plaintiff would quit following [the employer's] remedial action." The majority opinion in *Paroline* 1 specifically states that:

> There is evidence that [the employer] . . . knew that Paroline was highly upset at the prospect of encountering [the harassing supervisor] at the office. The evidence also showed that [the employer's] remedial action increased the risk of contact between [the harassing supervisor] and Paroline, precisely at a time when Paroline wanted to avoid [the harassing supervisor] altogether.

Paroline 1, 879 F.2d at 108-09. Of course, whether these facts would cause Paroline's resignation to be reasonably foreseeable is arguable, but there is a big difference between "no evidence" and "insufficient evidence."

The most likely explanation for the *Amirmokri* court's assertion (which echoes an assertion made in *Martin v. Cavalier Hotel Corp.*) is that the court fell into one of the traps created when courts start redefining terms. When Judge Wilkinson (the dissenter in *Paroline*) said that "no evidence" existed to show that Unisys acted with the intent to cause Paroline to resign, he was using "intent" in the ordinary, narrow sense to say that Unisys did not act purposefully. *See Paroline* 1, 879 F.2d at 113 (Wilkinson, J. concurring in part and dissenting in part). By the time the Amirmokri court used Wilkinson's "no evidence" quote, the meaning of intent had been expanded in *Martin*, so that an employer would be held to intend the reasonably foreseeable consequences of his actions. Judge Wilkinson never asserted that Paroline's resignation was not reasonably foreseeable; nor did he say anything which would allow one to infer what he would have said had the issue arisen. Thus, the *Amirmokri* court took Wilkinson's statement too far out of context, and as a result it simply doesn't mean the same thing, in the Fourth Circuit in 1995, that it did in 1990.

three judge panel that originally decided the case[61] was split two to one,[62] and the *en banc* decision, *Paroline* 2, which adopted the dissenting opinion of *Paroline* 1, was five to four.[63] The majority in *Paroline* 1 used the definition of intent articulated in *Bristow*,[64] and concluded that there was sufficient evidence for a reasonable fact finder to conclude that Paroline's employer intended that she quit, emphasizing the inadequacy of the employer's attempt to remedy the situation. The dissent[65] conceded that "a failure to act in the face of known intolerable conditions may create an inference that the employer was attempting to force the plaintiff to resign,"[66] but insisted that "such an inference depends upon some evidence that the inaction of the employer was directed at the plaintiff."[67] Therefore, the dissent claimed, because there was no evidence that the employer "engaged in any adverse action or inaction directed at the plaintiff,"[68] a reasonable fact finder could not find constructive discharge, and the district court's grant of summary judgment was proper. The dissent cited no authority for its requirement that the employer's "inaction" be "directed at the plaintiff."[69] Later courts, although frequently citing *Paroline* 2 as an authority for the Fourth Circuit's constructive discharge standard, have not seen fit to repeat this odd requirement.[70]

The current situation, as far as can be determined from the obscure language of the decisions, is that the federal circuit courts are applying, at least nominally, three different standards: the Ninth Circuit standard, applied by the Ninth Circuit only; the "reasonably foreseeable" standard,[71] applied by the Fourth and Eighth Circuits; and the *Young* standard, applied by the remainder of the circuits.[72]

---

61. The majority reversed the district court's grant of summary judgment for the employer. The subsequent *en banc* decision reversed that of the panel, affirming the district court's decision. *See Paroline* 2, 900 F.2d at 47.

62. *Paroline* 1, 879 F.2d at 100.

63. *Paroline* 2. *See supra* note 48.

64. "Although the plaintiff must prove that her employer had specific intent to force her to quit, such '[i]ntent may be inferred through circumstantial evidence, including a failure to act in the face of known intolerable conditions.'" *Paroline* 1, 879 F.2d at 108 (quoting *Bristow*, 770 F.2d at 1255).

65. The dissent ultimately prevailed at the *en banc* rehearing.

66. *Paroline* 1, 879 F.2d at 114.

67. *Id.*

68. *Id.*

69. *Id.*

70. Perhaps out of concern that they may be asked to explain how one "directs" "inaction."

71. With some slight modifications, as detailed above. The temptation to recognize this modified "reasonably foreseeable" standard as another distinct standard has been resisted.

72. The Tenth Circuit seems to be the only circuit to adopt the NLRB standard explicitly, and then to explicitly reject that standard for non-NLRA cases and adopt the

The state courts have not stayed out of the game. For the purposes of this comment, the most significant cases are *Brady v. Elixir Indus.*[73] and *Turner v. Anheuser-Busch, Inc.*[74] In *Brady*, a California Court of Appeal addressed, for the first time,[75] the question of what evidence a plaintiff had to show in order to prevail on a claim of constructive discharge.[76] The *Brady* court delineated a relatively clear standard,[77] which essentially

---

Young standard. However, an argument can be made that the Tenth Circuit has adopted the Ninth Circuit standard. *See Derr*, 796 F.2d at 343-44; *supra* note 31.

73. 242 Cal. Rptr. 324 (Ct. App. 1987).

74. 876 P.2d 1022 (Cal. 1994).

75. "[N]one of this state's courts have addressed the issue of what facts and circumstances will constitute a constructive discharge . . . ." *Brady*, 242 Cal. Rptr. at 327.

76. Although the court stated that the announced standard only applied to "what facts and circumstances will constitute a constructive discharge in a tortious discharge context," *id.* at 327 n.4, the California Courts of Appeal "subsequently expanded the test developed in *Brady* to encompass contract as well as tort claims." Joseph A. Meckes, Note, *Turner v. Anheuser-Busch, Inc.: California Supreme Court Provides Employers with a More Favorable Constructive Discharge Standard*, 26 GOLDEN GATE U. L. REV. 675, 683 (1996).

77. [W]e hold that, to establish a tortious constructive discharge, an employee must show:

> (1) the actions and conditions that caused the employee to resign were violative of public policy;
>
> (2) these actions and conditions were so intolerable or aggravated at the time of the employee's resignation that a reasonable person in the employee's position would have resigned; and
>
> (3) facts and circumstances showing that the employer had actual or constructive knowledge of the intolerable actions and conditions and of their impact on the employee and could have remedied the situation.

Brady, 242 Cal. Rptr. at 328.

Note that the only relevant portion of this standard is condition (3). The *Brady* court set out its standard to replace the following jury instruction, which it held to be "prejudicially erroneous":

> In order for plaintiff to recover for constructive discharge due to unlawful sexual discrimination, plaintiff must prove by a preponderance of the evidence the following:
>
> 1. There was, in fact, discrimination based on sex,
>
> 2. Which discrimination existed at the time of discharge, and
>
> 3. Which discrimination persisted after the employee protested the same to the employer, and
>
> 4. The employer failed to eliminate the discrimination within a reasonable time after notice thereof.
>
> In order for the discrimination to be sufficient to amount to a constructive discharge, it must be such conduct by the employer, made with the intent to cause the employee to resign, and which sex discrimination [sic] conduct made working conditions so intolerable that the employee, as a reasonable person, is

replaced condition (b) of the NLRB and *Young* standards[78] with an "actual or constructive knowledge" standard. As a result, although a plaintiff need not demonstrate that the employer intended to impose or permit the intolerable working conditions, there must be some evidence that the employer had "actual or constructive knowledge"[79] of those conditions and "could have remedied the situation."

In *Turner*,[80] a decision remarkable for its lucidity, the California Supreme Court reviewed and rejected the *Brady* standard,[81] and adopted an "actual knowledge" standard.[82] Under the *Turner* standard, an employer will not be found liable unless it had actual knowledge of the intolerable working conditions. As the *Turner* court notes,[83] the *Brady* court rejected the Ninth Circuit standard on the ground that "not requiring . . . [an] element of any kind relating to the employer's knowledge does not adequately insure that a peaceful, on-the-job resolution has been attempted or was futile."[84] The *Turner* court held that "the *Brady* court's goal of insuring corrective measures will be attempted before a lawsuit is

---

forced to resign.

Id. at 327.

78. Recall that this condition requires that the employer intended to create the intolerable conditions, while condition (c) of the NLRB standard requires that the employer intended to force the employee to resign.

79. "The California Civil Code states that 'Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.'" Meckes, *supra* note 76, at 684 n.61 (quoting CAL. CIV. CODE § 19 (West 1982)).

Note, however, that the California Supreme Court has stated that "the Brady court left [constructive knowledge] undefined." *Turner*, 876 P.2d at 1029.

80. For a detailed discussion of this decision, see Meckes, *supra* note 75.

81. "To the extent it is inconsistent with [the elements in our newly announced standard] in that it requires mere constructive knowledge of the intolerable conditions leading to the employee's resignation, the *Brady* line of cases is disapproved." *Turner*, 876 P.2d at 1029.

82. In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign.

For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees.

Id. at 1029.

83. "The *Brady* court . . . observed that its goal in developing a test for constructive discharge was 'to insure that a peaceful on-the-job resolution has been attempted or was futile.'" *Id.* at 1028.

84. *Brady*, 242 Cal. Rptr. at 328.

required"[85] was not furthered by the "constructive knowledge" component of the *Brady* standard,[86] and that it placed an unfair burden on employers. Emphasizing the superior fairness of its own standard, the *Turner* court stated:

> By requiring employees to notify someone in a position of authority of their plight, we permit employers unaware of any wrongdoing to correct a potentially destructive situation, and we prevent employers from shielding themselves from constructive discharge lawsuits simply by deliberately ignoring a situation that has become intolerable to a reasonable employee.[87]

The precise reasoning and language embodied in the *Brady* and *Turner* decisions and their respective standards exemplify the advantage of coming late to the field. The *Brady* and *Turner* courts, which benefited from hindsight and a lack of hampering precedent, formulated standards which are more precise than those of the federal courts, yet capable of dealing equitably with a greater variety of plaintiffs and defendants.

II. THE MERITS OF THE VARIOUS STANDARDS

In order to decide which of the various standards is most appropriate, one must identify the objectives of an ideal standard. The scenario which originally motivated the creation of the constructive discharge doctrine was that of an individual employer who wished to dispose of an employee without actually discharging him, and who therefore made working conditions so intolerable that the unwanted employee was forced to resign. All of the standards adopted by the courts deal easily with that scenario.[88]

A second scenario has all of the same conditions as the first, except that the individual who wishes to get rid of the employee is his immediate supervisor, the employer is a large corporation, and the senior officers of the corporation are unaware of the existence of either the employee or his supervisor. Intent standards tend to stumble a bit on this scenario, because of the difficult question of whose intent represents that of the corporation.[89]

A third scenario is that of the employee who is sexually harassed by his or her supervisor. Again, using intent standards has been difficult in

---

85. *Turner*, 876 P.2d at 1028.

86. *Id.*

87. *Id.* at 1029. Actually, it seems that the Brady standard would be more effective in preventing "employers from shielding themselves from constructive discharge lawsuits simply by deliberately ignoring a situation that has become intolerable to a reasonable employee," but one is reluctant to quibble with such an otherwise admirably well-reasoned decision.

88. Note that there is no need in this simple situation to give the employer notice along with an opportunity to remedy the problem.

89. This is a topic outside the scope of this discussion.

such cases, because the harassing employers or supervisors may desire that the employee remain, so that the harassment may continue.

Another scenario is that of the employee who finds conditions intolerable which the employer creates, either inadvertently[90] or intentionally, without realizing that the conditions are intolerable. That is, the employer is merely unacceptably insensitive or incompetent. A final scenario which an ideal standard should be capable of dealing with is that of the indifferent employer, combined with a harassing co-worker.

All of the above scenarios should, under certain conditions, result in liability for the employer.[91] On the other hand, an employer should not be found to have constructively discharged an employee who resigns because he or she finds working conditions intolerable, but who has not given the employer a reasonable opportunity to cure the problem. A policy of "not requiring [an] ... element of any kind relating to the employer's knowledge does not adequately insure that a peaceful, on-the-job resolution has been attempted or was futile."[92] For this reason, the Ninth Circuit's standard for constructive discharge must be rejected.[93]

On the other hand, as most courts have noted, the NLRB standard's requirement of proof of actual intent to cause the employee's resignation places far too great a burden on plaintiffs. More importantly, it causes unfair results when the plaintiff is subjected to sexual harassment.[94] For these reasons, the NLRB standard is rejected.

The remaining options are the "reasonably foreseeable consequence" standard of the Fourth and Eighth Circuits,[95] the *Young* standard of the

90. In *Young*, the plaintiff was an atheist who sought exemption from attendance at religious services which were part of monthly staff meetings. Young's supervisor informed her that attendance at the services was mandatory, thus effectively presenting Young with an ultimatum. Rather than waiting to be fired, she resigned. The employer, however, had a pre-existing policy of excusing the participation of any employees who so requested. Hence, the employer inadvertently created the intolerable condition, mandatory attendance at religious services, by a lack of communication with the supervisors. *See Young*, 509 F.2d at 141-44.

91. Liability should result, for example, if the employer fails to make a reasonable attempt to solve the problem, or if the problem has persisted for an unreasonable period of time after the employer was made aware of it. Unfortunately, the term "reasonable" is apparently unavoidable. It is hoped that the proposed standard at least minimizes the role played by such subjective terms.

92. *Brady*, 242 Cal. Rptr. at 328.

93. This is not to imply that the Ninth Circuit's decisions in this area are less than equitable. The claim is only that the Ninth Circuit's standard, *as stated*—not necessarily *as applied*—is inequitable.

94. Since the harassing supervisor in those situations clearly prefers that the plaintiff remain. *See, e.g., Martin*, 48 F.3d at 1353 ("[Supervisor] desired [plaintiff] to remain employed at the hotel so that he could continue to assault her").

95. This standard is also currently used by the NLRB.

remaining circuits,[96] the *Brady* standard, and the *Turner* standard. One problem with the RFC standard is that it is nonsensical to a layperson. In cases where the employer or the employer's agent[97] clearly intended that the plaintiff remain employed, the reasonably forseeable consequence standard permits the court to hold just the opposite: that the employer intended that the plaintiff resign, since such resignation was the reasonably foreseeable consequence of the employer's actions. When a rule requires the courts to enter a separate reality—where an actor is held to have intended just the opposite of what he really intended—it is time to adopt a different rule. Another problem with the RFC standard, which is shared by the *Young* standard, is that an employee who is harassed by fellow employees in non-supervisory positions is apparently not protected. Under both the RFC and *Young* standards, the intolerable workings must be created by the employer, or by an agent of the employer, and the courts, in this context, have uniformly held that employees in non-supervisory positions are not agents of the employer (see the discussion in *Paroline* 1). Although a court applying either standard could conceivably hold an unresponsive employer in such a situation liable for constructive discharge, the disagreements disclosed in the *Paroline* 1 decision and dissent illustrate that the same court could just as easily exonerate such an employer. It is this built-in uncertainty, *inter alia*, which illustrates the inadequacy of both the RFC and the *Young* standards. Designed to give the courts wide discretion, they provide neither employees nor employers with guidelines for behavior.

Two standards remain to be considered: the *Brady* standard and the *Turner* standard. As discussed in the previous section, the primary difference between the two standards is that the *Brady* standard allows an employee to prove that a constructive discharge occurred by showing that the employer had only constructive knowledge of the employee's intolerable working conditions and could have remedied the situation, while the *Turner* standard requires a showing of actual knowledge on the part of the employer. Although the *Turner* majority and the dissent emphasized the supposed differences between the two standards,[98] it is not clear whether there is any difference at all.

The differences hinge primarily on what the *Brady* court meant by "constructive knowledge" of the employer.[99] Presumably, the *Brady* court meant to include situations where a reasonably conscientious employer

96. With the exception of the Ninth, of course.

97. *See, e.g., Martin*, 48 F.2d at 1353 (holding employer responsible for its general manager's acts).

98. *See supra*, note 81.

99. The *Turner* court pointed out that "[t]he *Brady* court did not define the term 'constructive knowledge'." *Turner*, 876 P.2d at 1028.

could have inferred that the employee was being forced to work in intolerable conditions. The question is, what does the *Brady* court mean by "employer"? The *Turner* court explicitly includes all "supervisory employees" as representatives of the employer.[100] The *Brady* court may have felt that even though low-level supervisors are not agents of the employer, the employer should still be held responsible for situations brought to the attention of those supervisors. In that case, the courts would actually have been in substantial agreement. If the *Turner* court is, however, correct in its assertion that the two standards are substantively different, meaning that an employee under the *Brady* standard could prevail on a claim of constructive discharge even though none of the employer's supervisory employees were made aware of the resigning employee's intolerable working conditions, then the *Brady* standard must be rejected as clearly inequitable. An employee assertive enough to quit and then sue should be required to be assertive enough to inform his or her supervisor of intolerable working conditions and to give the employer a reasonable opportunity to resolve the situation. If the supervisor is the source of the harassment, the employee should be required to inform a more senior member of management. Regardless of what the *Brady* court actually meant, however, the vagueness of the term "constructive knowledge," recognized by the California Supreme Court, makes the *Brady* standard inferior to the *Turner* standard.

Remaining, then, is the *Turner* standard. Is it ideal? No. Is it sufficient? Well, almost. It does satisfy the requirement that the employer's intent should be disregarded, if the phrase "either intentionally created or" in the first sentence of the standard is set aside.[101] A few areas still need clarifying, however.

First, there is the question of who qualifies as a supervisory employee. This question occurs throughout labor law, and the courts have

---

100. *See id.* at 1029.

101. Then the first sentence reads:

> In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer . . . knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign.

Turner, 876 P.2d at 1029. *See also supra*, note 82.

Note that the standard is neither weakened nor strengthened by this modification. An employer found to have intentionally created the intolerable working conditions would still be liable under the modified standard, since the employer could hardly have intentionally created the conditions without having actual knowledge of them. Conversely, an employer found to have knowingly permitted the conditions to exist would also be liable under the unmodified standard.

generally restricted the category to those employees who have the right to hire, fire, or otherwise control the employee. In particular, a specific plaintiff's "supervisors," for labor law purposes, are generally only those employees who have the right to hire or fire the plaintiff, or who have been designated as the plaintiff's supervisors.[102] The question is crucial because "the realities of modern employment"[103] are such that a requirement that a supervisor must have the rough equivalent of the authority to hire or fire before he or she counts as a supervisor has significant potential for inequity. The average employee should not be expected or required to know that only supervisors who have a certain authority count as supervisors under the law. If dissatisfied employees are required to make

---

102. The NLRA defines "supervisor" as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11)(1994).

In Title VII, the key definition is that of "employer."

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 [of the United States Code, 5 USCS § 2102]), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26 [Internal Revenue Code of 1954, Internal Revenue Code of 1986], except that during the first year after March 24, 1972 [the date of enactment of the Equal Employment Opportunity Act of 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. § 2000e(b)(1994).

> An individual qualifies as an "employer" under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or employment. The supervisory employee need not have ultimate authority to hire or fire to qualify as an employer, as long as he or she has significant input into such personnel decisions. Furthermore, an employee may exercise supervisory control over the plaintiff for Title VII purposes even though the company has . . . designated another individual as the plaintiff's supervisor. As long as the company's management approves or acquiesces in the employee's exercise of supervisory control over the plaintiff, that employee will hold "employer" status for Title VII purposes.

Paroline, 879 F.2d at 104 (citations omitted).

103. *See supra*, note 28.

some non-harassing supervisor aware of their plight, those employees should not be penalized after the fact because they did not contact the "right" supervisor. They must only be expected to contact the person or persons authorized to give them orders or assignments—not first to inquire as to whether that supervisor has "significant input into" the employee's hiring or firing.[104] Therefore, "supervisory employees" is explicitly defined in the proposed modified *Turner* standard to include any employee authorized to give orders, instructions or assignments to the plaintiff. Anyone whom the plaintiff is expected to obey, therefore, is a supervisory employee. Note that this definition provides employers with a strong incentive to implement and thoroughly publicize official, employee-friendly grievance procedures, to insure that they are not held liable for constructive discharges that could have been avoided through efficient communications.

A second criticism of the *Turner* standard is that it does not address the question of an employer's obligation to "cure" the situation. The proper standard was enunciated in *Amirmokri*: an employer will be found to have knowingly permitted intolerable working conditions when, after being made aware of those conditions, the employer made no response, or the employer did respond, but the response was not "reasonably calculated to end [the] intolerable [working] conditions."[105] The employer should not be found liable unless he "failed to eliminate the [intolerable conditions] within a reasonable time after notice thereof."[106]

Finally, the requirement contained in the last clause of the *Brady* standard—that the employer "could have remedied the situation"[107]—should be adopted. Although there appear to be no cases where a court found that an employee was exposed to intolerable conditions which could not have been remedied by the employer, it would be inequitable to hold an employer liable in such a situation. Since the goal here is to find a comprehensive, equitable, and well-defined standard for constructive discharge, this relatively uncontroversial additional condition will be incorporated.

The proposed standard is as follows: in order to prevail on a claim of constructive discharge, a plaintiff must show, by a preponderance of the evidence,[108]

---

104. *See supra*, note 102. The assumption here, of course, is that there has been no well-publicized, official grievance procedure established by the employer.

105. *Amirmokri*, 60 F.3d at 1133. The court explained that "an employer may not insulate itself entirely from liability by taking some token action in response to intolerable conditions." *Id.* at 1133.

106. *Brady*, 242 Cal. Rptr. at 327.

107. *Id.* at 328.

108. This is the usual standard of proof. *See, e.g., Turner*, 876 P.2d at 1029.

(a) that the working conditions of the plaintiff, at the time of his or her resignation, were so intolerable that a reasonable person in the plaintiff's position would feel compelled to resign; and

(b) that an agent of the employer, such as an officer, director, or supervisory employee, was aware of those intolerable conditions and that those conditions had persisted after

(i) the employer's agent had become aware of them and

(ii) had a reasonable time to correct the situation.

The following provisos apply:

(1) The term "supervisory employee" shall include all employees to whom the plaintiff must answer, unless the employer has instituted and made all employees aware of an official grievance procedure which facilitates employee complaints without reprisal. If the intolerable working conditions are caused by a supervisor[109] of the plaintiff, then the plaintiff is obliged to notify at least one other agent of the employer.

(2) The conditions must be such that the employer was capable of correcting them.

(3) The employer's response, if any, must be reasonably calculated to end the intolerable working conditions. Furthermore, the employer's response must actually end the intolerable conditions within a reasonable time after notice thereof.[110]

III. CONCLUSION

The standard for constructive discharge is still evolving. The current standards are more enlightened and comprehensive than those previously employed, but the courts, especially the federal courts, have yet to adopt and carefully delineate a thoroughly equitable, yet practical standard. This comment has attempted to sketch the current state of the law of constructive discharge and to suggest a standard for the future.

109. Not identical with the employer.

110. In other words, the employer might not get it exactly right the first time, and may deserve an opportunity to try again. On the other hand, the plaintiff should not be required to tolerate endless inept attempts by the employer at correction while he or she suffers.