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Constructive Discharge: A Suggested Standard for West Virginia and Other Jurisdictions

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CONSTRUCTIVE DISCHARGE: A SUGGESTED STANDARD FOR WEST VIRGINIA AND OTHER JURISDICTIONS

I. INTRODUCTION

At common law, the employment relationship was deemed to be terminable at the will of either the employer or the employee.[1] Absent a contractual agreement to the contrary, an employee could quit at any time.[2] Likewise, an employer could fire an employee for good reason, bad reason, or no reason at all.[3]

With the passage of time, legislative enactments and judicial decisions have eroded the at-will doctrine. For example, the National Labor Relations Act (NLRA)[4] prohibits employers from hiring and firing employees on the basis of union membership;[5] Title VII of the Civil Rights Act of 1964 (Title VII)[6] prohibits discrimination in the terms and conditions of employment because of an "individual's race, color, religion, sex, or national origin;"[7] and the Age Dis-

1. *See generally* 53 AM. JUR.2D *Master and Servant* §§ 14-34 (1970).
2. *Id.*
3. *Id.*
4. 29 U.S.C. §§ 151-68 (1988).
5. *Id.* at § 158(b)(2).
6. 42 U.S.C. § 2000e to 2000e-17 (1988).
7. *Id.* at § 2000e-2(a)(1).

crimination in Employment Act[8] bars discrimination against those over the age of forty.

These and other legislative enactments[9] essentially constitute statutory exceptions to the at-will doctrine by proscribing certain previously permissible employer conduct. Courts have also weakened the at-will doctrine through the adoption of common-law exceptions.[10]

In response to the weakening of the at-will rule, some employer conduct has been forced "underground." Fearing liability, some employers have attempted to get around the various protective statutes by inducing the unwanted employee to quit. This is typically accomplished by making the work place unpleasant to the employee — unpleasant enough that the employee will quit rather than tolerate the disagreeable conditions.

In order to thwart this tactic, courts have adopted the doctrine of constructive discharge. The doctrine permits the courts to imply a discharge when certain circumstances are shown. Although the doctrine has attained widespread acceptance, there is disagreement over what an employee must prove in order to be considered constructively discharged. Two standards have emerged in the federal circuit courts of appeal, and the United States Supreme Court has yet to settle the conflict between them. Likewise, the West Virginia Supreme Court of Appeals has not ruled on the issue. The states that have ruled on the issue are also split on what standard to apply.

The purpose of this note is to analyze the competing standards used in constructive discharge cases and suggest a standard which West Virginia and other jurisdictions should follow. Part II examines the two standards now used by the United States circuit courts of appeal and a handful of states. Part III briefly discusses the current status of West Virginia law. Finally, Part IV analyzes to what extent the two dominant standards carry out the purpose of the constructive

8. 29 U.S.C. §§ 621-34 (1988).

9. *See e.g.*, W. VA. CODE § 23-5A-1 (1985) (prohibiting discrimination against employees who file workmen's compensation claims).

10. *See e.g.*, Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978) (recognizing the public-policy exception to the at-will rule).

discharge doctrine, and recommends the approach which is most consistent with the purposes of the constructive discharge doctrine.

II. THE COMPETING STANDARDS

Constructive discharge is a legal fiction that permits an employee's resignation to be treated as a firing when certain circumstances are present. As two commentators defined it,

> constructive discharge means a discharge implied by the courts. No express or actual discharge occurs; rather, the courts examine the circumstances surrounding the employee's decision to quit or resign. If the decision was forced on the employee, the courts will deem it a constructive discharge and will treat the employee as if he or she has been explicitly and directly discharged.[11]

The doctrine first appeared in cases involving anti-discrimination provisions of the National Labor Relations Act.[12] The NLRA prohibits an employer from discriminating against employees on the basis of union membership.[13] The National Labor Relations Board (Board),[14] recognizing that some employers might attempt to indirectly discriminate against union members and sympathizers by making their working conditions so intolerable that the employees would resign, adopted the doctrine of constructive discharge to deal with such situations.[15] The doctrine was later absorbed by the courts into cases involving discrimination under Title VII.[16] The doctrine is now

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11. Baxter & Farrell, *Constructive Discharge - When Quitting Means Getting Fired*, 7 EMP. REL. L.J. 346, 347 (1981) (emphasis omitted).

12. 29 U.S.C. §§ 151-68 (1988).

13. *Id.* at § 158(b)(2).

14. 29 U.S.C. § 160 (1988). This section assigns the Board primary responsibility for enforcing the provisions of the NLRA.

15. *See generally* Note, *Choosing a Standard for Constructive Discharge in Title VII Litigation*, 71 CORNELL L. REV. 587 (1986).

16. *See* Goss v. Exxon Office Systems Company, 747 F.2d 885 (3d Cir. 1984); Pena v. Brattleboro Retreat, 702 F.2d 322 (2d Cir. 1983); EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983); Held v. Gulf Oil Co., 684 F.2d 427 (6th Cir. 1982); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981); Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981); Heagney v. University of Washington, 642 F.2d 1157 (9th Cir. 1981); Alicea Rosado v. Garcia Santiago, 562 F.2d 114 (1st Cir. 1977); Young v. Southwestern Savings and Loan Association, 509 F.2d 140 (5th Cir. 1975); Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975).

commonly applied in other employment related causes of action.[17]

Proof of constructive discharge can have a significant impact on the relief available to a successful plaintiff. If the employer conduct that precipitates an employee's resignation is actionable, then the employee can recover damages, but only up to the time of her resignation. If, however, the employee can establish constructive discharge, she is entitled to recover not only for damages up to the time of the resignation, but back pay for lost wages occurring after the termination of employment.[18] In some circumstances, discharged employees are also entitled to receive front pay, which is an award for damages from the time of the judgment to when the plaintiff can work himself back into the position he would have been absent the discrimination.[19] Because of the wider range of damages available to a person who is constructively discharged over one who has merely resigned, it is obvious that aggrieved former employees will seek to invoke the doctrine.[20] It thus becomes critical for both employees and employers to know when an employer's conduct will sustain a finding of constructive discharge.[21]

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17. *See, e.g.*, Spulak v. K Mart Corp., 894 F.2d 1150 (10th Cir. 1990) (Age Discrimination in Employment Act); Kelley v. TYK Refractories, 860 F.2d 1188 (3d Cir. 1988) (§ 1981 civil rights); Kries v. Townley, 833 F.2d 74 (6th Cir. 1987) (state employee benefits plan); Weisman v. Connors, 69 Md. App. 732, 519 A.2d 795 (1987) (breach of contract).

18. *Goss*, 747 F.2d 885 (3d Cir. 1984).

19. *Id. See also* Shore v. Federal Express Corp., 777 F.2d 1155 (6th Cir. 1985).

20. By way of example, let us assume that a female employee who presently earns $1000 a month is denied a promotion to a position which pays $1500 a month. Believing that the denial is due to sex discrimination (assume this belief is correct), she approaches the employer, who becomes very angry at the suggestion. Soon thereafter the employee begins to observe what she believes are moves designed to force her to quit, such as a heavier work load and more critical performance evaluations. After two months of enduring this treatment, she resigns. The lawsuit she files is decided in her favor ten months after her resignation.

If she cannot establish that she was constructively discharged, her monetary damages are limited to $1000, which is the extra pay she would have made the two months prior to her resignation had she received the promotion. If, on the other hand, she can prove constructive discharge, she will additionally be entitled to receive $1500 a month lost salary for the ten months prior to the judgment (minus any mitigating earnings, of course), plus reinstatement or front pay until she is able to acquire a comparable position.

Obviously, a finding of constructive discharge can make quite a difference in a plaintiff's ultimate recovery.

21. The application of the doctrine can also have a significant impact on procedural aspects of a case, such as the statute of limitations. For example, in Panopulos v. Westinghouse, 216 Cal.

There are at present two competing standards used by the courts to decide whether a constructive discharge has occurred. These standards are commonly referred to as the "employer intent" and "reasonable employee" standards.[22]

A. The Employer Intent Standard

1. The NLRA

The employer intent standard originated with discrimination cases under the NLRA which, as noted previously, was the first area of employment law to use the constructive discharge doctrine. In *Crystal Princeton Refining Co.*,[23] the National Labor Relations Board held that in order to prove constructive discharge under the NLRA, an employee must show that "the burdens 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 . . . . [I]t must be shown that those burdens were imposed because of the employee's union activities."[24] The first element of proof consists of two parts. First, the employee must show the existence of intolerable working conditions. Then, if the employee can show that those intolerable conditions were deliberately imposed upon him by the employer, he has satisfied the first element.

The second element underscores the fact that the reason(s) underlying the imposition of the intolerable conditions must be unlawful. In an NLRA case, the unlawful conduct which satisfies the

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App.3d 660, 669-70, 264 Cal. Rptr. 810, 816-17 (1989), the court observed:

> The facts of this case present the anomaly that had the plaintiff resigned immediately and claimed constructive discharge upon his transfer . . . he would have had to file suit within two years, yet plaintiff remained on the job for five years . . . . While an employee is not in every case required to resign immediately in order to maintain an action for wrongful constructive discharge . . . . the employee may not unilaterally extend his or her right to sue for an injury already suffered simply by remaining on the job.

Id.

22. These standards are also referred to respectively as the "subjective" and "objective" tests. As the author finds these terms to be both confusing and somewhat misleading, this article will use the terms "employer intent" and "reasonable employee."

23. 222 N.L.R.B. 1068 (1976).

24. *Id.* at 1069.

second element is discrimination based upon an employee's union membership.[25] Thus, if an employer deliberately imposes intolerable conditions on an employee on the basis of some non-proscribed activity, a personality conflict for example, there will be no constructive discharge; there is no underlying violation of the law, since it not illegal for an employee to be discharged because of a mere personality conflict.[26]

Strictly speaking, the second "element" cited above is not a true element of constructive discharge, but rather the underlying violation of law which is a prerequisite to a constructive discharge action.

2. Title VII

Although the doctrine has found ready acceptance in Title VII actions, only a minority of circuits now apply the employer intent standard in Title VII litigation. The minority jurisdictions now consist of the Fourth[27] and Eighth[28] Circuits. In these jurisdictions, after the aggrieved plaintiff has established the underlying violation of law, she must prove "[1] deliberateness of the employer's action, and [2] intolerability of the working conditions."[29] Deliberateness is established by demonstrating that the employer desired to force the employee to quit.[30] Intolerability of working conditions is established if it can be shown that a reasonable employee would have found the conditions intolerable.[31]

Of the handful of states which have addressed the issue, Oregon[32] and California[33] have adopted modified versions of the employer intent standard. Oregon requires a finding of employer intent, but has relaxed the second element, requiring only that the employee

25. 29 U.S.C. § 158(b)(2) (1988).

26. This is assuming, of course, that the personality conflict itself is not due to any actionable employer conduct.

27. EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983).

28. Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981).

29. Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985).

30. *Id.*

31. *Id.*

32. Bratcher v. Sky Chef's, Inc., 308 Or. 501, 783 P.2d 4 (1989).

33. Campbell v. Surety Insurance, 217 Cal. App.2d 36, 265 Cal. Rptr. 814 (3d Dist. 1990).

actually find the working conditions intolerable.[34] Under the Oregon approach, a plaintiff need not show that a reasonable employee would have felt forced to resign. She merely must establish that she did in fact resign in the face of employer attempts to oust her.

In California, a plaintiff can establish the requisite mental state if she demonstrates that "the employer had actual or constructive knowledge of the intolerable actions and conditions and could have, but did not, remedy the situation."[35] California retains the requirement that the working conditions be intolerable to a reasonable employee.[36]

All courts, even those which follow the reasonable employee standard, uniformly agree that a constructive discharge occurs when an "employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation . . . ."[37] Courts which have required proof of scienter do so on the basis of the deliberateness requirement. "To act deliberately, of course, requires intent."[38]

In *Bristow v. Daily Press, Inc.*,[39] the Fourth Circuit noted that intent could be inferred from circumstantial evidence.[40] According to the court, intent can be inferred when an employer fails to act in the face of intolerable conditions.[41] The court cautioned, however, that "where all employees are treated identically, no one employee can claim that difficult working conditions signify the employer's intent to force that individual to resign."[42]

The California Third District Court of Appeal reached a similar conclusion in *Gantt v. Sentry Insurance*,[43] commenting that

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34. *Bratcher*, 308 Or. at 506, 788 P.2d at 6.

35. *Gantt*, at 217 Cal. App.3d at 66, 265 Cal. Rptr. at 833.

36. *Id.* at n.18.

37. Young v. Southwestern Savings and Loan Association, 509 F.2d 140, 144 (5th Cir. 1975). The quoted language appears almost uniformly in constructive discharge cases, but it is significant that it appears in *Young*, a seminal case adopting the reasonable employee standard.

38. Holsey v. Armour & Co., 743 F.2d 199, 209 (4th Cir. 1984).

39. 770 F.2d 1251 (1985).

40. *Id.* at 1255.

41. *Id.*

42. *Id.* (citing Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981)).

43. 217 Cal. App.3d 36, 265 Cal. Rptr. 814 (1990).

"[w]ithout some culpable mental state on the part of the employer the tort would be converted in essence to a form of strict liability for the creation of intolerable conditions."[44]

Both *Bristow* and *Gantt* demonstrate that courts using the employer intent standard (or some modified version thereof) are aware of the difficulty plaintiffs encounter in proving intent.[45] Their response is to allow proof by circumstantial evidence. Such evidence can include showing that the employer knew of the intolerable working conditions, but failed to do anything about them.

B. The Reasonable Employee Standard

Most of the circuits which have absorbed the doctrine into Title VII now employ the reasonable employee standard in determining whether an employee has been constructively discharged. These circuits include the First,[46] Second,[47] Third,[48] Fifth,[49] Sixth,[50] Ninth,[51] Tenth,[52] Eleventh,[53] and the District of Columbia.[54] Only the Seventh Circuit has yet to take sides on the issue. Maryland,[55] Illinois,[56] and Washington[57] have also thrown their hats into the reasonable employee ring. Additionally, Pennsylvania appears to be leaning in this direction too.[58]

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44. *Id.* at 217, 265 Cal. Rptr. at 833.

45. It should be noted that the *Gantt* court claimed not to be adopting an employer intent standard, but held that a constructive discharge claim does require the evidence to show that the employer had actual or constructive knowledge of the intolerable conditions and could have, but didn't, remedy the situation. Nonetheless, the *Gantt* test is virtually indistinguishable from *Bristow*, since both authorize proof of scienter through the use of circumstantial evidence.

46. Alicea Rosado v. Garcia Santiago, 562 F.2d 114 (1st Cir. 1977).

47. Pena v. Brattleboro Retreat, 702 F.2d 322 (2d Cir. 1983).

48. Goss v. Exxon Office Systems Co., 747 F.2d 883 (3d Cir. 1984).

49. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980).

50. Held v. Gulf Oil Co., 684 F.2d 427 (6th Cir. 1982).

51. Heagney v. Univ. of Washington, 642 F.2d 1157 (9th Cir. 1981).

52. Derr v. Gulf Oil Corp., 796 F.2d 340 (10th Cir. 1986).

53. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

54. Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981).

55. Beye v. Bureau of Nat'l Affairs, 59 Md. App. 642, 477 A.2d 1197 (1984).

56. Steele v. Illinois Human Rights Comm'n, 160 Ill. App.3d 577, 112 Ill. Dec. 568, 513 N.E.2d 1177 (1987).

57. Bulaich v. AT & T Information Systems, 113 Wash.2d 254, 778 P.2d 1031 (1989).

58. Hanson v. Penn. Dep't of Transp., 130 Pa. Comnw. 499, 568 A.2d 991 (1990).

According to this approach, "the question on which constructive discharge cases turn is simply whether the employer, by its illegal discriminatory acts, has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign."[59] Thus, the reasonable employee standard specifically rejects the notion that employees must prove scienter. A plaintiff need only prove that his actions were consistent with what a reasonable employee would have done in the same circumstances.[60]

Although the reasonable employee standard has achieved significant acceptance, there is scant discussion as to why this is so. At times the courts seem to view it as self evident that the reasonable employee standard is superior to that of employer intent. For instance, in *Bourque v. Powell Electrical Mfg. Co.*[61] the Fifth Circuit dismissed the employer intent standard as "inconsistent . . . with the realities of modern employment."[62] The court failed, however, to articulate those realities. In most of the other decisions adopting the reasonable employee standard, the courts have failed to articulate any reason for choosing this test, other than to cite precedent from other jurisdictions.

In *Derr v. Gulf Oil Corp.*,[63] the Tenth Circuit did devote some discussion to the justifications for the reasonable employee standard. The court observed that "typically proof of any element in these cases is circumstantial."[64] The reasonable employee standard "cut[s] through the details and difficulty of analyzing the employer's state of mind and focus[es] on an objective standard."[65] Quoting *Clark v. Marsh*,[66] a decision from the District of Columbia Circuit, the Tenth Circuit noted that "'[t]o 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

59. Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986).
60. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980).
61. *Id.*
62. *Id.* at 65.
63. 796 F.2d 340 (1986).
64. *Id.* at 344.
65. *Id.*
66. 665 F.2d 1168 (1981).

held to have intended those consequences it could reasonably have foreseen.'"[67]

The court then opined that the reasonable employee standard "will simplify the task of the finder of fact in determining not only whether the employer discriminated against the employee but also whether the manner of discrimination rendered work conditions intolerable."[68]

Based on the discussion in *Derr*, there appear to be at least three policy reasons favoring the adoption of this standard: [1] because proof is often based on circumstantial evidence, scienter is too difficult to establish; [2] because of the difficulty of proof, employers will be rewarded for injurious conduct even though the results of such conduct were foreseeable; and [3] use of an objective standard simplifies the task of the fact-finder.

III. West Virginia Law on Constructive Discharge

Discussion of the current status of West Virginia law on constructive discharge does not present a difficult problem. There is none.[69] The issue has been raised in only one case to reach the Supreme Court of Appeals, *Chico Dairy v. West Virginia Human Rights Comm'n*[70] The court, however, did not address the constructive discharge issue because it found as a matter of law that there had been no underlying violation of law. Lacking a substantive violation of law, it was unnecessary for the court to discuss the issue of constructive discharge.

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67. Derr v. Gulf Oil Co., 796 F.2d 340, 344 (10th Cir. 1986) (quoting Clark v. Marsh, 665 F.2d 1168, 1175 n.8) (emphasis omitted).

68. *Id.*

69. There is some law in West Virginia concerning a resigning employee's ability to collect unemployment compensation. *See e.g.*, Curry v. Gatson, 376 S.E.2d 166 (W. Va. 1988) (holding that racial or sexual harrassment in the workplace which would cause a reasonably prudent person to resign will not disqualify former employee from receiving unemployment compensation benefits upon resignation).

70. 382 S.E.2d 75 (W. Va. 1989).

IV. An Argument for Employer Intent

A. *The Ends Determine the Means*

Any decision as to what standard to apply should necessarily depend on which standard best accomplishes the purposes of the constructive discharge doctrine.

The policy which forms the foundation for the constructive discharge doctrine is the desire by the courts to prevent employers from accomplishing covertly that which they are prohibited by law from doing overtly. Stated in other terms, the doctrine's purpose is to prevent an employer from making a mockery of employees' legal protections by having an employee voluntarily acquiesce to an employer's legally unjustified desire to end the employment relationship. As one court commented:

> It would defy both reason and fairness to immunize [an employer] from liability simply because he has been clever enough to [effectively fire an employee] by forcing a resignation. That would, in effect, reward him for the extra measure of malefaction of not only acting in contravention of some public policy but of making things so intolerable that the employee is forced to initiate his own unlawful termination.[71]

It is important to note that the purpose of constructive discharge is *not* to provide employees with expanded substantive employment rights, but rather to allow them a mechanism to better enforce the rights they *already* possess. It should also be remembered that application of the doctrine merely affects the scope of recovery, and not liability for the underlying unlawful conduct.

Courts have also expressed a desire, to the extent possible, to have disputes solved within existing employment relationships.[72] Thus, courts should apply a standard which will prevent employer sub-

71. Beye v. Bureau of Nat'l Affairs, 59 Md. App. 642, 653, 477 A.2d 1197, 1203 (1984).

72. *See* Derr v. Gulf Oil, 796 F.2d 340, 342 (10th Cir. 1986); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 66 (5th Cir. 1980).

terfuge and encourage settlements of disputes while the employment relationship is still intact.

B. The Means to the Ends

With the foregoing discussion in mind, it is the author's contention that the employer intent standard is most consistent with the purposes that the constructive discharge is designed to serve. This contention is based on three premises: (1) the doctrine is designed to prevent intentional misconduct, hence scienter is an indispensable element; (2) since intent may be inferred through circumstantial evidence, plaintiffs do not face insurmountable problems with proof; and (3) by allowing inferences of intent based on employer inaction to known, intolerable conditions, aggrieved employees (or their agents) will be encouraged to make employers aware of their complaints. Employers who are not trying to force an employee out will remedy the work conditions, thus fostering settlement of disputes within the employment relationship.

At first blush, one may wonder why there is even a debate about whether intent should be required in a constructive discharge action. After all, the doctrine was designed to combat employers who force employees whom they cannot lawfully fire to resign. If the behavior at issue is intentional misconduct, then it is nonsensical to fail to require proof of intent.

Supporters of the reasonable employee standard argue that requiring proof of scienter presents too difficult a burden for plaintiffs. In *Derr v. Gulf Oil Corp.*,[73] for instance, the Tenth Circuit admitted it was concerned about the "difficulty of analyzing the employer's state of mind . . . ."[74] Such a statement is merely a diplomatic way of saying "because scienter is so difficult to prove, it need not be proven at all."

The answer to the plaintiff's dilemma need not be made at the expense of justice. Use of circumstantial evidence can provide a

73. 796 F.2d 340 (1986).

74. *Id.* at 344.

viable vehicle for proving scienter. The California court which decided *Gantt* was on the mark when it said that intent could be inferred from an employer's failure to remedy intolerable conditions of which it has actual or constructive knowledge.[75]

Allowing such an inference enhances a plaintiff's chance of success at trial and simultaneously encourages dispute settlement while the employment relationship is still in existence. If the employee approaches the employer and it responds positively to correct her legitimate concerns, the dispute is resolved and no further action will be necessary. On the other hand, an employer's refusal to respond to an employee's legitimate concerns will create a strong inference that the employer intended to impose the challenged practices. Retaining the element of scienter and creating a strong inference of intent upon an employer's failure to address an employee's concerns over her working conditions provides the means with which courts can uphold the ends of the constructive discharge doctrine.

With the foregoing discussion in mind, the author suggests the following analytical framework for determining when a constructive discharge has occurred: First, the employee must establish the underlying violation of law; second, the plaintiff must establish that she was working under conditions that a reasonable employee would consider intolerable; third, she must demonstrate, through direct or circumstantial evidence, that the employer intended to impose the intolerable conditions upon her. Intent will be inferred when the employer was or should have been put on notice (either from the employee or some third party) that the employee's working conditions were intolerable.

An employee who establishes the first element will be entitled to recover for damages up to the time of her resignation. Proof of the latter two elements will entitle the resignation to be treated as a discharge, permitting the employee to recover damages accordingly.

V. CONCLUSION

The doctrine of constructive discharge provides a necessary mechanism for protecting employees from employer subterfuge. It

75. *See Gantt v. Sentry Ins.*, 217 Cal. App. 3d 36, 66, 265 Cal. Rptr. 814, 833 (3d Dist. 1990).

prevents employers from doing covertly that which they are prohibited form doing overtly, *i.e.*, discharge employees on unlawful grounds. Such a goal is noble. But in seeking to thwart such schemes, courts should be careful not to impose liability on employers for acts which they did not intend, particularly since the situations in which these cases arise involve intentional misconduct.

West Virginia, and other jurisdictions which have yet to address this issue, should adopt the means which most effectively executes the ends of the doctrine. The employer intent standard is the most effective means. Courts can require scienter and simultaneously allay the plaintiff's concerns about the difficulty of proof by the use of inferences. Such a standard will not only effectively establish intent, it will often encourage the resolution of disputes before a termination of employment occurs.

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