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Labor Law - Employment Discrimination - Employer That Knowingly Permits Acts of Discrimination So Intolerable That Reasonable Employee Subject to Them Would Resign May Be Liable for Constructive Discharge under Title VII

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LABOR LAW—EMPLOYMENT DISCRIMINATION—EMPLOYER THAT KNOWINGLY PERMITS ACTS OF DISCRIMINATION SO INTOLERABLE THAT REASONABLE EMPLOYEE SUBJECT TO THEM WOULD RESIGN MAY BE LIABLE FOR CONSTRUCTIVE DISCHARGE UNDER TITLE VII

Goss v. Exxon Office Systems (1984)

Over the last fifty years the United States has witnessed a significant expansion of employee rights, primarily as a result of Congress' enactment of the National Labor Relations Act (NLRA)[1] and the Civil Rights Act of 1964.[2] Courts construing the language of these statutes have de-

1. National Labor Relations Act, ch. 372, § 1, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982)). The NLRA, originally enacted in 1935, was extensively modified by the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959. *See* ch. 120, Pub. L. No. 101, 61 Stat. 136 (1947); Pub. L. No. 86-257, 73 Stat. 519 (1959). Under the NLRA, employees have the right to organize, to bargain collectively, and to "engage in other concerted activities for the purpose of . . . mutual aid and protection." 29 U.S.C. § 157. Moreover, § 8 of the NLRA protects an employee's exercise of these rights by prohibiting threats to retaliate and other "unfair labor practices" by employers. *Id.* § 158. For a further discussion of the NLRA, see R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 21-22 (1976).

2. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (1964) (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (1982)). The Civil Rights Act of 1964 is comprehensive in scope, providing protection against a wide range of discriminatory acts. *See generally id.* In particular, title VII of the Act prohibits discrimination in employment. *See id.* §§ 2000e–2000e-17. Under the express terms of title VII it is unlawful for an employer:

> (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.

Id. § 2000e-2(a).

It has been suggested that the word "sex" was added to the list of race, color, religion, and national origin in the hope of sabotaging the bill by making it totally unpalatable to the House of Representatives. *See, e.g.*, Sale v. Waverly-Shell Rock Bd. of Educ., 390 F. Supp. 784, 787 (N.D. Iowa 1975). However, most courts have indicated that Congress' intent in including the word "sex" was to prevent disparate treatment of female employees and to equalize the sexes in regard to employment opportunities. *See, e.g.*, Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (noting that Civil Rights Act "should reach any device or policy of an employer which serves to deny acquisition and retention of a job or promotion in a job *because* the individual is either male or female") (emphasis in original); Diaz v. Pan Am. World Airways, 442 F.2d 385, 386 (5th Cir.) ("The amendment adding the word 'sex'

veloped the "constructive discharge" doctrine.[3] An employee is considered to have been constructively discharged when an employer makes working conditions so intolerable that the employee resigns; no actual dismissal by the employer is required.[4] A finding of constructive discharge benefits the aggrieved employee by providing a greater scope of relief than would be available if the conditions suffered were not so intolerable as to force the employee to resign.[5]

. . . was adopted . . . to provide equal access to the job market for both men and women."), *cert. denied*, 404 U.S. 950 (1971). Thus, title VII has frequently provided the basis for sex discrimination litigation. *See, e.g.*, Holthaus v. Compton & Sons, Inc., 514 F.2d 651 (8th Cir. 1975) (employee threatened with discharge for becoming pregnant); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975) (female employees dismissed for objecting to sexual advances by male supervisor); Ashworth v. Eastern Airlines, 389 F. Supp. 597 (E.D. Va. 1975) (stewardess threatened with dismissal for gaining weight); 1978 EEOC Dec. (CCH) ¶ 6588 [No. 77-36] (women required to wear sexually provocative outfits as job condition).

3. The constructive discharge doctrine initially developed under the NLRA. *See, e.g.*, Bausch & Lomb Optical Co. v. NLRB, 217 F.2d 575, 577 (2d Cir. 1954) (inter-departmental transfer of employee to less desirable position involving a two-thirds reduction in pay "constructively forced" employee to resign); NLRB v. Saxe-Glassman Shoe Corp., 201 F.2d 238, 243 (1st Cir. 1953) (intimidation and harassment by employer of union organizer, causing latter to quit, amounted to constructive discharge). The doctrine has since been applied to a wide range of employment discrimination cases. *See infra* note 6 and accompanying text.

4. *See* Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975). The general standard as articulated by the Fifth Circuit in *Young* is as follows:

> 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 and is as liable for any illegal conduct involved therein as if he had formally discharged the aggrieved employee.

Id. at 144 (citation omitted). *See also* Baxter & Farrell, *Constructive Discharge—When Quitting Means Getting Fired*, 7 EMPLOYEE REL. L.J. 346, 347 (1981) (general discussion of constructive discharge under *Young* rule).

5. Title VII of the Civil Rights Act of 1964 provides for the payment of back pay to victims of employment discrimination, covering a period of up to two years between the time the discrimination began and the time it ceased or the employee resigned. 42 U.S.C. § 2000e-5(g) (1982). In constructive discharge cases, however, the resigning employee may also recover "front pay" (for the period *after* he or she resigned) in addition to preresignation damages. *See* Baxter & Farrell, *supra* note 4, at 366.

Front pay derives from the provisions of title VII which authorizes the reinstatement of an employee whose employment was terminated for discriminatory reasons. 42 U.S.C. § 2000e-5(g). An award of "front pay" is an acceptable alternative to the equitable remedy of reinstatement. *See, e.g.*, Dillon v. Coles, 746 F.2d 998, 1006-07 (3d Cir. 1984) (considering but declining to order award of front pay in light of fact that back pay award was more than adequate); White v. Carolina Paperboard Corp., 564 F.2d 1073, 1091 (4th Cir. 1977) (ordering payment of front pay in lieu of reinstatement in race discrimination class action suit). In constructive discharge cases, as in discriminatory discharge cases, front pay is calculated to cover the period running from the date of resignation up to the date the victim of discrimination attains an opportunity to move to his or her

The application of the doctrine to statutory discrimination cases has been accepted in most federal circuit courts of appeals.[6] In these circuits, discrimination based on race, color, religion, sex, or national origin in violation of title VII of the Civil Rights Act of 1964[7] can establish grounds for a constructive discharge claim.[8] For example, the sudden demotion of a woman from executive secretary to clerical worker because of her unwed pregnancy has been deemed a constructive discharge.[9]

The circuits disagree, however, on the proper standard for determining when an employee has been constructively discharged.[10] Some courts apply the doctrine where an employer knowingly permits discriminatory working conditions so intolerable that a reasonable person subject to them would resign, and where a resignation has, in fact, taken

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rightful place in the job market. Chewning v. Schlesinger, 471 F. Supp. 767, 776 (D.D.C. 1979). Thus, the potential damages recovery is significantly expanded in constructive discharge cases since, unlike in other employment discrimination cases, a resigning employee may recover front pay as well as preresignation back pay.

6. *See, e.g.*, Glass v. Petro-Tex Chem. Corp., 757 F.2d 1554 (5th Cir. 1985) (sex discrimination); Buckley v. Hospital Corp. of Am., 758 F.2d 1525 (11th Cir. 1984) (age discrimination); Easter v. Jeep Corp., 750 F.2d 520 (6th Cir. 1984) (sex discrimination); Holsey v. Armour & Co., 743 F.2d 199 (4th Cir. 1984) (race discrimination), *cert. denied*, 105 S. Ct. 1395 (1985); Uviedo v. Steves Sash & Door Co., 738 F.2d 1425 (5th Cir. 1984) (national origin discrimination); Davis v. Sears, Roebuck & Co., 708 F.2d 862 (1st Cir. 1983) (race discrimination); Pena v. Brattleboro Retreat, 702 F.2d 322 (2d Cir. 1983) (age discrimination); Irving v. Dubuque Packing Co., 689 F.2d 170 (10th Cir. 1982) (race discrimination); Nolan v. Cleland, 686 F.2d 806 (9th Cir. 1982) (sex discrimination); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (sexual harassment); Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981) (sex discrimination); EEOC v. St. Anne's Hosp. of Chicago, Inc., 664 F.2d 128 (7th Cir. 1981) (personnel officer fired for hiring a black employee); Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1971) (race discrimination).

7. For a discussion of title VII of the Civil Rights Act of 1964, see *supra* note 2.

8. *See, e.g.*, Satterwhite v. Smith, 744 F.2d 1380 (9th Cir. 1984) (race discrimination); Held v. Gulf Oil, 684 F.2d 427 (6th Cir. 1982) (sex discrimination). For a further discussion of *Satterwhite*, see *infra* notes 55-57 and accompanying text. For a further discussion of *Held*, see *infra* notes 52-54 and accompanying text.

9. *See* Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977).

10. Some courts of appeals require a finding that the discrimination complained of amounted to an intentional course of conduct calculated to force the victim's resignation. *See, e.g.*, Irving v. Dubuque packing Co., 689 F.2d 170, 172 (10th Cir. 1982); Muller v. United States Steel Corp., 509 F.2d 923, 929 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975). Other courts require only that the conduct complained of would have the foreseeable result that a reasonable person in the employee's situation would resign. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 907-08 (11th Cir. 1982); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980). For further discussion of the split among the circuits concerning the appropriate standard, see *infra* notes 35-37 & 42-57 and accompanying text.

place.[11] Others require a showing that the employer subjected its employee to such conditions with an intent to force the employee to resign.[12]

In *Goss v. Exxon Office Systems*,[13] a sex discrimination case, the Third Circuit considered application of the constructive discharge doctrine under title VII for the first time. The court held that an employer need not *intend* to force an employee's resignation for the doctrine to apply; it is sufficient that the employer knowingly permitted acts of discrimination[14] so intolerable that a reasonable person subject to them would resign.[15]

Suzanne Goss was employed as a sales representative with Exxon Office Systems Company.[16] Goss had been assigned to a lucrative sales territory in Montgomery County, Pennsylvania, and was in charge of several major Exxon accounts.[17] After Goss became pregnant in the spring of 1980, her supervisor, Robert Melchionni, expressed strong doubts to Goss about her ability to combine motherhood with a career.[18]

Although Goss suffered a miscarriage in July, 1980, she again became pregnant three months later.[19] In December of that year, after Goss had obtained a large order from Merck, Sharp & Dohme Pharmaceutical Company, Melchionni again verbally harrassed her about her plans to have a family while maintaining a career with the company. Melchionni further indicated that he was considering removing Goss

11. For further discussion of the reasonable employee standard, or "objective test," see *infra* notes 51-54 and accompanying text. For a collection of cases applying the objective test, see B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 611 n.41 (2d ed. 1983).

12. For a further discussion of the application of the test requiring an inquiry into the employer's intent, see *infra* notes 43-50 and accompanying text. For a collection of cases requiring a showing of intent, see B. SCHLEI & P. GROSSMAN, *supra* note 11, at 611 n.40.

13. 747 F.2d 885 (3d Cir. 1984).

14. Under title VII, discriminatory working conditions are those which subject employees to disparate treatment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e (1982). For the Supreme Court's view of disparate treatment, see International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.14 (1977). *See also* B. SCHLEI & P. GROSSMAN, *supra* note 11, at 13-22.

15. 747 F.2d at 888. For further discussion of the court's holding in *Goss*, see *infra* notes 32-41 and accompanying text.

16. 747 F.2d at 888.

17. *Id.* Goss' account responsibility included such major pharmaceutical companies as Merck, Sharp & Dohme and McNeil Laboratories.

18. *Id.* In response to Melchionni's questioning, Goss indicated her intention to have both a career and a family. *Id.*

19. *Id.* Goss returned to work after the miscarriage without any loss in working time. *Id.*

from the Merck account.[20]

Just before the Christmas holiday, Goss suffered a second miscarriage.[21] When she returned to work in January, 1981, she was told she was being transferred, over her objections, to a less desirable sales territory.[22] She was replaced by Richard Slaughter, who was given the position as an inducement for his wife to transfer from Exxon's Houston office to Philadelphia.[23] Although there were two lucrative territories available,[24] Melchionni had recommended that Goss' area, rather than that of a male employee, should be offered to Slaughter.[25] Melchionni supported his recommendation with the observation that Goss was " 'wacko,' pregnant, and likely to leave."[26] On February 9, 1981, Goss submitted her resignation to Exxon.[27] She subsequently filed suit in the United States District Court for the Eastern District of Pennsylvania.[28]

The district court found that Exxon had engaged in sex discrimination in violation of title VII,[29] and that such discrimination was so severe as to constitute a constructive discharge.[30] Exxon appealed the lower court's decision to the Third Circuit, conceding that it subjected Goss to sex discrimination, but denying that the discriminatory conditions she suffered were so intolerable that they amounted to a constructive

20. *Id.* The court found that Melchionni's verbal conduct was aggressive enough to drive Goss to tears. *Id.*

21. *Id.* After the second miscarriage, Goss spent two weeks recuperating. Because of the year-end holidays, she missed only one week of work. *Id.*

22. *Id.* Goss complained about her sudden transfer to Melchionni's superiors at Exxon, in accordance with the company's "open door" policy. *Id.* Despite the series of discussions which followed, the Exxon official told Goss to either sign an agreement accepting a new territorial assignment, or resign. *Id.*

23. *Id.*

24. *Id.* The second available area, serviced by Tom Katona, was not offered to Slaughter. *Id.*

25. *Id.*

26. *Id.* Based on Melchionni's recommendation and comments, the trial court concluded that the decision to give Goss' territory to Slaughter was based on Goss' sex and pregnancy. *Id.* at 889.

27. *Id.* Over the next two years Goss held jobs at three other companies, each of which paid her less than she had been making at Exxon. *Id.*

28. The district court case is unreported. The case was heard by Judge Clarence Newcomer of the United States District Court for the Eastern District of Pennsylvania. *Id.* at 885-86.

29. *Id.* at 885. The district court found that, in order to make room for Slaughter, Exxon sacrificed Goss rather than a male employee because of her sex and pregnancy, and that this decision was a violation of title VII. *Id.* at 888.

30. *Id.* at 885. The district court noted that for a salesperson, a positive mental attitude is essential to proper performance. *Id.* at 888-89. The series of events preceeding Goss' resignation effectively shattered Goss' confidence in herself and in her employer, thus making it impossible for her to continue to work effectively. *Id.* As a result, the district court found that Goss was entitled to a remedy both for pretermination sexual discrimination and for wrongful termination of her employment. *Id.* at 889.

discharge.[31]

Judge Gibbons, writing for a unanimous court,[32] began his analysis by tracing the development of the constructive discharge doctrine from its introduction under the NLRA[33] through its modern application to title VII cases.[34] The Third Circuit then addressed the split of opinion among the federal courts of appeals as to what findings are necessary before the doctrine can be applied.[35]

Under the approach adopted by the Eighth and Tenth Circuits, the court noted, an employer's discrimination must amount to "an intentional course of conduct calculated to force the victim's resignation."[36] However, the Third Circuit explained that other circuits apply an "objective" standard; that is, the conduct complained of must have the "foreseeable result" of inducing a reasonable person in the employee's position to resign.[37]

After examining the split of authority, the Third Circuit held, with-

31. *Id.* at 887. Goss appealed the judgment in her favor, contending that the judgment was inadequate. Exxon cross-appealed, conceding that Goss was subjected to sex discrimination, but asserting that it did not amount to a constructive discharge. *Id.*

32. The case was argued before Judges Seitz, Gibbons, and Hunter. *Id.*

33. *Id.* at 887 (citing NLRB v. Tricor Prods., Inc., 636 F.2d 266, 271 (10th Cir. 1980); J. P. Stevens & Co. v. NLRB, 461 F.2d 490, 494-95 (4th Cir. 1972); NLRB v. Century Broadcasting Corp., 419 F.2d 771 (8th Cir. 1969); Bausch & Lomb Optical Co. v. NLRB, 217 F.2d 575, 577 (2d Cir. 1954); NLRB v. Saxe-Glassman Shoe Corp., 201 F.2d 238, 243 (1st Cir. 1953)).

34. 747 F.2d at 887. For further discussion of the application of the constructive discharge doctrine to title VII cases, see *supra* notes 6 & 8 and accompanying text.

35. *Id.* at 887-88. For further discussion of the split among circuits, see *infra* notes 42-57 and accompanying text.

36. 747 F.2d at 887-88 (citing Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981); Muller v. United States Steel Co., 509 F.2d 923, 929 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975)). In *Johnson*, black employees claimed they were constructively discharged when they quit after having been subjected to harsh working conditions. 646 F.2d at 1256. The Eighth Circuit held that the employer subjecting the blacks to harsh working conditions was not liable, as the conditions were imposed equally on all employees, and clearly the employer did not wish to force all of its employees to resign. *Id.* In *Muller*, a Spanish-American temporary employee was found not to have been constructively discharged by his employer's refusal to consider him for a permanent position. 509 F.2d at 929. The Tenth Circuit reasoned that the failure to consider the employee for elevation was a result of the company's reduced operation and economic concerns, rather than a deliberate plan to force the employee to quit. *Id.*

37. 747 F.2d at 887-88 (citing Held v. Gulf Oil Co., 684 F.2d 427 (6th Cir. 1982); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980); Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977)). The Sixth Circuit's approach in *Held* is representative of the courts' analysis under the objective standard. In *Held*, a white female quit her job after having been subject to disparate treatment on account of her sex. 684 F.2d at 430. The court held that she had been constructively discharged, despite the lack of evidence as to her employer's intent, since "a man is held to intend the foreseeable consequences of his conduct." *Id.* at 432 (citation omitted).

out discussion, that it would apply the objective standard: "The court need merely find that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign."[38] Having determined the legal standard governing applicability of the constructive discharge doctrine,[39] the court reviewed the district court's opinion and concluded that its findings were "legally sufficient" to support a judgment for Goss.[40] In a separate discussion of damages, Judge Gibbons affirmed the lower court's judgment against Exxon for back pay as well as for front pay.[41]

The split of opinion among the circuits that the Third Circuit confronted in *Goss* focuses on the findings necessary for the constructive discharge doctrine to apply.[42] Some circuits[43] have held that the constructive discharge doctrine applies only when the employer's actions were specifically designed to force a resignation. In *Muller v. United*

38. 747 F.2d at 888. Significantly, the Third Circuit does not require a finding of employer's specific intent to force an employee's resignation as a prerequisite for application of the constructive discharge doctrine.

39. *Id.* at 889. The court characterized the proper legal standard as whether an objective, reasonable person would have felt compelled to resign under the same conditions suffered by the employee seeking recovery. *Id.* at 888.

40. *Id.* at 888-89.

41. *Id.* The district court had awarded back pay, authorized under § 706(g) of title VII, for the period from January, 1981, the date of resignation, through June, 1983, the date of Goss' reemployment. *Id. See* 42 U.S.C. § 2000e-5(g) (1982). The Third Circuit explained that the back pay award included lost commissions and job search expenses incurred during that time. 747 F.2d at 888-89. According to the district court's instructions, Goss' actual earnings for the period were deducted from the total award. *Id.* at 889.

The Third Circuit rejected Exxon's contention that a lower average of actual earnings from prior years, rather than projected earnings for 1981, should be used to calculate lost commissions. *Id.* at 889. The court reasoned that "[t]he risk of lack of certainty with respect to projections of lost income must be borne by the wrongdoer, not the victim." *Id.* (citing Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931)).

The court also approved of the district court's award of front pay covering the period ending when Goss would be assigned to a sales territory by her new employer. For a further discussion of front pay, see *supra* note 5.

42. The United States Supreme Court has recently taken a step toward resolving the split among the circuits. *See* Sure-Tan, Inc. v. NLRB, 104 S. Ct. 2803 (1984). In *Sure-Tan*, the Court considered application of the constructive discharge doctrine under the unfair labor practices provision of the NLRA. *Id.* (citing National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982)). The Court concluded that undocumented aliens had been constructively discharged when their employer "purposefully created working conditions so intolerable that the employee[s] had no option but to resign." *Id.* at 2810. Thus the Supreme Court seems to adopt the view that for the constructive discharge doctrine to apply under the NLRA, there must be a showing of an employer's intent to create intolerable working conditions, but not of its intent to force an employee to resign.

43. *See, e.g.*, Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981); Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975).

States Steel Corp.,[44] the Tenth Circuit refused to apply the doctrine where an Hispanic employee resigned after being denied a promotion on the basis of his race.[45] The court held that the employee had not been constructively discharged since the discriminatory policy was not implemented with an intent to force the employee to quit.[46]

Similarly, in *Johnson v. Bunny Bread Co.*,[47] the Eighth Circuit refused to apply the doctrine where one of the plaintiffs, a black man, quit his job as a cleaner at a bread company after complaining that the work was too harsh and that the atmosphere was racially charged.[48] The court reasoned that the doctrine was inapplicable since all the company's employees were subject to equally harsh working conditions.[49] The court noted that "certainly Bunny Bread did not wish to force all its employees to resign."[50] Thus, without the requisite finding of intent, a court adopting the *Muller* approach would refuse to consider such treatment as amounting to a constructive discharge.

The majority of other courts, however, would find the constructive discharge doctrine applicable without a showing of an employer's intent to force its employee to quit, as long as the conditions of discrimination would have caused a reasonable person to resign.[51] In *Held v. Gulf Oil*,[52]

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44. 509 F.2d 923 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975).

45. 509 F.2d at 925. The plaintiff, Muller, had been employed with U.S. Steel for 14 years without being considered for a promotion. Since the time the 1964 Civil Rights Act was passed, no Spanish-American at the U.S. Steel plant had been promoted to a position of "spell foreman" or temporary foreman, a necessary step to becoming a supervisory employee. *Id.*

46. *Id.* at 929.

47. 646 F.2d 1250 (8th Cir. 1981).

48. *Id.* at 1256-57. The plaintiffs' work records in *Johnson* showed declining work performance and acts of repeated insubordination toward their superiors. *Id.* at 1252-53.

49. *Id.* at 1256-57. The court found that the difficult task of hand-scrubbing brew tanks, which the plaintiffs complained was required of them solely because they were black, was required of blacks and whites equally. *Id.*

50. *Id.* at 1256.

51. *See, e.g.*, Satterwhite v. Smith, 744 F.2d 1380, 1383 (9th Cir. 1984) (employee not considered for promotion due to race); Holsey v. Armour & Co., 743 F.2d 199, 209 (4th Cir. 1984) (black employees at meat processing plant harassed and improperly disciplined), *cert. denied*, 105 S. Ct. 1395 (1985); Parrett v. City of Connersville, 737 F.2d 690, 694 (7th Cir. 1984) (following Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980)); Pena v. Brattleboro Retreat, 702 F.2d 322, 323 (2d Cir. 1983) (58-year-old administrator replaced by woman in her early thirties); Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982) (environment of sexual bias tolerated and fostered by employer); Henson v. City of Dundee, 682 F.2d 897, 899 (11th Cir. 1982) (police dispatcher resigned after allegedly harassed by supervisor); Clark v. Marsh, 665 F.2d 1168, 1172 (D.C. Cir. 1981) (army clerk not promoted due to sex); Meyer v. Brown & Root Constr. Co., 661 F.2d 369, 372 (5th Cir. 1981) (employee demoted after informing employer of her pregnancy); NLRB v. Cable Vision, Inc., 660 F.2d 1, 7 (1st Cir. 1981) (union activist required to work hours in conflict with his second job as part-time musician). *See also* Baxter & Farrell, *supra* note 4, at 350 (noting that "most cases specifically have held that such intent is not necessary") (citing Fra-

the Sixth Circuit applied the constructive discharge doctrine where a retail marketer was subject to disparate treatment by her employer on the basis of her sex.[53] The court found it sufficient that the employer "tolerated and fostered" an "environment of sexual bias."[54] The absence of any showing that the employer was motivated by an intent to force the employee to quit did not absolve it from liability.[55]

In *Satterwhite v. Smith*,[56] the Ninth Circuit similarly looked to the employer's awareness of intolerable working conditions, rather than to its intent, in deciding to apply the constructive discharge doctrine. In *Satterwhite*, a black employee quit after he was refused access to promised training and advancement opportunities, and after whites were regularly promoted ahead of him.[57] The court concluded that the district court properly found these conditions discriminatory and intolerable.[58] As such, the constructive discharge doctrine would apply.

The ruling of the Third Circuit in *Goss* is consistent with the second line of cases, which require no finding of an employer's intent to force an employee to resign. Thus, for an employer to be liable in the Third Circuit for constructive discharge under title VII, an employee need only show that: 1) discriminatory working conditions existed; 2) the degree of discrimination was so intolerable that a reasonable person subject to the same conditions would resign; 3) the employee did, in fact, resign; and 4) the employee's resignation was a foreseeable consequence of allowing such conditions to persist.[59]

It is submitted that the objective test adopted by the Third Circuit is

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zer v. KFC Nat'l Management Co., 491 F. Supp. 1099, 1105 (M.D. Ga. 1980), *aff'd without opinion*, 636 F.2d 313 (5th Cir. 1981); Bourque v. Powell Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980); Calcote v. Texas Educ. Found., 578 F.2d 95 (5th Cir. 1978)).

52. 684 F.2d 427 (6th Cir. 1982).

53. *Id.* at 432.

54. *Id.* at 432. The "atmosphere of bias" to which the court referred included assigning the plaintiff (who was hired as a sales representative) to menial tasks, subjecting her regularly to sex-based innuendos, and requiring her to work longer hours than her male counterparts. *Id.* at 429.

55. *Id.* at 432. The court reasoned that an employer must be held responsible for the foreseeable consequences of its conduct, even if there was no proof of its specific intent to cause harm. *Id.*

56. 744 F.2d 1380 (9th Cir. 1984).

57. Satterwhite was hired by the Port of Tacoma, Washington, as a temporary employee on the sweeper crew, with the understanding that he would get a permanent appointment, based on seniority, when an opening became available. The court found that despite their agreement, the Port of Tacoma never interviewed Satterwhite for a permanent position but regularly interviewed and hired white men. *Id.* at 1381.

58. *Id.* at 1383. The court included in its evaluation of working conditions an assessment of "aggravating factors," such as the atmosphere created by occasional racial insults, that all blacks working at the Port suffered. *Id.* at 1382.

59. For a discussion of the Third Circuit rule as developed and applied in *Goss*, see *supra* note 38 and accompanying text.

both practical and consistent with well recognized principles of labor law and civil rights law. The test is practical in that it obviates the need for a difficult and somewhat nebulous inquiry into an employer's intent. Whether an employer discriminates against its victim with the intention of forcing the latter to resign, or instead intends for the employee to remain and accept the discriminatory working conditions, is a fine line that may be impossible to discern in a given situation.

Furthermore, the Third Circuit test is consistent with the long-established rule in labor law that an employer will be held responsible for the foreseeable consequences of its conduct, whether or not it can be proved that those consequences were intended.[60] As the United States Supreme Court noted in *Radio Officers v. Labor Board*,[61] a case involving an employer's discrimination in favor of union management, "an employer's protestation that he did not intend [the results of discriminatory behavior] must be unavailing where the natural consequence of his action [was such a result]."[62]

Similarly, the Third Circuit test is consistent with the principles developed in title VII cases that an employer will be liable for the consequences of its discriminatory employment practices, regardless of whether intent to discriminate can be shown.[63] In *Griggs v. Duke Power*,[64]

60. *See* Radio Officer Union v. NLRB, 347 U.S. 17, 45 (1953) ("This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct."); Held v. Gulf Oil, 684 F.2d 427, 432 (6th Cir. 1982) (noting the established rule in labor law that a person is deemed to intend the foreseeable consequences of his or her conduct). *See also* Clark v. Marsh, 665 F.2d 1168, 1175 n.8 (D.C. Cir. 1981) ("To the extent that [the employer] denies a conscious design to force [the employee] to resign, we note that an employer's subjective intent is irrelevant; [the employer] must be held to have intended those consequences it could reasonably have foreseen.") (citations omitted).

61. 347 U.S. 17 (1953).

62. *Id.* at 45.

63. *See, e.g.*, Griggs v. Duke Power, 401 U.S. 424 (1971); Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250 (6th Cir. 1985); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983). *Duke Power* has been hailed as "the most important decision in employment discrimination law." B. SCHLEI & P. GROSSMAN, *supra* note 11, at 5. For further discussion of *Duke Power*, see *infra* notes 64-66 and accompanying text.

In *Erebia*, a title VII violation was found where an employer permitted an atmosphere of racial hostility to persist at its workplace, despite the fact that there was no showing of the employer's intent to discriminate. The Sixth Circuit reasoned that to require a finding that the employer intended to discriminate "would erode severely the important protection courts have recognized under [civil rights statutes]. An employer with a small number of minority employees could allow them to be harassed and subjected to slurs, simply do nothing, and avoid responsibility and liability." 772 F.2d at 1258.

In *Katz*, a female air traffic controller filed a sex discrimination suit based on substantial sexual harassment by male employees at her workplace. 709 F.2d at 253-54. The court found that since the female employee's supervisors were aware of the pervasive sexual slurs, insults, and innuendos directed at her, but

where the administration of a standardized intelligence test as a condition of employment had the effect of discriminating on the basis of race, a violation of title VII was found to exist regardless of whether the employer intended to discriminate against any particular ethnic group.[65] The rationale behind the *Duke Power* holding was that "Congress directed the thrust of [title VII] to the *consequences* of employment practices, not simply the motivation."[66] The Third Circuit rule, holding an employer responsible for the consequences of its employment practices—consequences which may include a forced resignation—regardless of whether the consequences were intended, is, therefore, in keeping with the Supreme Court's interpretation of title VII as evidenced in *Duke Power*.

Given the Third Circuit's holding in *Goss*, it will be good practice for employers to take notice of the constructive discharge doctrine, and to investigate potentially discriminatory conditions that may exist at their workplace. Otherwise, an employer may find itself liable for discriminatory working conditions that induced one or more of its employees to resign, even though the employer never intended that such resignations occur.

While the expense of investigating and remedying latent areas of discrimination at a particular workplace may discourage some employers from taking such action, that cost should be weighed against the potentially far greater expense of defending against, and paying damages associated with, a successful constructive discharge suit. That expense, as the *Goss* decision pointed out, may include an award of full back pay[67] as well as an award of lost future earnings.[68] It is suggested that the least costly choice might well be to investigate and correct potential problems rather than to pay the costs of an unexpected constructive discharge claim.

The *Goss* decision will undoubtedly have a lasting impact on employer-employee relations. Employers in the Third Circuit now have an added incentive to seek out potential sources of discrimination, and to

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failed to take corrective action, the employer was liable for violations under title VII. *Id.* at 254.

64. 401 U.S. 424 (1971).

65. *Id.* at 436. The Supreme Court in *Duke Power* interpreted title VII to proscribe "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431. In other words, practices that had a discriminatory effect were to be forbidden, regardless of the employer's intent in undertaking those acts. *Id.* at 432.

66. *Id.* at 432 (emphasis in original).

67. For a discussion of back pay awards in constructive discharge cases, see *supra* notes 5 & 41.

68. Lost future earnings, also known as front pay, are calculated from the date employment is terminated until the time the victim is expected to regain his or her rightful place in the job market. For a further discussion of front pay, see *supra* notes 5 & 41.

maintain tolerable, nondiscriminatory conditions at their workplace. Indeed, by applying an objective standard to constructive discharge cases, the Third Circuit has moved in a direction for which all employees, especially potential victims of title VII discrimination, will be grateful.

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