COMMENTS

HELP WANTED: AN EXPANSIVE DEFINITION OF CONSTRUCTIVE DISCHARGE UNDER TITLE VII

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This Comment calls for an expansive definition of constructive discharge, proposing a subjective standard which examines the impact on the individual of the hidden discrimination that courts have often failed to recognize as a cause of constructive discharge. The doctrine of constructive discharge, which allows a victim of discrimination to receive damages in the form of back pay when she leaves an intolerably or intentionally discriminatory work environment, is one part of the vast body of law on the enforcement of Title VII of the Civil Rights Act of 1964.[1] A later development, without specific congressional authorization,[2] the doctrine of constructive discharge has not evolved to the same degree as the law under Title VII generally and at present has only limited applicability to the majority of Title VII cases.[3]

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[1] Title VII provides that:

> (a) . . . It shall be an unlawful employment practice for an employer—
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> (1)to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1982)

[2] The courts created the doctrine of constructive discharge by analogy to cases arising under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982). *See* 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); Note, *Choosing A Standard For Constructive Discharge in Title VII Litigation,* 71 CORNELL L. REV. 587, 591 (1986).

[3] *Cf.* 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 86.50 (1987) (noting that as a result of the exacting standards of the early constructive dis-

Currently, Title VII effectively remedies and deters the blatant discrimination once common in the American workplace.[4] Similarly, the doctrine of constructive discharge can provide redress for blatant discrimination.[5] However, Title VII can also be effective against both nonovert and unintentional discrimination through disparate treatment and disparate impact analyses.

Under the disparate treatment analysis, an employee can make out a prima facie case of employment discrimination by proving four objective factors:

> (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.[6]

Although intent is an element of disparate treatment,[7] if this prima facie case is made out, the intent of the employer to discriminate is presumed.[8]

Under the disparate impact analysis, a neutral employer policy may be found to be in violation of Title VII if statistics demonstrate

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charge cases, the doctrine had little importance in discrimination cases). This Comment suggests that, under the current standards, the applicability of the constructive discharge doctrine remains too limited.

[4] *See* J. FEAGIN & C. FEAGIN, DISCRIMINATION AMERICAN STYLE: INSTITUTIONAL RACISM AND SEXISM 43 (2d ed. 1986); B. WILLIAMS, BLACK WORKERS IN AN INDUSTRIAL SUBURB 10 (1987).

[5] *See, e.g.,* Lewis v. Federal Prison Indus., 786 F.2d 1537 (11th Cir. 1986) (age harassment); Easter v. Jeep Corp., 750 F.2d 520 (6th Cir. 1984) (sexual harassment); Calcote v. Texas Educ. Found., 578 F.2d 95 (5th Cir. 1978) (racial harassment); Taylor v. Jones, 489 F. Supp. 498 (E.D. Ark. 1980) (same), *aff'd in relevant part following new trial,* 653 F.2d 1193 (8th Cir. 1981).

[6] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). In International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), the Court defined disparate treatment as a situation in which "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." *Id.* at 335 n.15. The *McDonnell Douglas* test has been modified to apply to various employment practices including compensation, promotion, and transfer. *See* 2 A. LARSON & L. LARSON, *supra* note 3, § 50.22.

[7] *See International Bhd. of Teamsters,* 431 U.S. at 335 n.15.

[8] *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978); 2 A. LARSON & L. LARSON, *supra* note 3, § 50.61. Of course, the employer may rebut the employee's prima facie case with evidence of nondiscriminatory motivation. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); 2 A. LARSON & L. LARSON, *supra* note 3, § 50.61. If, however, there is direct evidence of intentional discrimination, the employer must rebut with evidence that the employment decision would have been the same absent the discrimination. *See* Hopkins v. Price Waterhouse, 825 F.2d 458, 470-71 (D.C. Cir. 1987).

that it adversely affects minority workers.[9] Employer intent is not an element; the focus is on the impact of the policy on the worker.[10]

In contrast, constructive discharge requires either a specific intent by the employer to force the employee to resign[11] or that the employment conditions be so intolerable that a reasonable employee would be forced to resign.[12] Intolerable employment conditions are demonstrated

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[9] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). In *International Bhd. of Teamsters,* the Supreme Court described disparate impact cases as those which "involve 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." 431 U.S. at 336 n.15. In a majority of circuits, the neutral practices may include subjective, as well as objective, employment practices if the plaintiffs prove the causal connection between those practices and the disparate impact. *See* Antonio v. Wards Cove Packing Co., 810 F.2d 1477, 1480 n.1, 1482 (9th Cir. 1987) (en banc) (applying impact analysis to subjective criteria, following the Second, Third, Sixth, Tenth, Eleventh, and District of Columbia Circuits, and noting conflicting results in other circuits); Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination,* 73 VA. L. REV. 1297, 1339-42 (1987) (discussing the application of disparate impact to subjective selection procedures).

[10] *See International Bhd. of Teamsters,* 431 U.S. at 336 n.15.

[11] The specific intent requirement reflects the development of the constructive discharge doctrine by analogy to the National Labor Relations Act ("NLRA"). The constructive discharge standard articulated by the National Labor Relations Board included the requirement that "the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign." Crystal Princeton Ref. Co., 222 N.L.R.B. 1068, 1069 (1976). Early cases applying constructive discharge adopted this standard, *see* 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), and it is still the applicable standard in the Fourth and Eighth Circuits. *See, e.g.,* Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) ("Our decisions require proof of the employer's specific intent to force an employee to leave."), *cert. denied,* 106 S. Ct. 1461 (1986); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981) ("To constitute a constructive discharge, the employer's actions must have been taken with the intention of forcing the employee to quit."). For a discussion of the employer intent standard for constructive discharge cases and its evolution from NLRA cases, see Note, *supra* note 2, at 588-91; Comment, *Constructive Discharge Under Title VII and the ADEA,* 53 U. CHI. L. REV. 561, 566-68 (1986).

[12] The reasonable employee standard, originally articulated by the First Circuit in a first amendment case, Rosado v. Santiago, 562 F.2d 114 (1st Cir. 1977), requires a finding "that the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Id.* at 119. The standard was applied to constructive discharge in the Title VII context and further refined by the Fifth Circuit in Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65-66 (5th Cir. 1980) (requiring aggravating factors to prove the existence of an intolerable work environment), and is followed by the Second, *see* Pena v. Brattleboro Retreat, 702 F.2d 322, 325-26 (2d Cir. 1983), Third, *see* Goss v. Exxon Office Sys., 747 F.2d 885, 887-88 (3d Cir. 1984), Sixth, *see* Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982), Ninth, *see* Noland v. Cleland, 686 F.2d 806, 812-13 (9th Cir. 1982), Tenth, *see* Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986), Eleventh, *see* Henson v. City of Dundee, 682 F.2d 897, 907 (11th Cir. 1982), and District of Columbia, *see* Clark v. Marsh, 665 F.2d 1168, 1173-74 (D.C. Cir. 1981), Circuits. For a discussion of the development of the reasonable employee standard, see Note, *supra* note 2, at 598-604; Comment, *supra* note 11, at 563-66. This Comment con-

by aggravating factors which accompany the discrimination,[13] commonly harassment.[14] Thus, a victim of employment discrimination may be in the anomalous position of being able to establish a prima facie case of discrimination under either a disparate impact or disparate treatment standard but unable to establish constructive discharge under the current standards.[15] As a result, an employee who quits her job in the face of discrimination that she finds intolerable is often found to have left voluntarily, thereby forfeiting any right to equitable relief in the form of back pay or otherwise.[16]

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trasts its proposed standard to the majority reasonable employee standard.

[13] *See Bourque,* 617 F.2d at 65-66 (unequal pay alone is not so aggravating that it would cause a reasonable employee to resign); *see also* Note, *supra* note 2, at 604-17 (discussing the development of the *Bourque* aggravating factors analysis).

[14] *See, e.g.,* Calcote v. Texas Educ. Found., 578 F.2d 95, 97 (5th Cir. 1978) ("[C]onstructive discharge was based upon the salary and merit pay discrepancies . . . and upon alleged harassment."); Parker v. Siemens-Allis, Inc., 601 F. Supp. 1377, 1389 (E.D. Ark. 1985) ("[E]vidence of continuing discrimination on the basis of sex in the form of transfers, unequal pay and harassment was presented which would enable the Court to conclude a constructive discharge took place."); *see also supra* note 5.

Cases in which the underlying Title VII violation is sexual harassment have received considerable recent attention from the courts. In Meritor Sav. Bank, FSB v. Vinson, 106 S. Ct. 2399 (1986), the Supreme Court's first treatment of sexual harassment in employment, the Court held that sexual harassment was a form of discrimination prohibited under Title VII. *Id.* at 2409. Sexual harassment is already recognized as an aggravating factor for the purposes of constructive discharge, but *Vinson* may help develop the law of constructive discharge to include discharge from hidden discrimination. The *Vinson* Court recognized the link between discrimination and mental injury necessary to make out a claim of constructive discharge under the subjective standard proposed by this Comment. The Court approved an expansive interpretation of Title VII because " '[O]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.' " *Vinson,* 106 S. Ct. at 2405 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972)). The same rationale supports this Comment's argument for an expansive definition of constructive discharge.

For an in depth discussion of *Vinson* as well as a thorough review of the literature and cases relating to sexual harassment, see Note, *Between the Boss and a Hard Place: A Consideration of* Meritor Savings Bank, FSB v. Vinson *and the Law of Sexual Harassment,* 67 B.U.L. REV. 445 (1987). *See also* Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII,* 97 HARV. L. REV. 1449, 1467 (1984) ("[C]ourts should adopt clear standards defining abusive environment sexual harassment.").

[15] This Comment does not suggest that the plaintiff will prevail on her Title VII claim every time she establishes a prima facie case based on nonovert discrimination. The employer is free to rebut the prima facie case by demonstrating a legitimate nondiscriminatory reason for the allegedly discriminatory act. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Thus, Title VII, too, does not sufficiently combat institutional racism. The limitations of current law under Title VII is beyond the scope of this Comment. For a criticism of current law under Title VII, see Comment, *Title VII Today: The Shift Away from Equality,* 20 J. MARSHALL L. REV. 525 (1987).

[16] An employee who quits her job due to discrimination may recover damages in the form of back pay only if she proves constructive discharge. *See, e.g.,* Muller v.

By focusing on employer intent or aggravating factors in constructive discharge cases, courts fail to recognize that discrimination can be subtle, even unintentional, yet have a devastating enough effect on an employee to force her to resign.[17] The existence of hidden "institutional" discrimination is not a novel concept. It has been discussed by many legal commentators[18] and is the subject of much psychological and sociological research.[19]

United States Steel Corp., 509 F.2d 923, 930 (10th Cir. 1975) ("Unless [plaintiff] was constructively discharged, he would not be entitled to damages in the form of back pay . . . from the date of leaving the [defendant's] employ."). This is because Title VII requires mitigation of 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." 42 U.S.C. § 2000e-5(g) (1982). *See generally* 2 A. LARSON & L. LARSON, *supra* note 3, § 55.37(c) (discussing the Title VII mitigation requirement). Thus, in Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1122 (D.D.C. 1985), *aff'd in part and rev'd in part,* 825 F.2d 458 (D.C. Cir. 1987), the district court awarded the plaintiff only attorney's fees for her successful claim of sex discrimination because she failed to demonstrate that her resignation was the result of constructive discharge. The court of appeals reversed the district court's ruling on constructive discharge and remanded for a determination of appropriate damages and relief.

[17] Because intent is necessary under the disparate treatment analysis, unintentional discrimination may have to be remedied under a disparate impact analysis. *See* Rutherglen, *supra* note 9, at 1310-11. However, in Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987), the District of Columbia Circuit stated that, "[T]he fact that some or all the partners at Price Waterhouse may have been unaware of that motivation [to discriminate], even within themselves, neither alters the fact of its existence nor excuses it." *Id.* at 469. In *Hopkins,* the district court found that the plaintiff made out a prima facie case of disparate treatment that the defendant successfully rebutted. *Id.* at 463-64. However, the district court also found direct evidence of discrimination in the "unconscious sexual stereotyping" which played a role in the partnership evaluation, and the court of appeals affirmed this finding. *Id.* at 464, 468.

[18] *See, e.g.,* Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling,* 17 HAR. C.R.-C.L. L. REV. 133, 140 (1982) (defining institutional racism as "the subtle and unconscious racism in schools, hiring decisions, and the other practices which determine the distribution of social benefits and responsibilities"); Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics,* 24 UCLA L. REV. 581, 596 (1977) (defining institutional racism as "another, more subtle kind of racism—unintentional, perhaps, but effective—which is as much a part of the legal system as are overt and covert racist laws and practices"); *cf.* Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,* 39 STAN. L. REV. 317, 328-44 (1987) (discussing the existence and negative effects of unconscious racism); Spiegelman, *Court Ordered Hiring Quotas After* Stotts: *A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine,* 20 HARV. C.R.-C.L. L. REV. 339, 371-78 (1985) (describing "victim group isolation" as the discrimination resulting from the underrepresentation of a group in the workplace).

[19] *See* Alvarez, *Institutional Discrimination in Organizations and Their Environments,* in DISCRIMINATION IN ORGANIZATIONS 2, 2 (1979) (defining institutional discrimination as "a set of social processes through which organizational decision making, either implicitly or explicitly, results in a clearly identifiable population receiving fewer psychic, social, or material rewards per quantitative and/or qualitative unit of performance than a clearly identifiable comparison population within the same organi-

In examining charges of constructive discharge, courts should abandon the employer intent or reasonable person test in favor of a subjective standard that can take into account the effect of nonovert, "institutional" racism on the *individual* employee. This effect may be demonstrated where the employee suffers from adverse physical or psychological symptoms as a result of the discrimination.[20] Thus, under this standard, a victim of a Title VII violation who is forced to leave a workplace intolerably contaminated by nonovert "institutional" discrimination may receive equitable relief in the form of back pay or other relief under the doctrine of constructive discharge.

This Comment discusses current employment discrimination law, utilizes sociological and psychological studies, and borrows from workmen's compensation law to create a new standard for constructive discharge. Part I illustrates the current anomalous situation whereby plaintiffs can prove a violation of Title VII but not constructive discharge and proposes a new standard to redress this situation. Part II develops a mode of proof to meet the proposed standard, describing institutional discrimination and how its potential negative physical and psychological impact can result in constructive discharge. Part III discusses causation and the nexus between the institutional discrimination and its negative impact on the employee necessary to prove constructive discharge under the proposed standard.

I. The Failure of Current Law to Redress Constructive Discharge from Institutional Discrimination

A plaintiff who is the victim of a Title VII violation may be compelled to leave her place of work by the negative effects of an atmosphere of discrimination, the existence of which courts currently do not recognize. The following interview with a black managerial employee provides one example of how institutional discrimination may result in

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zational constraints"); Barbarin, *Community Competence: An Individual Systems Model of Institutional Racism,* in INSTITUTIONAL RACISM AND COMMUNITY COMPETENCE 6, 8 (1981) (comparing overt racism, "observable behavior of a white individual or community," with institutional racism, "organizational or system processes, behaviors, policies, or procedures, which produce negative outcomes for nonwhites relative to those for whites"); *cf.* B. WILLIAMS, *supra* note 4, at 11 (describing "subtle, informal types of discrimination" as manifested in terms and conditions of employment, discharge, and promotion); J. WORK, RACE, ECONOMICS, AND CORPORATE AMERICA 26 (1984) (defining racism as "a set of institutionalized and negative social values, . . . whether expressed within or outside of institutions by individual whites or groups, . . . which serves to foreclose full and equal access to socioeconomic and political institutions").

[20] *See infra* notes 110-31 and accompanying text.

constructive discharge:

> After Ken Rhodes' supervisor ignored the due date for his annual performance review last year, the 24-year-old auditor for a major Manhattan bank began to worry. Past reviews indicated the Howard University graduate's exemplary performance, yet two white colleagues with the same seniority were promoted a month before. Surely his promotion would come soon, he thought. It didn't. According to his supervisor, all promotions would be deferred for four months due to a departmental reorganization.
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> "I knew that was a lie," says Rhodes [not his real name], his voice rising slightly as he recalled that meeting. "I knew all promotions were not being deferred." For a fast-tracker like Rhodes, putting his career on hold was a bitter pill to swallow. But realizing the repercussions of crying racism, Rhodes chose not to fight back, eventually becoming depressed about his job and his career. "It seemed as if no matter how well I did my job it was all for nothing."[21]

A plaintiff in Rhodes' situation may be able to make out a prima facie case of a Title VII violation based on disparate treatment. However, if depression resulting from this Title VII violation forces her to leave her job, she cannot make out a cause of action for constructive discharge. Under current law, a single Title VII violation such as discriminatory unequal pay, transfer, or failure to promote is generally insufficient to support a cause of action for constructive discharge absent proof of employer intent to discharge or aggravating factors creating an intolerable employment environment.[22]

A. *Judicial Indifference to Mental Injury Caused by Unequal Pay, Failure to Promote, and Discriminatory Transfer*

In the context of unequal pay, the court in *Bourque v. Powell Electrical Manufacturing Co.*[23] stated: "[D]iscrimination manifesting itself in the form of unequal pay cannot, alone, be sufficient to support

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[21] Greene, *New Prescriptions for Executive Stress,* BLACK ENTERPRISE, Aug. 1985, at 62, 62. In Rhodes' story, his patience was rewarded when a black woman replaced his former supervisor and promoted him. Not all tales of discriminatory failure to promote will have this satisfactory ending.

[22] *See infra* notes 23-26 and accompanying text. Some courts, however, are starting to take a broader view of constructive discharge. *See infra* notes 41-54 and accompanying text.

[23] 617 F.2d 61 (5th Cir. 1980).

a finding of constructive discharge. . . . Unequal pay is not a sufficient justification to relieve [the employee] of her duty to mitigate damages by remaining on the job."[24] Like unequal pay, "failure to promote, in and of itself is not sufficient to result in a constructive discharge."[25] And, as in other constructive discharge cases, when the underlying Title VII violation is discriminatory transfer, the employee must prove that her transfer would have resulted in intolerable working conditions.[26]

This strict standard for constructive discharge began with *Rosado v. Santiago,*[27] a case involving constructive discharge based on a first amendment violation. In *Rosado,* a social worker alleged that he had been constructively discharged by means of a retaliatory transfer from the position of district director in one office to a nondirector position with equal pay in another after he criticized his immediate superior in a letter to the regional supervisor.[28] In holding that a constructive discharge had occurred, the trial court focused on the diminution of title, prestige, and duty, and termed Rosado's transfer a demotion.[29] The First Circuit affirmed the finding of retaliatory discharge but reversed the ruling on constructive discharge, noting that Rosado's new working conditions were not objectively intolerable.[30] In remanding, the court set forth a strict standard for constructive discharge, stating that the "limited blow to one's pride or prestige does not provide reason enough

[24] *Id.* at 65-66; *see also* Pittman v. Hattiesburg Mun. Separate School Dist., 644 F.2d 1071, 1077 (5th Cir. 1981) (inequality in pay did not "ipso facto" constitute constructive discharge for a black worker because of "cordial" employment conditions and the lack of aggravating factors); Heagney v. University of Wash., 642 F.2d 1157, 1166 (9th Cir. 1981) (employer's discrimination in terms of unequal pay alone would not be constructive discharge within the purview of Title VII), *overruled on other grounds sub nom.* Antonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987).

[25] Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982); *accord* EEOC v. Federal Reserve Bank, 698 F.2d 633, 672 (4th Cir. 1983) (absent harassment, failure to promote is insufficient as a basis for a claim of constructive discharge), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984).

[26] *See supra* note 12.

[27] 562 F.2d 114 (1st Cir. 1977).

[28] *Id.* at 119.

[29] *Rosado* is important because it is typical. The court of appeals reversed the district court's finding of a demotion and its holding on constructive discharge, failing to realize that transfers which are not characterized by the employer as demotions can entail a significant loss of prestige, duty, or influence. Thus, courts diligently should attempt to identify and remedy these de facto demotions which offer employers a tactical means by which to rid themselves of certain employees by imposing intolerable changes in working conditions.

[30] *See Rosado,* 562 F.2d at 117, 119.

to resign . . . ."[31] This case was relied on by the court in *Bourque* for the development of its aggravating factors analysis.[32]

By refusing to recognize a claim of constructive discharge in the absence of employer intent or the aggravating factor of harassment, a court may fail to recognize other very real aggravating factors justifying constructive discharge. The court in *EEOC v. Federal Reserve Bank*[33] summarily rejected " 'embarrassment and an unfavorable working environment' " as a result of being passed over for promotion as a basis for constructive discharge, without any consideration that intolerable mental injury can result.[34]

Judicial insensitivity to the potentially damaging psychological effects of employment discrimination is again apparent in *Neale v. Dillon.*[35] The underlying Title VII claim was failure to promote and transfer to a nonsupervisory job while the plaintiff was on maternity leave,[36] which the plaintiff found intolerably damaging to her prestige. While the court found no discrimination in violation of Title VII, it went further and suggested that the plaintiff's personal embarrassment would not have constituted constructive discharge had discrimination been found.[37] Similarly, in *Schaulis v. CTB/McGraw-Hill,*[38] the court stated that "[a]n employer has not effected a constructive discharge merely because an employee believes that she has . . . limited opportunities for advancement . . . ."[39]

Of course, not all plaintiffs claiming emotional harm will be able to prove its existence or its relation to discrimination. In *Rosado,* the court wisely considered the public policy issues which require that employees not be allowed to walk off their jobs whenever they are informed of a transfer that is not to their liking. Some transfers undoubtedly are necessary to the operation of business organizations. Indeed, it

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[31] *Id.* at 119-20.

[32] *See supra* note 12.

[33] 698 F.2d 633 (4th Cir. 1983), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984).

[34] *Id.* at 672. The court's discussion of constructive discharge is dictum. The claim of constructive discharge was mooted by the fact that the court held that the plaintiff did not establish an underlying Title VII violation. *Id.*

[35] 534 F. Supp. 1381 (E.D.N.Y.), *aff'd,* 714 F.2d 116 (2d Cir. 1982).

[36] *Id.* at 1386.

[37] *Id.* at 1390. There is a modicum of wisdom in the *Neale* opinion. In reviewing the evidence of discriminatory transfer, the court noted that the plaintiff's new position was not generally perceived as lacking in prestige and that transfer from a supervisory position in one department to a nonsupervisory position in another was both commonplace and nonstigmatizing in the particular workplace. *Id.*

[38] 496 F. Supp. 666 (N.D. Cal. 1980) (holding that the plaintiff failed to make out a prima facie case of sex discrimination).

[39] *Id.* at 676.

is the express province of the employer to make these decisions.[40] However, plaintiffs with real injury causally related to employment discrimination should receive redress from the courts.

B. *Toward Recognizing Constructive Discharge from Mental Injury*

To provide redress for constructive discharge manifested as mental injury from discrimination, courts need not radically depart from current law governing constructive discharge. Courts simply need to adopt a more expansive view of what may constitute an aggravating factor. Just as harassment itself may be both the Title VII violation and the cause of constructive discharge, courts must recognize that a Title VII violation such as discriminatory unequal pay, transfer, or failure to promote may also create an intolerable working environment through its effect on the mental health of the plaintiff.

Courts have already begun to realize that they must recognize the effects of discrimination on the individual victim. In *Schneider v. Jax Shack, Inc.*,[41] the Eighth Circuit, which ordinarily applies an employer intent standard,[42] focused instead on the impact of the constructive discharge on the employee.[43] Although the court was concerned with an economic impact,[44] the shift in focus from the subjective employer intent to the impact on the individual employee suggests that the Eighth Circuit is expanding its view of what may constitute constructive discharge.

With *Goss v. Exxon Office Systems*,[45] the Third Circuit also presented a broad view of what factors are relevant to constructive discharge. In *Goss*, a female sales representative claimed sex discrimination resulting in a discriminatory transfer. The court held that Goss

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[40] *See Rosado*, 562 F.2d at 119:

> Unless the transfer is, in effect, a discharge, the employee has no right simply to walk out; he must accept the orders of his superior, even if felt to be unjust, until relieved of them by judicial or administrative action. Were this not so, a public employee would be encouraged to set himself up as the judge of every grievance; and the public taxpayer would end up paying for periods of idleness while the grievance was being adjudicated.

[41] 794 F.2d 383 (8th Cir. 1986).

[42] *See* Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981).

[43] The court found the impact to be great enough to constitute an *actual* discharge. *Schneider*, 794 F.2d at 384-85.

[44] "Employers should not be able to avoid responsibility for discriminatory discharges by first demoting employees to part-time or fill-in status or by stringing out employees' tenures with nebulous commitments until the employees for their own economic well-being must 'quit.'" *Id.* at 385.

[45] 747 F.2d 885 (3d Cir. 1984).

had been constructively discharged, noting not only that the transfer was a move to an inferior work environment involving a substantial cut in pay,[46] but also that the reassignment had shattered the plaintiff's confidence, an asset essential to her performance as a saleswoman.[47]

Clark v. Marsh[48] sounds a particularly hopeful note. *Clark* is one of the few cases in which courts have found a constructive discharge when the plaintiff's primary allegation was discriminatory failure to promote.[49] Clark retired because she was not promoted to a position for which she was qualified and to which she was the logical successor. The court found that Clark's retirement amounted to constructive discharge because: 1) she had been the victim of a "continuous pattern of discriminatory treatment encompassing deprivation of opportunities for promotion, lateral transfer, and increased educational training"; 2) she reasonably expected numerous opportunities for advancement; and 3) she had "vigorously pursued" these opportunities to no avail.[50] Most importantly, the court observed that "the predictable humiliation and loss of prestige accompanying her failure to obtain this particular position constitute[d] the 'aggravating factors' required by *Bourque*."[51]

Clark represents a step forward for the law of constructive discharge for three reasons. First, the court emphasized the humiliation

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[46] Central to the issue of whether a transfer constitutes constructive discharge in many cases is whether the transfer is tantamount to a substantial demotion. While demotion is not by any means an essential element, courts are far more likely to find for the employee if the transfer is a demotion in disguise. *Compare* Thompson v. McDonnell Douglas Corp., 552 F.2d 220, 222 (8th Cir. 1977) (finding no constructive discharge where the transfer actually gave the plaintiff a better chance at promotion) *with* Jacobs v. Martin Sweets Co., 550 F.2d 364, 370 (6th Cir. 1977) (finding demotion and constructive discharge), *cert. denied,* 431 U.S. 917 (1977).

[47] *Goss,* 747 F.2d at 888-89 (citing and approving district court finding). *See also* EEOC v. Hay Associates, 545 F. Supp. 1064, 1085-87 (E.D. Pa. 1982) (holding that sex discrimination in the forms of failure to promote, unequal pay, and false attribution of the plaintiff's work to male colleagues was sufficient to establish intolerable working conditions resulting in constructive discharge).

[48] 665 F.2d 1168 (D.C. Cir. 1981).

[49] The plaintiff in *Clark,* an army employee, alleged that she was denied promotion on the basis of sex and was the victim of retaliatory action for having filed a formal complaint of employment discrimination against the Army. *See* Clark v. Alexander, 489 F. Supp. 1236, 1238, 1243 (D.D.C. 1980), *aff'd in relevant part sub nom.* Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981).

[50] *Clark,* 665 F.2d at 1174.

[51] *Id.* at 1175-76. This recognition represents a departure from the tendency of many courts not to discuss subjective mental impact and to examine only objective evidence of harassment as an aggravating factor or the cause of an intolerable workplace environment. *See supra* note 14 and accompanying text. The doctrine of constructive discharge also has expanded outside of the context of Title VII. *See* Parrett v. City of Connersville, 737 F.2d 690, 694 (7th Cir. 1984) (finding constructive discharge due to humiliation and mental injury in a § 1983 case in which the employee was given no work at all to do in his empty, windowless office).

associated with nonpromotion and explicitly identified it as an aggravating factor in constructive discharge. Although the court conceded that some embarrassment and loss of prestige are predictable in a failure to promote case, it nonetheless viewed these factors as highly significant.[52] In contrast, most courts have viewed embarrassment as part and parcel of nonpromotion and have not considered it an aggravating circumstance in the context of a constructive discharge.[53] Second, the court recognized the importance of Clark's "vigorous pursuit" of success. This vigorous pursuit of success resulted in constant frustration to Clark and contributed to what ultimately became intolerable working conditions. Such a finding should help employees who, after devoting substantial physical and psychological energies to their jobs, find that the denial of an expected promotion makes life in their workplace intolerable. Third, the *Clark* court employed a subjective analysis, giving weight to Clark's expectation of promotion. The fact that Clark justifiably believed that she would receive a promotion helped her to establish the intolerability of her present position. Generally, an employee's individual expectations are not considered in the constructive discharge context.[54]

Thus, *Clark* represents a meaningful step forward for minority employees. The expansive view in *Clark* of what may constitute an aggravating factor should be adopted by all the circuit courts of appeals.

Despite an emphasis on the individual, rather than the objective "reasonable" employee, the expansion of the concept of aggravating

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[52] Clark had achieved worldwide recognition in her capacity as acting director of the Army Office of Employment Policy and Grievance Review. *Clark,* 665 F.2d at 1175. It is possible that the court took into account the far-reaching scope of her humiliation in characterizing it as an aggravating circumstance. This factor should not serve as a limitation for less influential Title VII plaintiffs. The geographical reaches of a former employee's embarrassment should not be determinative of whether her departure is recognized as a constructive discharge.

[53] *See, e.g.,* EEOC v. Federal Reserve Bank, 698 F.2d 633, 672 (4th Cir. 1983) (employee's allegation that "embarrassment and unfavorable working environment" resulted from being passed over in promotion is insufficient for constructive discharge claim (dictum)), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984).

[54] The standard is whether a "reasonable" employee would consider the employment conditions intolerable. *See supra* note 12. In *Clark,* the District of Columbia Circuit relied on the plaintiff's *reasonable* expectation of opportunities for advancement. 655 F.2d at 1174. Similarly, in Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987), the court relied on the fact that the failure to promote "would have been viewed by any *reasonable* senior manager as a career-ending action." *Id.* at 473 (emphasis added). However, in both cases the District of Columbia shifted from the objective to the subjective reasonable person by examining the impact of discrimination on the individual employee.

factors to include the mental health impact of hidden discrimination does not condone a situation in which "a public employee would be encouraged to set himself up as the judge of every grievance, and the public taxpayer would end up paying for periods of idleness while the grievance was being adjudicated."[55] Instead, a plaintiff must demonstrate constructive discharge in a three-part test. First, the plaintiff must prove the discrimination resulting in the underlying Title VII violation. Second, the plaintiff must demonstrate the intolerable effects of that discrimination. Finally, she must establish a nexus between the discrimination and the symptoms which make her employment intolerable. Parts II and III of this Comment develop these three steps.

II. Demonstrating the Existence and Impact of Institutional Discrimination in the Workplace

Although a Title VII claim may be made with circumstantial proof of discrimination through disparate treatment or disparate impact,[56] before a court will remedy a constructive discharge created by institutional discrimination, the plaintiff must convince the court that such discrimination exists. Professor Lawrence approaches the problem of demonstrating hidden discrimination in his article on unconscious racism with a review of the psychological literature on the causes of racism[57] and anecdotes of racism in everyday life.[58] Professor Spiegelman instead provides a review of the sociological literature concerning the effects of isolation on minorities in organizations.[59] To prove constructive discharge by institutional discrimination, a plaintiff must prove both that the employment environment is discriminatory and that this discrimination has made the employment environment intolerable to the individual plaintiff.

A claim of constructive discharge must be based on an underlying violation of Title VII. The underlying violation may be either harassment[60] or a discriminatory condition of employment such as unequal

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[55] *Rosado,* 562 F.2d at 119.

[56] *See supra* notes 6-10 and accompanying text.

[57] *See* Lawrence, *supra* note 18, at 331-39. Professor Lawrence proposes an equal protection approach to institutional discrimination designed to help courts recognize race-based behavior for the imposition of strict scrutiny. His test asks courts to look for the cultural meaning behind an allegedly racially discriminatory act. *Id.* at 324.

[58] *Id.* at 339-44.

[59] Spiegelman, *supra* note 18, at 371-78. Professor Spiegelman argues for a remedy in employment discrimination cases that will remove the institutional structures which cause discrimination in the first place. Thus, his test requires courts to recognize that employment discrimination can result in "victim group isolation" which mere reinstatement or damages in the form of back pay will not remedy. *Id.* at 362-71.

[60] *See* Meritor Sav. Bank, FSB v. Vinson, 106 S. Ct. 2399, 2409 (1986); *see also*

pay, discriminatory failure to promote, or discriminatory transfer.[61] In both types of Title VII cases, courts should recognize that the Title VII violation itself may be evidence of further, pervasive institutional discrimination that can give rise to aggravating factors supporting a claim of constructive discharge.

A. *Demonstrating the Existence of Institutional Discrimination in the Work Environment*

Proving the existence of institutional discrimination empirically is difficult. Anecdotal reports are helpful.[62] One can also point to studies pointing out differentials in wages[63] or upward mobility,[64] but these studies are merely consistent with the existence of discrimination. They do not prove its existence.

> Because multiple factors may explain differentially negative outcomes and because most people are unable or unwilling to acknowledge their own racial practices, the existence of institutional racism cannot be proved in the strictest sense but must be inferred on the basis of observed differences in the treatment or status of whites and nonwhites.[65]

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supra note 14 (discussing *Vinson*).

[61] *See supra* notes 23-51 and accompanying text.

[62] *See, e.g.*, Jones, *Black Managers: The Dream Deferred,* HARV. BUS. REV., May-June 1986, at 84; *Good News, Bad News, and an "Invisible Ceiling"*, FORTUNE, Sept. 16, 1985, at 29.

[63] *See* McDonough, Snider & Kaufman, *Male-Female and White-Minority Pay Differentials in a Research Organization,* in DISCRIMINATION IN ORGANIZATIONS, *supra* note 19, at 123; *see also* R. FARLEY, BLACKS AND WHITES: NARROWING THE GAP 57-81, 195-98 (1984) (examining earnings differentials between whites and blacks from 1959 to 1979 and concluding that the continued differential between black and white men is the result of continued discrimination). *But see* Medoff, *Discrimination and the Occupational Progress of Blacks Since 1950,* 41 AM. J. ECON. & SOC. 295, 302 (1985) (finding substantial improvement in the occupational position of blacks relative to whites between 1950 and 1980).

[64] *See generally* Pomer, *Labor Market Structure, Intragenerational Mobility, and Discrimination: Black Male Advancement out of Low-Paying Occupations, 1962-1973,* 51 AM. SOC. REV. 650, 657 (1986) (finding limited upward mobility for black men and noting that this is "consistent with the possibility that discrimination against blacks permeates the United States labor market"). Scholars do not unanimously agree that current racial discrimination is responsible for the current disparity in the labor market between the positions of blacks and whites. *See* W. WILSON, THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS 144-54 (2d ed. 1980) (noting both the status improvement of some blacks and the accompanying growing black urban underclass and concluding that this is the result of class, not racial, bias).

[65] Barbarin, *Community Competence: An Individual Systems Model of Institutional Racism,* in INSTITUTIONAL RACISM AND COMMUNITY COMPETENCE, *supra* note 19, at 6, 9.

Thus, despite the lack of empirical proof, evidence sufficient to demonstrate institutional discrimination may be inferred from evidence of stereotyping, tracking, and career ceilings.

Finding institutional discrimination from such evidence does require an inquiry into an employer's subjective criteria for pay, promotion, or transfer. However, courts traditionally defer to employer judgment on subjective criteria and their application to individual employees in Title VII litigation.[66] Furthermore, some courts emphasize the importance of subjectivity in the promotion process and therefore maintain a "hands off" approach regarding employee evaluations. In *Namenwirth v. Board of Regents of the University of Wisconsin System,*[67] the plaintiff, a female zoology professor, alleged sex discrimination in her tenure denial. The Seventh Circuit, while acknowledging the possibility of discrimination, upheld the faculty committee's discretion in tenure evaluations. In finding for the defendant, the court held that the judicial system is constrained in determining the significance or validity of the committee's conclusion that one tenure applicant has academic potential and another does not.[68] But the court conceded that allowing the decisionmakers to act as the ultimate judges of qualification "would ordinarily defeat the purpose of the discrimination laws."[69] The *Namenwirth* court also acknowledged the importance of peer esteem in securing tenure.[70] Such an endorsement, however, potentially invites discrimination. As the dissent recognized, an inherent problem exists in the majority's analysis, "given that the dispositive factor in such decisions is the ability of the candidate to win the esteem of the very people whose sexual biases are in question."[71] While hesitating to second-guess tenure decisions, the dissent defended the notion that the majority abandoned—albeit reluctantly—that the university's evaluation of an employee's potential "is not different in kind from any other employer's judgment of potential."[72]

In contrast, courts view subjective employment criteria in the blue-collar context with suspicion. The landmark case in this area, *Rowe v. General Motors,*[73] establishes some guidelines for blue-collar employ-

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[66] *See* Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level,* 21 WM. & MARY L. REV. 45, 46-49 (1979); *see also* 2 A. LARSON & L. LARSON, *supra* note 3, §§ 50.70-.80 (discussing special problems of proof for professional employees).

[67] 769 F.2d 1235 (7th Cir. 1985), *cert. denied,* 474 U.S. 1061 (1986).

[68] *See id.* at 1242-43.

[69] *Id.* at 1243.

[70] *See id.* at 1242.

[71] *Id.* at 1244 (Swygert, J., dissenting).

[72] *Id.* at 1248 (Swygert, J., dissenting).

[73] 457 F.2d 348 (5th Cir. 1972). For a discussion of *Rowe,* see generally Wain-

ers. In *Rowe,* the plaintiff was a janitor at an automotive plant who alleged discriminatory denial of a promotion from an hourly to a salaried position. In finding for the plaintiff, the court held that General Motors' promotion criteria violated Title VII in five respects: 1) a foreman's recommendation was the most important and indispensible requirement in the process; 2) foremen received no written instructions concerning qualifications; 3) the standards that were controlling were vague and subjective; 4) hourly employees were not notified of promotion opportunities or requisite qualifications; and 5) no safeguards were implemented to deter discriminatory practices.[74]

Courts should approach subjective criteria with the same suspicion in the white-collar context. As the *Namenwirth* dissent pointed out, the danger of discrimination allowed by subjective criteria is possible at any employment level.[75] This approach requires an examination of the effects of employment discrimination on the individual employee, not the "reasonable person." An obvious objection is the injection of subjectivity into the court's review of employment discrimination, an approach seemingly rejected by the Court's focus on objective factors in its analysis of disparate treatment and disparate impact.[76] This objection is inapposite. Courts already review subjective matters in employment discrimination cases. Title VII applies to white-collar employees whose employment conditions are necessarily based on subjective evaluation processes.[77] Indeed, even when applying the disparate impact analysis, a majority of circuits are willing to review subjective employment criteria.[78] Subjective factors should be closely examined by courts to determine if there is a Title VII violation because "high-level subjectivity subjects the ultimate [employment] decision to the intolerable occur-

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troob, *supra* note 66, at 48-49.

[74] *Rowe,* 457 F.2d at 358-59.

[75] *See Namenwirth,* 769 F.2d at 1248 (Swygert, J., dissenting); *see also* Bartholet, *Application of Title VII to Jobs in High Places,* 95 HARV. L. REV. 947, 947 (1982) (arguing that there is no legal basis for distinguishing between upper- and lower-level selection methods in applying Title VII). *But see* Maltz, *Title VII and Upper Level Employment—A Response to Professor Bartholet,* 77 NW. U.L. REV. 776, 777 (1983) (arguing that strict review of subjective criteria in the professional workplace would impose overly stringent burdens on employers).

[76] *See supra* notes 6-10 and accompanying text.

[77] *See* Hishon v. King & Spaulding, 467 U.S. 69 (1984) (holding that Title VII is applicable to a law firm partnership decision). Because white-collar employees are frequently hired, fired, promoted, demoted, transferred, and assigned salary levels based on highly subjective criteria, the employer/employee relationship is subject to an especially high probability of bias contamination. As such, subjectivity is a particularly crucial concern in the white-collar environment. "Bias contamination," as used in this Comment, refers to the intentional or unintentional influence of prejudicial consideration that has an impact on the decision of an employer.

[78] *See* Antonio v. Cove Packing Co., 810 F.2d 1477, 1480 n.1 (9th Cir. 1987).

rence of conscious or unconscious prejudice."[79] Furthermore, an examination of only objective factors may blind the court to the presence of the nonovert discrimination which exists in both white- and blue-collar workplaces.[80]

In scrutinizing the subjective criteria used to determine employment conditions, courts should be particularly alert when presented with evidence of bias contamination demonstrating institutional discrimination.

1. Stereotyping

Unconscious discrimination may take the form of stereotypes about the employee's race. This "colorism,"[81] as the phenomenon is termed by one commentator, may influence personnel decisions as much as objective criteria. In a nonracist society, race would function like eye color.[82] However, in our culture, this is not the case:

> Eye color is an irrelevant category; nobody cares what color people's eyes are; it is not an important cultural fact; nothing turns on what eye color you have. It is important to see that race is not like that at all. And this truth affects what will and will not count as cases of racism. In our culture, to be nonwhite—and especially to be black—is to be treated and seen to be a member of a group that is different from and inferior to the group of standard, fully developed persons,

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[79] Robinson v. Union Carbide Corp., 538 F.2d 652, 662 (5th Cir. 1976) (blue-collar context), *cert. denied,* 434 U.S. 822 (1977); *see also Antonio,* 810 F.2d at 1481 (applying disparate impact analysis to subjective employment criteria in blue-colloar context because "subjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized"); Wade v. Mississippi Coop. Extension Serv., 528 F.2d 508, 514, 518 (5th Cir. 1976) (in white-collar context, upholding trial court's finding that subjective questions on evaluation form were vulnerable to conscious or unconscious discrimination by evaluating supervisors); *Rowe,* 457 F.2d at 359 (holding that promotion or transfer procedures that depend on subjective evaluation are a ready mechanism for discrimination in blue-collar context).

[80] Although promotions in "upper-level" employment are generally based primarily upon subjective, discretionary, and intangible qualities, such as judgment, leadership, initiative, and sensitivity, and "lower-level" promotions are generally based on objective, skills-related, objective criteria, *see* Note, *Title VII and Employment Discrimination in "Upper Level" Jobs,* 73 COLUM. L. REV. 1614, 1614 (1973), subjectivity as a result of institutional discrimination is present at the blue-collar level as well. *See, e.g., Antonio,* 810 F.2d 1477 (examining discrimination through subjective employment criteria in a cannery); B. WILLIAMS, *supra* note 4 (an empirical study of the institutional discrimination present in one suburban factory).

[81] "Colorism" is an attitude or predisposition to act in a certain manner based on a person's skin color, the actor treating her own race favorably and other races unfavorably. *See* Jones, *supra* note 62, at 88.

[82] Wasserstrom, *supra* note 18, at 604.

the adult white males.[83]

Despite efforts to eliminate employment discrimination, supervisors continue to embrace a double standard when evaluating minorities[84] and women.[85] Where such a double standard exists, the "standard" employee—the adult white male—benefits. For example, an employer may promote or reward a standard employee because she genuinely believes that the employee is "more articulate," "more collegial,"[86] or "more charismatic" than another.[87] As a result, employees who overcome these latent negative presumptions at the hiring phase must still contend with them when they are being considered for promotions or merit raises later in their employment.

Employers typically reject any allegation that they harbor unconscious prejudice toward an employee. They may assert in their defense that they really don't think of their employee as black (or Jewish or Hispanic, etc.).[88] These kinds of statements, although meant as compliments, are nevertheless injurious in that they suggest that: 1) the employer unconsciously associates negative attributes with the employee's group, although she has exempted the particular employee from these attributes; and 2) the employer has a predisposition not to hire, promote, or otherwise reward a member of the employee's group, but that she has overcome this predisposition in the case of the particular employee. The mere fact that such a predisposition exists, however unconsciously, diminishes the likelihood of equal employment opportunity for minorities and women.[89]

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[83] *Id.* at 586. This statement applies to sex and ethnicity as well as race.

[84] One white consultant observed that " 'the same qualities that are rewarded in white managers become the reason the black manager is disliked and penalized.' " Jones, *supra* note 62, at 88. Aggressiveness, generally perceived as a valuable trait in the corporate world, is often characterized as arrogance in black workers. Conversely, employees who are not aggressive are perceived as lacking assertiveness. *See id.*

[85] *See, e.g.,* Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987). The Hopkins court recognized that the plaintiff suffered from the application of a double standard. Her assertive behavior was characterized as unfeminine, macho, and lacking in charm. *Id.* at 465-68 (approving the district court's findings).

[86] It is interesting to note the definition and underlying connotation of the word "collegial." Webster's Dictionary defines "collegial" as "marked by power or authority vested equally in each of a number of colleagues." WEBSTER'S NEW COLLEGIATE DICTIONARY 218 (1981). The mere fact that an employer selects a word that conveys a greater feeling of equality between himself and his "colleague" suggests an unconscious predisposition to view the employee as an equal, an inclination which may not exist in his evaluation of competent candidates with cultural differences.

[87] *See* Lawrence, *supra* note 18, at 343.

[88] *See id.* at 318, 341-42 (discussing these types of statements in a broader context).

[89] Overt racists tend to harbor certain types of stereotyped ideas about the "outgroup," i.e., perceiving blacks as lazy, dishonest, stupid, and oversexed, and Jews as

2. Tracking

Unconscious prejudice may also take the form of stereotypes about the position.[90] In the subconscious contemplation of personnel matters, these hidden biases play a part in what are often termed "gut reactions" or "instincts" about an individual's compatibility with a particular position. If the employer unconsciously sees the position as "white," this perception may contribute to her assessment of who is an appropriate candidate for the job.[91] Similarly, when an employer sees a position as "male," the perception may spawn discrimination against women.[92] Alternatively, minorities and women are often ushered into designated positions. For example, some employers place blacks in a "black track" of quasi-respectable but minimally influential roles. Blacks are channelled into "the relations"—community relations, industrial relations, and personnel relations[93]—but these "special jobs" are outside of the mainstream; they have little or no impact on company profits and offer very little prospect of promotion to top management.[94] The situation is similar for women: "In the worlds of finance, manufacturing, and the federal government the sharp separation of women into less-well-paying clerical jobs and men into higher-paying white-collar jobs has been well documented . . . ."[95]

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pushy, conniving, and obsessed with money. *See id.* at 333; *see also* Jones, *supra* note 62, at 88 (A 1982 survey of the class of 1957 from Harvard, Yale, and Princeton showed that only 55%, 47%, and 36%, respectively, of the respondents believed that blacks are as intelligent as whites.). These stereotypes exist in and unknowingly emerge from the "nonracist" in the form of subtle, often imperceptible biases.

[90] *See* J. FEAGIN & C. FEAGIN, *supra* note 4, at 63-64 (noting tracking in both the white- and blue-collar context).

[91] *See* Note, *supra* note 80, at 1629 (explaining that employers in traditionally white-male professions may unknowingly gauge females and minorities against a stereotyped image of the profession and reach the conclusion that "they lack the intangible qualities indicative of professional aptitude and competence").

[92] *See* Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987). In noting that limited contacts with an individual in a traditionally male profession may foster unconscious stereotyping, the district court said, "A far more subtle process [than intentional discrimination] is involved when one who is in a distinct minority may be viewed differently by the majority because the individual deviates from an artificial standardized profile." 617 F. Supp. 1109, 1118 (D.D.C. 1985), *rev'd in part and aff'd in part,* 825 F.2d 458.

[93] *See* Jones, *supra* note 62, at 89. *See also* Stevens & Marquette, *Black MBAs: Room at the Top?,* MBA, Aug./Sept. 1978, at 41.

[94] *See* G. DAVIS & G. WATSON, BLACK LIFE IN CORPORATE AMERICA: SWIMMING IN THE MAINSTREAM 19 (1982). The law does not require merely that there be equal opportunity for all employees to advance, but also that they not be segregated in a manner that keeps members of certain groups from positions along any promotion "track." *See* Note, *supra* note 80, at 1620.

[95] J. FEAGIN & C. FEAGIN, *supra* note 4, at 64.

3. Employment Ceilings

For minority and women employees, biased subjectivity in promotion evaluations may also result in a low employment "ceiling."[96] Like the evaluations that often impose it, the ceiling is in many cases a manifestation of bias contamination. Generally, severe restriction on advancement in an organization alone does not constitute constructive discharge because courts primarily consider working conditions and the presence of workplace harassment as the primary factors in the proof of constructive discharge.[97] These factors, however, do not exclusively account for the adverse impact on the employee—the emotional and physical distress created by the halted advancement.[98]

Studies have shown that even the most confident and indispensable minority employees have reason to question the likelihood of ever reaching upper-level positions in their organizations.[99] Thus, aspiring minorities can be victimized by a rising roadblock. Even the sincere efforts and support of high-level staffers may fail to thwart minority ceilings. This situation may occur when an ascending executive "takes along" middle managers as she climbs the corporate ladder. Although the upper-level supervisor may be committed to the nondiscriminatory promotion of minorities and women, if the middle manager envisions them in only lower positions or designated minority jobs, they will suffer the ceiling effect despite the organization's well-intended progressive policy.[100]

4. Judicial Recognition of the Existence of Bias Contamination

One court has taken a step in the right direction towards recognizing hidden discrimination in subjective criteria. In *Hopkins v. Price Waterhouse,*[101] the court found a violation of Title VII in the rejection of a female partnership candidate. In finding the defendant guilty of sex discrimination, the district court emphasized that the defendant took no action to make its partners aware of possible stereotypes that

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[96] A "ceiling" reflects the point at which an employee feels that there is a limited opportunity for advancement. *See Good News, Bad News, and an "Invisible Ceiling", supra* note 62, at 29.

[97] *See supra* note 14 and accompanying text.

[98] *See infra* notes 126-27 and accompanying text.

[99] *See* Campbell, *Black Executives and Corporate Stress,* N.Y. Times, Dec. 12, 1982, § 6 (Magazine), at 36, 106. *See generally* Jones, *supra* note 62, at 84-92 (reporting the effects of unconscious, unthinking criteria as impediments to minority promotions, despite the commitment of top executives to fairness and promotion of qualified minorities).

[100] *See* Stevens & Marquette, *supra* note 93, at 42.

[101] 825 F.2d 458 (D.C. Cir. 1987).

could color their evaluation of partnership candidates.[102]

Despite finding the existence of sex discrimination, the district court held that the employee did not establish the aggravating factors necessary to prove constructive discharge.[103] On appeal, the circuit court reversed this holding, finding that the "decision to deny Hopkins partnership status . . . coupled with [her department's] failure to renominate her, would have been viewed by any reasonable senior manager in her position as a career-ending action"[104] and thus resulted in constructive discharge.

The dissent, while agreeing with the majority's treatment of relief,[105] disagreed with the finding of a Title VII violation based on stereotyping, claiming that the record "provided no causal connection between Hopkins' fate and such stereotyping."[106] The dissent felt that, "though some forms of sexual stereotyping can be discriminatory, the instances here . . . were at most 'generalized discrimination within the employment unit' rather than discrimination 'in the particular employment decision for which retroactive relief was sought.' "[107] Contrary to what the dissent averred, the causal relationship in *Hopkins* between the generalized discrimination and the action for which relief was sought was established by the plaintiff's expert on sexual stereotyping.[108] Similarly, expert testimony can establish the nexus between hidden discrimination and mental injury resulting in constructive discharge.[109]

B. *Demonstrating the Impact of Institutional Discrimination on the Individual Employee*

The above examples of bias contamination may demonstrate to a court that institutional discrimination exists, but a plaintiff who quits her job because of such discrimination must prove that her constructive discharge was truly an involuntary result of an unbearable environment.

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[102] 618 F. Supp. 1109, 1118-19 (D.D.C. 1985), *rev'd in part and aff'd in part,* 825 F.2d 458.

[103] *Id.* at 1121. The plaintiff dropped her allegations of harassment and retaliation before trial. *Id.*

[104] 825 F.2d at 473.

[105] *Id.* at 473 n.1 (Williams, J., dissenting).

[106] *Id.* at 474 (Williams, J., dissenting).

[107] *Id.* (Williams, J., dissenting) (quoting Toney v. Block, 705 F.2d 1364, 1366-67 (D.C. Cir. 1983) (emphasis omitted)).

[108] *Id.* at 469.

[109] *See infra* notes 134-54 and accompanying text.

1. The Intolerable Effects of Institutional Discrimination

Professor Spiegelman has noted the negative effects of institutional discrimination in his concept of "victim group isolation," the "disadvantages which befall an individual member of an identifiably different minority in an organization."[110] The experience of being in an "outgroup" increases ordinary employment pressures.[111]

One effect may be an intolerable increase in stress. Stress can be defined as "any circumstance, situation or event that causes or accelerates the development of human emotional or physical disability or disease."[112] Although seldom recognized as such in the Title VII context, stress can act as both a result of an intolerable working condition and as the proximate cause of the constructive discharge. The negative effects of stress in the workplace on the mental health of the worker are well documented.[113] Indeed,

> the most common symptoms [of occupational stress] in order of decreasing frequency are: (1) anxiety and/or neurosis (25 percent); (2) depression (20 percent); (3) stress-related, psychosomatic disorders (headache, low back pain, hypertension, gastrointestinal tract) (15 percent); (4) alcohol and other drug abuse (15 percent); (5) situational adjustment problems (e.g., divorce, finances, death in the family) (10 percent); and (6) other disorders (e.g., severe mental and/or physical morbidity or mortality) (15 percent).[114]

Another researcher has identified the stress facing many employees, particularly those in managerial positions, as being derived from concern about career prospects (promotability), the organizational structure and climate (how well she "fits in"), interpersonal relations at work, and the employee's role in the organization.[115] Problems in any of these areas may bring about ill-health.[116]

Of course, stress is not the exclusive problem of minority employees. Stress occurs at both the white-collar and blue-collar levels and is common in many occupations.[117] However, where the stress is the re-

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[110] Spiegelman, *supra* note 18, at 371.

[111] *See id.* at 371-73 & nn.90-91.

[112] Seltzer, *Psychological Stress and Legal Concepts of Disease Causation,* 56 CORNELL L. REV. 951, 951 (1971).

[113] *See, e.g.,* K. PELLETIER, HEALTHY PEOPLE IN UNHEALTHY PLACES: STRESS AND FITNESS AT WORK 39-84 (1984).

[114] *Id.* at 48-49.

[115] C. COOPER, PSYCHOLOGY AND MANAGEMENT 202 (1981).

[116] *See* K. PELLETIER, *supra* note 113, at 39-84.

[117] *See id.* at 43-46.

sult of an illegal activity, such as employment discrimination, courts should recognize their ability to remedy the injury under Title VII.

For minority workers in the white-collar workplace, the adverse effects of the work environment are magnified. Because of their small numbers and consequent high visibility, minority workers are constantly aware that they are being closely monitored.[118] A study of black MBAs revealed the following: ninety percent viewed the organizational climate as worse for them than for their peers; forty-one percent further described that climate as "patronizing"; eighty-four percent felt that their workplace was "psychologically unhealthy."[119] Only fifteen percent, however, characterized their offices as "supportive."[120] These statistics support the notion that the stressful environment resulting from unequal pay, unlawful transfer, and failure to promote can render the workplace intolerable.

Cultural differences often result in a shortage of "stress repellents" for minorities. Studies have found a significant positive correlation between an employee's close relationship with her supervisor and reduced job pressure.[121] Similar benefit flows from close relationships with colleagues.[122] Often, black or female employees are placed in designated minority positions or other high-profile/low-influence slots, resulting in a conflict between formal and actual power.[123] This role ambiguity can manifest itself in the form of greater futility, increased job-related tension, and lower self-confidence.[124]

Blacks are prone to certain stress-related ailments in addition to those that plague workers in general. Of the thirty-five million people suffering from hypertension or high blood pressure, blacks are at twice the risk of whites.[125] Thus, repressed anger and anxiety may have more damaging psychological effects on black workers, possibly resulting in constructive discharge. Nevertheless, courts have not yet recognized the possibility that seemingly voluntary resignations by minority and women employees actually may be constructive discharges in which the employees were forced to quit in order to maintain or recover their good health.

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[118] *See* Campbell, *supra* note 99, at 39.
[119] *See* Jones, *supra* note 62, at 86.
[120] *Id.* at 86.
[121] C. COOPER, *supra* note 115, at 207.
[122] *Id.* at 208.
[123] *See supra* notes 93-95 and accompanying text.
[124] *See* C. COOPER, *supra* note 115, at 204-05.
[125] *See* Campbell, *supra* note 99, at 102, 104 (quoting National High Blood Pressure Information Center statistics).

2. The Intolerable Effects of Unequal Pay, Failure to Promote, and Discriminating Transfer

Not only does institutional discrimination itself create intolerable conditions for employees, but the resulting unequal pay, failure to promote, or unjustified transfer may also be devastating. For example, with many employees, failure to promote can be more than a mere setback or slight disappointment. An employee who has reached a ceiling—the point beyond which she will not be promoted—may suffer frustration and anger when her optimum work yields no further rewards.[126] Similarly, a transfer that is in reality a demotion can have an adverse impact on an employee's estimation of her own competence.[127] Failure then becomes a self-fulfilling prophecy. The situation created by forcing a deserving employee to remain in her current position can create not just a workplace that the employee would rather abandon, but also an environment that she is compelled to leave.

Like proving the existence of institutional discrimination itself, the link between discrimination and stress is difficult to prove empirically. All individuals are faced with many stresses, of which discrimination may be just one. However, the fact that discrimination causes stress with both mental and physical repercussions is beyond question.[128]

Indeed, a recent article, written jointly by a professor of psychiatry at Yale Medical School and the Dean of DePaul University College of Law, calls for more research "studying how racial discrimination brings about psychological injury."[129] The authors trace the legal development of claims based on mental suffering and note the dearth of medical research "to elucidate the effects of short-term contact with dis-

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[126] *See, e.g.,* P. BENNER, STRESS AND SATISFACTION ON THE JOB 113-20 (1984) (describing a paradigm case of an individual who found the disappointment of being passed over for a promotion unbearable).

[127] *See* Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888-89 (3d Cir. 1984) (discriminatory transfer and demotion of a sales representative resulted in her loss of confidence in herself and her employer and detracted from her ability to perform her sales function).

[128] *See* R. JONES, BLACK PSYCHOLOGY 359-400 (2d. ed. 1980); Bowser, *Racism and Mental Health: An Exploration of the Racist's Illness and the Victim's Health,* in INSTITUTIONAL RACISM AND COMMUNITY COMPETENCE, *supra* note 65, at 107, 110-12 (discussing the adverse effects of racism on mental health and blacks' mechanisms for coping); Cash, *Extra-Dimensional Systemic Frustrations That Endanger the Mental Health of Black People,* in KEY MENTAL HEALTH ISSUES IN THE BLACK COMMUNITY 1, 17 (1976).

[129] Griffith & Griffith, *Racism, Psychological Injury, and Compensatory Damages,* 37 HOSP. & COMMUNITY PSYCHIATRY 71, 75 (1986).

criminatory behavior:"[130]

> Blacks have clearly benefited from the judicial activism that has resulted in the punishment of racism and the deterrence of racist conduct. They have also profited from the willingness of courts to recognize that racist conduct can produce severe emotional distress. But greater psychiatric input would result in a better assessment of emotional distress so that plaintiffs can produce their evidence of psychological damage in a more professional framework.[131]

As Part III discusses, this psychiatric input may be used to prove a case of constructive discharge.

III. Judicial Recognition of Constructive Discharge Resulting from Institutional Discrimination: Precedents in Workmen's Compensation Law

This Comment's argument in favor of expanding the doctrine of constructive discharge to recognize mental stress induced by discrimination in the workplace as an aggravating factor is not a radical departure from current law. In the area of workmen's compensation, courts have already allowed redress in causes of action based on emotional harm from an emotional stimulus.[132]

Case law in the workmen's compensation area provides helpful guidance in identifying circumstances that should give rise to claims of constructive discharge. This analogy does not address the psychological pressures that result *from* constructive discharge;[133] rather, it examines psychological pressures as the *cause* of constructive discharge. The analysis concludes that an employee should be able to establish that an act of discrimination—for instance, an unlawful transfer—resulted in a psychological injury, rendering her incapable of further tolerating the

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[130] *Id.*

[131] *Id.*

[132] This Comment's proposal for a new standard for constructive discharge also finds some support in the well-established recognition of a tort action for intentional infliction of emotional distress because this tort action also provides a remedy for psychological injury from psychological stimulus and faces similar causation problems. Of course, this tort requires intent, an element which this Comment's proposal seeks to avoid. For a discussion of intentional infliction of emotional distress, see Prosser, *Intentional Infliction of Mental Suffering: A New Tort,* 37 MICH. L. REV. 874 (1939); Note, *Torts: An Analysis of Mental Distress as an Element of Damages and as a Basis of an Independent Cause of Action When Intentionally Caused,* 20 WASHBURN L.J. 106, 108-123 (1980).

[133] Studies have noted a relationship between mental disorders and unemployment. *See* B. O'BRIEN, PSYCHOLOGY OF WORK AND UNEMPLOYMENT 209-50 (1986).

work environment. It should be irrelevant whether the unlawful transfer was the direct cause of the discharge. All that should matter is that the employer's discriminatory act in some way forced the plaintiff to leave the workplace.

The comparison between workmen's compensation awards and findings of constructive discharge reveals that a common problem presents itself to plaintiffs in both types of cases: courts are far more reluctant to grant relief for mental injuries caused by mental stimuli than for physical injuries.[134] Early cases granting relief for mental injury were limited to injury caused by the occurrence of a sudden, traumatic event.[135] More recently, courts have recognized mental injuries caused by nonsudden emotional stimuli to be "injuries" under various workmen's compensation statutes.[136] The same standard used by the courts in finding mental injuries in workmen's compensation claims can be applied to psychological symptoms resulting from the intolerable working conditions produced by discrimination.

In workmen's compensation cases, state courts have adopted two standards for proving that a mental injury was caused by nontraumatic elements in the workplace environment: the unusual-stress test and the objective causal-connection test.[137] The former test, articulated in *Swiss Colony, Inc. v. Department of Industry, Labor & Human Relations*,[138] requires that the mental injury result from something more than the normal stresses and tensions common to everyday worklife.[139] The latter test, articulated in *McGarrah v. State Accident Insurance Fund Corp.*,[140] requires a workmen's compensation claimant to prove that the "employment conditions . . . were the 'major contributing cause' of the mental disorder."[141]

The unusual-stress standard, if applied to constructive discharge

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[134] *See* Comment, *Workers' Compensation and Gradual Stress in the Workplace*, 133 U. PA. L. REV. 847, 857 (1985).

[135] *Id.* at 857-58.

[136] *See, e.g.*, American Nat'l Red Cross v. Hagen, 327 F.2d 559 (7th Cir. 1964) (holding that plaintiff's condition of "abnormal stress" was precipitated by accumulated conditions in the work environment); Fireman's Fund Ins. Co. v. Industrial Comm'n, 119 Ariz. 51, 579 P.2d 555 (1978) (finding that the delegation to the plaintiff of excessive responsibilities caused her unexpected mental breakdown); Royal State Nat'l Ins. Co. v. Labor & Indus. Relations Appeal Bd., 53 Haw. 32, 487 P.2d 278 (1971) (holding that "an employee suffers a work-related injury . . . when he sustains a psychogenic disability precipitated by the circumstances of his employment").

[137] *See* Comment, *supra* note 134, at 849.

[138] 72 Wis. 2d 46, 240 N.W.2d 128 (1976).

[139] *Id.* at 51, 240 N.W.2d at 130.

[140] 296 Or. 145, 675 P.2d 159 (1983).

[141] *Id.* at 166, 675 P.2d at 171; *see also* Comment, *supra* note 134, at 851-53 (discussing the objective causal-connection test generally).

claims, would require the claimant to establish that stress and tension in the workplace be increased by the employer's discriminatory action to such a level as to render the workplace intolerable. This standard, like the existing reasonable person standard for constructive discharge, would not aid in demonstrating constructive discharge from hidden discrimination. It is likely that discriminatory failure to promote, unequal pay, or transfer will be difficult to characterize as extraordinary conditions in the workplace, in many cases leaving those types of discrimination outside the reach of an extraordinary stress standard for constructive discharge.[142]

The causal-connection test is more applicable as a constructive discharge standard for the purposes of this Comment. In a Title VII case, the plaintiff would have to prove that she was constructively discharged after incurring psychological injury caused by intolerable working conditions grounded in discrimination. If such a claim could be established, the plaintiff would be entitled to recover back pay from the date of the constructive discharge. With the two-part causal-connection test, a victim of hidden discrimination can make out a cause of action for constructive discharge. First, the plaintiff must demonstrate that the stressful conditions exist.[143] This condition can be met by demonstrating the existence and the effects of institutional discrimination as discussed above in Part II A and B. Second, the plaintiff must prove that the discrimination was a "major contributing cause" of the mental disorder.[144] The establishment of this condition is demonstrated in the following cases in which psychiatric testimony established the causal connection between the mental injury and the workplace-related mental stimuli, including transfer, demotion, and reduction in pay.

In *McGarrah v. State Accident Insurance Fund,*[145] a deputy sheriff believed that his captain had a vendetta against him that was demonstrated by transfer to a less desirable position and failure to promote. Consequently, the deputy became hostile and acutely depressed and did not return to work. In reversing the Workers' Compensation Board's denial of compensation, the court of appeals noted that psychiatric testimony demonstrated that the plaintiff's mental injury was the result of a perceived vendetta and other workplace pressures and that

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[142] For a discussion of the burden of demonstrating that long-term emotional stress produces damaging effects, see Note, *Emotional Stress—Now a Cause of Compensable Injury?,* 34 LA. L. REV. 846 (1974).

[143] *See* Comment, *supra* note 134, at 852 (discussing the casual-connection test in the workmen's compensation context).

[144] *See McGarrah,* 296 Or. at 166, 675 P.2d at 171 (applying casual-connection test in the workmen's compensation context).

[145] 296 Or. 145, 675 P.2d 159 (1983).

corroborating evidence supported the existence of an actual vendetta.[146] The Oregon Supreme Court affirmed, approving the finding that the actual stressful conditions of employment were a major contributing cause of the plaintiff's mental disorder.[147]

Similarly, in *Korter v. EBI Cos.*,[148] the court held that workmen's compensation for temporary psychiatric disability was erroneously denied an employee who suffered depression and anxiety after a demotion caused him to lose self-confidence and become unsure of his authority and of others' expectations.[149] The plaintiff met his burden of proof of establishing the relationship between his disability and his employment environment by the testimony of a psychiatrist, even though the psychiatrist did not state that employment conditions were the sole cause of the plaintiff's problems.[150]

In *Kelly's Case*,[151] the Supreme Court of Massachusetts affirmed a finding of compensable injury arising out of and in the course of employment when an employee suffered an emotional breakdown upon being informed that she was being laid off from one department and transferred to another.[152] The nexus between the mental injury and the employment conditions was again established by psychiatric testimony.[153]

Like the above workmen's compensation plaintiffs, a plaintiff in Title VII case can put psychiatric testimony to the same use to demonstrate that mental injury is an aggravating factor resulting from employment discrimination. In utilizing psychiatric testimony, this Comment's proposal to broaden the standard for constructive discharge does not introduce too much subjectivity. The court need not rely on the subjective opinion of the plaintiff,[154] but can rely on expert psychiatric

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[146] *See* Matter of Compensation of McGarrah, 59 Or. App. 448, 451, 456, 651 P.2d 153, 155, 158 (1982), *aff'd sub nom.* McGarrah v. State Accident Ins. Fund 296 Or. 145, 675 P.2d 159 (1983).

[147] *See McGarrah,* 296 Or. at 166, 675 P.2d at 172.

[148] 46 Or. App. 43, 610 P.2d 312 (1980).

[149] The plaintiff returned from vacation to find out that he had been replaced as supervisor, had lost his secretary, and had been moved to a smaller office. *Id.* at 45, 610 P.2d at 313.

[150] *See id.* at 48-51, 610 P.2d at 314-16.

[151] 394 Mass. 684, 477 N.E.2d 582 (1985).

[152] *See id.* at 684, 477 N.E.2d at 582-83.

[153] *See id.* at 685-86, 477 N.E.2d at 583.

[154] Indeed, a third test for demonstrating workplace-related mental stress in workmen's compensation cases, allowing recovery for perceived, not necessarily real, unfavorable employment conditions, has been rejected. *See* Fox v. Alascom, Inc., 718 P.2d 977, 981-84 (Alaska 1986) (discussing the different tests in workmen's compensation law to prove emotional injury and selecting a "preliminary link" test requiring more than the employee's subjective perception of her workplace as the source of her injury); Comment, *supra* note 134, at 849 n.5. This degree of subjectivity could not occur in a

evidence of an intolerable working condition and its manifestation as mental injury.

CONCLUSION

The definition of constructive discharge under Title VII must be broadened to encompass the negative effects of institutional discrimination and discriminatory conditions of employment such as unequal pay, failure to promote, and discriminatory transfer. The discriminatory act is, more often than not, shrouded in an unconscious prejudice that adversely influences the subjective evaluation criteria upon which salary, transfer, and promotion decisions are often based. Thus, courts need to apply a subjective approach in the analysis of whether a Title VII plaintiff has established intolerable working conditions.

The negative physical and psychological effects of inequities in salaries, promotions, and transfers greatly affect all employees. When these negative effects are the result of illegal discrimination, however, Title VII should provide a remedy. These effects, already recognized as significant by progressive courts in workmen's compensation claims, are clear manifestations of how an employer's act can serve as an indirect cause of a constructive discharge.

The recognition of the impact institutional discrimination can have on minority and women employees reveals that many "voluntary resignations" can be, in fact, discharges—the reasonable reactions of these employees to intolerable working environments. Having recognized that minorities and women still face pervasive, hidden, institutional discrimination in the white male-dominated workplace, the courts should now strive to achieve a broader recognition of what constitutes intolerable working conditions and a more expansive definition of the constructive discharge doctrine.

case of constructive discharge under Title VII because an actual Title VII violation must underlie the constructive discharge claim.