Washington Law Review

Volume 70 | Number 2

4-1-1995

Enough Is Enough: Pre Se Constructive Discharge for Victims of Sexually Hostile Work Environments under Title VII

Sarah H. Perry

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

 Part of the Labor and Employment Law Commons

Recommended Citation

Sarah H. Perry, Notes and Comments, *Enough Is Enough: Pre Se Constructive Discharge for Victims of Sexually Hostile Work Environments under Title VII*, 70 Wash. L. Rev. 541 (1995).
Available at: https://digitalcommons.law.uw.edu/wlr/vol70/iss2/7

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

Copyright © 1995 by Washington Law Review Association

ENOUGH IS ENOUGH: PER SE CONSTRUCTIVE DISCHARGE FOR VICTIMS OF SEXUALLY HOSTILE WORK ENVIRONMENTS UNDER TITLE VII

Sarah H. Perry

Abstract: In Title VII sexual harassment cases based on hostile work environments, application of the constructive discharge doctrine imposes unfair burdens on claimants. A finding of constructive discharge requires a greater severity or pervasiveness of harassment than that required for finding a hostile work environment. This forces many hostile environment victims to remain in abusive and intolerable conditions because they cannot afford to resign. Unless found constructively discharged by their employers, victims who quit their jobs cannot recover back pay for the period between resignation and judgment. The incorrect and inconsistent application of the constructive discharge doctrine in sexually hostile environment cases causes this result. A per se rule that necessitates finding a constructive discharge when a sexually hostile work environment is found provides a uniform and fair solution to the problem.

Imagine a woman named Jane who works in a small manufacturing company.[1] Jane's supervisor, a twenty-eight-year employee of the company, begins to discuss very personal matters with her, including the lack of a sexual relationship with his wife. He tells Jane that he wants a personal relationship with her and bombards her with unwelcome invitations for drinks, lunch, dinner, and breakfast. He also makes lewd references to parts of her body and becomes belligerent when Jane rejects his advances. This harassment causes Jane to suffer severe bouts of trembling and crying, eventually requiring hospitalization. The emotional distress keeps Jane away from the office on sick leave for a few months. Upon her return to work, the harassment continues.

Jane finally complains about the harassment to her company's personnel manager. Despite her complaint, the company delays investigation. Nevertheless, the company eventually finds that Jane's supervisor has been harassing female employees for several years. Although the company disciplines the supervisor with demotion, the company fails to prevent him from entering Jane's work area. After finding her former supervisor at the desk next to her own and hearing his explanation that he has been assigned there indefinitely, Jane resigns.

1. These facts are based on those in Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987). Although victims and perpetrators of sexual harassment may be men or women, sexual harassment almost always involves a male perpetrator and a female victim. David D. Kadue, *Sexual Harassment at Work*, C742 ALI-ABA 465, 473 (1992). For this reason, this Comment will refer to the victim as female and the harasser as male.

She then brings a Title VII action against her employer for sexual harassment and constructive discharge.[2]

Jane uses her best efforts to find comparable employment after her resignation, but she is unsuccessful. Three-and-one-half years later, the court finds her employer liable for sexual harassment due to a hostile work environment under Title VII. The court reasons that the company is liable because it had knowledge of the harassment but failed to take prompt and effective remedial action. However, the court concludes that Jane was not justified in quitting her job, and, therefore, she may not recover back pay for the three-and-one-half years from resignation until judgment. Jane is also not entitled to punitive damages from the employer under Title VII. The court concludes that she may only receive damages for her pain and suffering.

The constructive discharge doctrine as applied in Title VII hostile environment actions requires victims like Jane either to remain in intolerable and abusive conditions or to resign and risk losing back pay. It is important to find a constructive discharge rule that is fair to both victims and employers. For over a decade, circuit courts have applied different constructive discharge tests, resulting in varying standards for sexual harassment victims. Moreover, courts have misapplied these tests. As a result, victims are subjected to inconsistent results and unfair burdens. A uniform rule that is easy to apply would provide a more just result and promote prompt adjudication of sexual harassment claims. In light of a recent circuit court decision confirming that employers can effectively shield themselves from sexual harassment liability,[3] such a rule would also be fair to employers.

This Comment addresses the problems encountered by Jane and other victims of sexual harassment who quit their jobs in response to a hostile

---

2. A constructive discharge occurs when an employee is forced into resignation even though not formally discharged by the employer. *See infra* notes 27–29 and accompanying text. Constructive discharge claims are frequently brought with claims of discrimination. *See, e.g.*, Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985) (including claims of age discrimination and constructive discharge), *cert. denied*, 475 U.S. 1082 (1986); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980) (including claims of sex discrimination and constructive discharge); Calcote v. Texas Educ. Found., 578 F.2d 95 (5th Cir. 1978) (including claims of racial discrimination and constructive discharge); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975) (including claims of religious discrimination and constructive discharge).

Lin Farley, a professor and researcher of sexual harassment, notes that it is not uncommon to find working women who have left more than one job over their working careers because of sexual harassment, even though doing so may severely penalize them economically. Lin Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* 24 (1978).

3. *See* Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 110 (3d Cir. 1994).

and abusive work environment. Part I examines the relevant history of the sexual harassment and constructive discharge doctrines, and the relationship between the two doctrines. Part II highlights the inappropriateness of the current approaches to constructive discharge in the hostile environment context, and proposes a rule that would necessitate a finding of constructive discharge when a court finds a sexually hostile work environment. Finally, part II argues that the proposed rule is fair, promotes the purposes of Title VII, and is supported by public policy.

I. THE HISTORY OF SEXUAL HARASSMENT AND CONSTRUCTIVE DISCHARGE

A. Sexual Harassment Based on Hostile Work Environment

Sexual harassment is a form of sex discrimination under the Civil Rights Act of 1964 (Act or Title VII).[4] The Act prohibits discrimination on the basis of "sex," but neither the statute nor legislative history define what constitutes discrimination based on sex.[5] Nevertheless, the Supreme Court has conclusively established that sexual harassment is sex discrimination under Title VII.[6] The Court noted that Title VII affords employees the right to work in an environment free from discrimination, intimidation, ridicule, and insult based on sex.[7]

Circuit courts have developed the elements necessary to find a hostile environment.[8] Claimants must show (1) that the employee is a member of a protected group; (2) that the employee was subjected to unwanted sexual harassment; (3) that the harassment was based on sex; (4) that the

4. "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his [sic] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1988).

5. "Sex" was added to Title VII only one day before the House of Representatives approved the statute, and the limited floor discussion provided no insight into the intended definition of the word. EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*, 1005, 3213–32 (1968); Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1090 (5th Cir. 1975); Diaz v. Pan Am. World Airways, 442 F.2d 385, 386 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

6. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986).

7. *Id.* at 65.

8. This Comment refers to sexual harassment based on a hostile work environment as a "hostile environment" or "sexually hostile environment." Other forms of discrimination giving rise to a hostile environment are not within the scope of this Comment, and any references thereto are clearly identified.

harassment affected or unreasonably interfered with a term, condition, or privilege of employment; and (5) *respondeat superior*.[9] Most hostile environment litigation focuses on the fourth and fifth elements.

To satisfy the fourth element of the hostile environment claim, the harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.[10] The Supreme Court elaborated on this standard in *Harris v. Forklift Systems, Inc.*[11] The *Harris* Court reaffirmed that the harassing conduct need only be sufficiently severe or pervasive to create an objectively hostile or abusive work environment—one that a reasonable person would find hostile or abusive—and concluded that the victim must subjectively perceive the environment to be hostile or abusive.[12] Although the Court did not define "severe or pervasive," circuit courts seem to focus on the pervasiveness element.[13] The required showing of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct.[14]

---

9. Jones v. Flagship Int'l, 793 F.2d 714, 719–20 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); Henson v. City of Dundee, 682 F.2d 897, 903–05 (11th Cir. 1982). *Accord* Collins v. Baptist Memorial Geriatric Ctr., 937 F.2d 190, 195 (5th Cir. 1991) (describing the last element as "some ground to hold the employer liable"), *cert. denied*, 502 U.S. 1072 (1992).

Respondeat superior means that "a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent. . . . Under [this] doctrine an employer is liable for injury to person or property of another proximately resulting from acts of employee done within [the] scope of his employment in the employer's service." *Black's Law Dictionary* 1311–12 (6th ed. 1990). *See also infra* notes 15–18 and accompanying text.

10. *Vinson*, 477 U.S. at 67. The absence of a noticeable decrease in productivity is not necessary when evidence shows that the harassment had an impact on the victim and made it more difficult for her to do her job. Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1455 (7th Cir. 1994).

11. 114 S. Ct. 367 (1993).

12. *Id.* at 370–71.

13. *E.g.*, Carrero v. New York City Hous. Auth., 890 F.2d 569, 577 (2d Cir. 1989) (explaining that the complaining employee must prove that the conduct was sufficiently pervasive to create an offensive environment); *Jones*, 793 F.2d at 720 (approving trial court's focus on the pervasiveness of harassment).

Courts have required that claimants show a pattern of offensive conduct before finding a hostile environment. *E.g.*, Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 533 (7th Cir. 1993) (noting that relatively isolated incidents of non-severe misconduct will not support a hostile environment claim); *Carrero*, 890 F.2d at 577 (stating that the incidents of harassment must be sufficiently continuous and concerted to be deemed pervasive for finding a hostile environment); *see also EEOC: Policy Guidance on Sexual Harassment*, 8 Fair Empl. Prac. Man. (BNA) 405:6681, 405:6690 (1990); Debra L. Raskin, *Sexual Harassment in Employment*, C780 ALI-ABA 131, 143–44 (1993).

14. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

Under the fifth element for finding a hostile environment, *respondeat superior*, employer liability is governed by agency principles.[15] A recent decision by the Third Circuit identifies three agency situations where an employer may be liable: (1) when torts are committed by employees within the scope of their employment; (2) when the employers are liable for their own negligence or recklessness; and (3) when the harassing employee relied upon apparent authority or was aided by the agency relationship.[16] Negligence by the employer in failing to prevent or correct the harassment is the most common ground for employer liability.[17] Most courts have held that the employer is liable when it had actual or constructive knowledge of the harassment but failed to take appropriate remedial action.[18]

In determining employer liability for hostile environment, in some circuits it is relevant that a supervisor is the perpetrator.[19] For example, the Second Circuit has determined that when the perpetrator is either a co-worker or a low-ranking supervisor who did not rely on his apparent authority and was not aided by the agency relationship, the employer will be liable only if it either provided no reasonable avenue for complaint or knew of the harassment but did nothing to remedy it.[20] The employer may be liable in other situations, however, regardless of the absence of notice or the reasonableness of the complaint procedures.[21] This liability

---

15. The Supreme Court has recommended that courts look to agency principles for guidance in determining employer liability. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

16. Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 106 (3d Cir. 1994). *See also* Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994).

17. Kadue, *supra* note 1, at 489. *See also infra* notes 23–26 and accompanying text.

18. *See, e.g.*, Davis v. Tri-State Mack Distrib., 981 F.2d 340, 343 (8th Cir. 1992).

19. *Karibian*, 14 F.3d at 779–80. Although the Second Circuit has applied different standards for employer liability depending on whether the harasser is a supervisor, other courts have not made this distinction. *See, e.g.*, *Davis*, 981 F.2d at 343. Further discussion of this issue is outside the scope of this Comment.

20. *Karibian*, 14 F.3d at 780. *Accord Davis*, 981 F.2d at 343 (holding the employer liable for hostile environment created by a supervisor when the employer knew or should have known of the harassment and failed to take prompt remedial action); Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991) (agreeing that remedies by an employer should be reasonably calculated to end the harassment).

The complainant may demonstrate employer knowledge of the harassment with evidence that she complained of the harassment to higher management. Waltman v. International Paper, 875 F.2d 468, 478 (5th Cir. 1989). *Accord* Bundy v. Jackson, 641 F.2d 934, 943 & n.8 (D.C. Cir. 1981) (concluding that the employer had full knowledge of the alleged offense after receiving a formal complaint). The pervasiveness of the harassment may also give rise to the inference of employer knowledge or constructive knowledge. *Waltman*, 875 F.2d at 478.

21. *Karibian*, 14 F.3d at 780. The Supreme Court has held that lack of notice does not necessarily shield an employer from Title VII liability. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

may occur when a high-ranking supervisor is the harasser or when a supervisor uses either his actual or apparent authority to further the harassment or was otherwise aided in accomplishing the harassment by the existence of the agency relationship.[22]

Another factor in determining employer liability is the effectiveness of the employer's grievance procedure. In *Meritor Savings Bank v. Vinson*,[23] the Supreme Court noted that the mere existence of a grievance procedure and a policy against discrimination, together with a claimant's failure to invoke the procedure, does not insulate the employer from liability.[24] The Court recognized, however, that it is more likely that an employer will be able to insulate itself from liability if its grievance procedures are calculated to encourage victims of harassment to come forward.[25] The Third Circuit recently clarified how an employer can shield itself from Title VII liability for hostile environment. The court concluded that a grievance procedure which (1) is known to the victim and (2) timely stops the harassment will protect the employer from liability.[26]

B. Constructive Discharge

Constructive discharge claims are often brought with hostile environment claims.[27] Even though an employee is not formally discharged by her employer, a court may consider her constructively discharged if conditions at the workplace forced her into resignation.[28] A

22. *Karibian*, 14 F.3d at 780.

23. 477 U.S. 57 (1986).

24. *Id.* at 72. In *Vinson*, the employer's policy against discrimination did not specifically address sexual harassment, and the grievance procedure required the employee to first complain to her supervisor, the alleged harasser. *See also* EEOC v. Hacienda Hotel, 881 F.2d 1504, 1516 (9th Cir. 1989) (holding employer liable for sexual harassment despite employee's failure to invoke the grievance procedure when the discrimination policy did not specifically proscribe sexual harassment and the internal grievance procedures required initial resort to the supervisor accused of engaging in or condoning the harassment).

25. *Vinson*, 477 U.S. at 73.

26. Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 110 (3d Cir. 1994).

27. *See, e.g.*, Smith v. Bath Iron Works Corp., 943 F.2d 164 (1st Cir. 1991) (including allegation that hostile work environment resulting from sexual harassment forced the victim to resign); Ramsey v. City & County of Denver, 907 F.2d 1004 (10th Cir. 1990) (including allegations of hostile environment and constructive discharge), *cert. denied*, 113 S. Ct. 302 (1992); *see also supra* note 2.

28. *See infra* notes 36–37 and accompanying text.

finding of constructive discharge allows a claimant to recover back pay for the period between resignation and judgment.[29]

The doctrine of constructive discharge originated in cases under the National Labor Relations Act (NLRA).[30] The NLRA expressly forbids unfair labor practices, including discrimination based on union membership.[31] When an employer deliberately makes an employee's working conditions so intolerable as to force the employee to quit because of union activities or union membership, the employer has constructively discharged the employee in violation of the NLRA.[32]

The National Labor Relations Board (NLRB)[33] set forth the two elements of constructive discharge in *Crystal Princeton Refining Co. v. International Chemical Workers Union*:[34] (1) the burdens imposed upon the employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign; and (2) it must be shown that those burdens were imposed because of the employee's union activities.[35]

---

29. *See* Derr v. Gulf Oil Corp., 796 F.2d 340, 342 (10th Cir. 1986) (holding that plaintiff was not entitled to back pay and reinstatement because she was not constructively discharged); Satterwhite v. Smith, 744 F.2d 1380, 1381 n.1 (9th Cir. 1984) (noting that employee who quits cannot secure back pay unless his employer constructively discharged him).

"Back pay" as used in this Comment refers to the period of time after termination of the employment relationship and is equivalent to what the plaintiff would have earned with the former employer, less the amount actually earned in other employment up to the date of judgment. *See, e.g.*, Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108, 1119 (3d Cir. 1988), *cert. denied*, 492 U.S. 905 (1989). However, "back pay" has also been used to refer to the period of time while the employee is still employed and is the difference between what the plaintiff earned in employment with the defendant employer and what the plaintiff would have earned without discrimination. *See, e.g.*, Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 63 (5th Cir. 1980).

30. *See, e.g.*, Crystal Princeton Ref. Co. v. International Chem. Workers Union, 222 N.L.R.B. 1068, 1069 (1976) (holding that the plaintiff's temporary transfer after an unsuccessful union organizing campaign did not amount to a constructive discharge in violation of NLRA); J.P. Steven[s] & Co. v. NLRB, 461 F.2d 490, 495 (4th Cir. 1972) (holding that the employer constructively discharged the employee because of union activities).

The National Labor Relations Act (NLRA) is now referred to as the Labor-Management Relations Act (LMRA). 29 U.S.C. § 141 (1988). To avoid confusion, this Comment will refer to the Act as the NLRA.

31. 29 U.S.C. § 158(a)(3) (1988).

32. *Id.*; *J.P. Steven[s] & Co.*, 461 F.2d at 494.

33. The NLRB is a body created by the NLRA to hear and decide labor disputes. 29 U.S.C. § 153 (1988). The decisions of the NLRB are appealable to the circuit courts. *Id.* § 160.

34. 222 N.L.R.B. 1068 (1976).

35. *Id.* at 1069. The Supreme Court recognized this doctrine in Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 894 (1984).

As the circuit courts began to apply the constructive discharge doctrine outside the NLRA context, the courts split as to the proper test to apply. Currently, two circuit courts apply the "employer intent" test, requiring that the employee show intolerable conditions and the employer's specific intent to coerce the employee's resignation.[36] The other circuits apply the "reasonable employee" test, requiring the plaintiff to demonstrate that her working conditions were so intolerable that a reasonable person in her position would be compelled to resign.[37]

1. The Employer Intent Test

In applying the employer intent test in cases under Title VII, circuit courts have been lenient with the intent requirement. These courts have concluded that intent may be inferred through circumstantial evidence.[38] Some courts infer intent when a reasonable employer would have foreseen that the employee would resign under the circumstances,[39] while

36. Hukkanen v. International Union of Operating Eng'rs., 3 F.3d 281, 284 (8th Cir. 1993); EEOC v. Clay Printing Co., 955 F.2d 936, 944 (4th Cir. 1992).

37. James v. Sears, Roebuck & Co., 21 F.3d 989, 992 (10th Cir. 1994); Stetson v. Nynex Serv. Co., 995 F.2d 355, 361 (2d Cir. 1993); Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239, 242 (5th Cir. 1993); Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 677 (7th Cir. 1993); Morgan v. Ford, 6 F.3d 750, 755–56 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2708 (1994); Aviles-Martinez v. Monroig, 963 F.2d 2, 6 (1st Cir. 1992); Gray v. York Newspapers, Inc., 957 F.2d 1070, 1079 (3d Cir. 1992); Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987); Hopkins v. Price Waterhouse, 825 F.2d 458, 472 (D.C. Cir. 1987), *aff'd in part and rev'd in part*, 490 U.S. 228 (1989).

The Sixth Circuit applies a two-pronged test requiring inquiry into the feelings of a reasonable employee and the foreseeability on the part of the employer. Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987).

Some circuit courts applying the reasonable employee test state that the employer must deliberately make the employee's working conditions intolerable for a finding of constructive discharge. *See, e.g.*, *Stetson*, 995 F.2d at 361; *Ugalde*, 990 F.2d at 242–43. This test should not be confused with the employer intent test. *See also infra* notes 41–42 and accompanying text.

38. *See, e.g.*, Bristow v. Daily Press, 770 F.2d 1251, 1255 (4th Cir. 1985) (concluding that intent can be inferred from employer's failure to remedy known intolerable conditions), *cert. denied*, 475 U.S. 1082 (1986). It may therefore be irrelevant whether the plaintiff is required to prove an improper intent. *See* Paroline v. Unisys Corp., 879 F.2d 100, 114 n.2 (4th Cir. 1989) (Wilkinson, J., dissenting) (noting that the result of the employer intent test may be the same as the reasonable employee test), *vacated in part on reh'g*, 900 F.2d 27 (1990).

39. *See, e.g.*, *Hukkanen*, 3 F.3d at 284–85 (holding employer liable for constructive discharge despite plaintiff's failure to show that employer consciously meant to force her to quit, since the employer must necessarily be held to intend the reasonably foreseeable consequences of its actions).

others infer intent when the employer failed to act in the face of known intolerable conditions.[40]

2. *The Reasonable Employee Test and Aggravating Factors Requirement*

Adoption of the reasonable employee test by some circuit courts created the current split over the appropriate test for constructive discharge. These courts followed the Fifth Circuit's interpretation of *Young v. Southwestern Savings & Loan Ass'n.*[41] The rule set forth provides 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 constructively discharged the employee.[42]

The Fifth Circuit later interpreted its decision in *Young* as setting forth the reasonable employee test.[43] First, in *Calcote v. Texas Education Foundation,*[44] the Fifth Circuit required only that acts creating the intolerable conditions be intended by the employer.[45] Then in *Bourque v. Powell Electrical Manufacturing Co.*, the Fifth Circuit expressly adopted the reasonable employee test on the grounds that neither *Young* nor *Calcote* required employer intent to force the employee to resign.[46] The Fifth Circuit concluded that the trier of fact must only be satisfied that the working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.[47] Subsequently, nine other circuits adopted this test.[48]

---

40. *See, e.g.*, Holsey v. Amour & Co., 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985).

41. 509 F.2d 140 (5th Cir. 1975).

42. *Id.* at 144. Although this language refers to deliberate action by the employer, it should not be confused with the employer intent test.

43. Some courts apply a "reasonable woman" standard to eliminate potential male-bias resulting from application of a sex-blind reasonable person standard in sexual harassment cases. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 879–80 (9th Cir. 1991). The policy basis for such a standard may also apply to the reasonable employee test. Discussion of this issue is outside the scope of this Comment.

44. 578 F.2d 95 (5th Cir. 1978).

45. *Id.* at 98.

46. 617 F.2d 61, 65 (5th Cir. 1980).

47. *Id.* at 65 (quoting Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977)).

48. *See supra* note 37.

The reasonable employee test includes a requirement that claimants prove "aggravating factors."[49] Plaintiffs may satisfy this requirement by showing a continuous pattern of discriminatory treatment.[50] The aggravating factors requirement developed as a result of a reluctance by the circuit courts to find constructive discharge based upon a single incident of employment discrimination. For example, in cases involving unequal pay, discriminatory failure to promote, or unlawful transfer, circuit courts have held that this discriminatory conduct alone is insufficient for a finding of constructive discharge.[51] Some courts have also applied the aggravating factors requirement in the hostile environment setting, requiring that hostile environment victims demonstrate a greater severity or pervasiveness of harassment than the minimum required to establish a hostile environment.[52]

The courts requiring aggravating factors have reasoned that society and the policies underlying Title VII will be served best if unlawful discrimination is attacked within the context of the existing employment relationship whenever possible.[53] Thus, employees should not be allowed to quit at the slightest incident of discrimination.[54] In addition,

---

49. *See, e.g., Bourque*, 617 F.2d at 65.

50. Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987) (stating that plaintiff must prove aggravating factors such as a "continuous pattern of discriminatory treatment") (citation omitted). *See also* Hopkins v. Price Waterhouse, 825 F.2d 458, 473 (D.C. Cir. 1987) (noting that the mere fact of discrimination alone is insufficient for a claim of constructive discharge), *aff'd in part and rev'd in part*, 490 U.S. 228 (1989); Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982) (holding that the continuous course of discriminatory conduct suffered by plaintiff supports a finding of constructive discharge). *But see* Levendos v. Stern Entertainment, Inc., 860 F.2d 1227, 1232 (3d Cir. 1988) (refusing to conclude that a single act of discrimination can never compel a reasonable person to resign).

51. *See, e.g.*, Jurgens v. EEOC, 903 F.2d 386, 392 (5th Cir. 1990) (holding that discriminatory denial of promotion alone cannot comprise a constructive discharge); Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982) (noting that failure to promote, unlawful transfer, or unequal pay, standing alone, does not amount to a constructive discharge).

One way that unequal pay and discriminatory failure to promote can violate Title VII is by being the result of sex discrimination. Sexual harassment is another form of sex discrimination under Title VII.

52. *See* Landgraf v. USI Film Prods., 968 F.2d 427, 430 (5th Cir. 1992) (holding the employer liable for a hostile environment under Title VII but concluding that the harassment was not severe enough to amount to a constructive discharge), *aff'd on other grounds*, 114 S. Ct. 1483 (1994); *accord* Campbell v. Kansas State Univ., 780 F. Supp. 755, 765–66 (D. Kan. 1991) (holding that although a working environment may be severe enough to constitute sexual harassment, it may nevertheless be insufficiently intolerable to compel resignation).

53. *See, e.g.*, Derr v. Gulf Oil Corp., 796 F.2d 340, 342–43 (10th Cir. 1986); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 66 (5th Cir. 1980).

54. *See* Halbrook v. Reichhold Chems., Inc., 735 F. Supp. 121, 127 (S.D.N.Y. 1990) (concluding that claimants should "stay and fight" to remedy Title VII violations).

courts have pointed out that plaintiffs fulfill their duty to mitigate damages by remaining on the job.[55]

The reasons behind the aggravating factors requirement have not convinced all courts that the requirement is necessary. In *Ezold v. Wolf, Block, Schorr & Solis-Cohen*,[56] the Eastern District of Pennsylvania acknowledged the general desire to encourage employees to stay on the job so that the employer will have a chance to remedy the discriminatory situation. The court concluded, however, that this goal only makes sense when a possible solution exists.[57] Other courts have questioned the mitigation rationale by pointing out that the plaintiff may actually mitigate damages by leaving her job.[58]

C. Title VII Remedies

A finding of constructive discharge is essential in a hostile environment case if the victim quits her job and seeks back pay from the employer. Back pay is available under Title VII, but only if an employee has been actually or constructively discharged. Although other damages are available to a limited extent under Title VII, back pay comprises a significant portion of a victim's losses.

---

55. *Jurgens*, 903 F.2d at 389; *Bourque*, 617 F.2d at 66.

Once the claimant establishes damages, the employer may demonstrate that the claimant failed to mitigate those damages. EEOC v. Gurnee Inn Corp., 914 F.2d 815, 818 (7th Cir. 1990) (holding that the employer failed to prove that the claimant was not reasonably diligent in seeking other employment and that with the exercise of reasonable diligence there was a reasonable chance that the claimant might have found comparable employment).

56. 758 F. Supp. 303 (E.D. Pa. 1991), *rev'd on other grounds*, 983 F.2d 509 (3d Cir.), *and cert. denied*, 114 S. Ct. 88 (1993).

57. *Id.* at 311 (holding the employer liable for back pay because the employee had no opportunity to eradicate discrimination in the workplace, and requiring her to remain on the job denied her a complete remedy); Nobler v. Beth Israel Medical Ctr., 715 F. Supp. 570, 572 (S.D.N.Y. 1989) (holding that back pay restrictions are inapplicable where the harm is irremediable). Although these cases dealt with denial of promotion, the reasoning that in some situations a possible solution to discriminatory conduct does not exist applies to other areas of discrimination as well.

58. Harrison v. Dole, 643 F. Supp. 794, 797 (D.D.C. 1986) (reasoning that denial of back pay to victim of discriminatory denial of promotion would discourage claimant from mitigating damages by finding other employment where she would be allowed to advance without discrimination).

Hostile environment claimants who quit their jobs in response to discriminatory treatment mitigate damages by searching for other employment. *See, e.g.*, Helbing v. Unclaimed Salvage & Freight Co., 489 F. Supp. 956, 963 (E.D. Pa. 1980) (holding that back pay after resignation should be decreased by the amounts earnable with reasonable diligence). Section 706(g)(1) of the 1964 Civil Rights Act provides that "[i]nterim 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)(1) (Supp. 1993).

The Act provides a back pay award for victims of discrimination. Under § 706(g)(1) of the Act, the court may order reinstatement of employees with or without back pay.[59] Circuit courts have interpreted this section to mean that a victim of sexual harassment may obtain back pay only if the employer discharged the employee either actually or constructively.[60]

Without a finding of constructive discharge, a victim of sexual harassment can obtain only a limited amount of compensatory and punitive damages.[61] The Civil Rights Act of 1991 (the 1991 Amendments) provides that the complaining party may recover compensatory and punitive damages in addition to the relief authorized by § 706(g) of the Act.[62] Compensatory damages include future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.[63] Punitive damages are appropriate only in cases of reckless or callous disregard for the plaintiff's rights or intentional violations of federal law.[64]

II. A PROPOSED RULE TO ADDRESS SHORTCOMINGS OF THE CURRENT STATE OF THE LAW

The tests for constructive discharge currently applied by the circuit courts impose unfair burdens on hostile environment victims. Some

---

59. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g)(1) (Supp. 1993).

60. *See, e.g.*, Jurgens v. EEOC, 903 F.2d 386, 390 n.5 (5th Cir. 1990) (concluding that an employee must have been actually or constructively discharged by the employer in order to be eligible for back pay compensation for lost wages beyond the end of the employment period). *But see Ezold*, 758 F. Supp. at 312 (awarding back pay without a finding of constructive discharge in a sex discrimination suit). This decision is contrary to the weight of authority.

61. Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)(A)–(D) (Supp. 1993). The sum of the amounts awarded for compensatory damages and punitive damages are capped by an amount depending on the size of the defendant employer. For employers with fewer than 101 employees, this amount is $50,000; for employers with more than 100 and fewer than 201 employees, damages are capped at $100,000; for employers with more than 200 but less than 501 employees, damages are capped at $200,000; and for employers with more than 500 employees, damages are capped at $300,000. *Id.*

62. Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(1) (Supp. 1993). Before the 1991 Amendments, back pay was the only potential relief for a sexual harassment victim aside from an injunction. *See, e.g.*, Brooms v. Regal Tube Co., 881 F.2d 412, 423 (7th Cir. 1989). In some cases, back pay may still be the only form of relief available to hostile environment victims.

63. Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3) (Supp. 1993).

64. United States v. Balistrieri, 981 F.2d 916, 936 (7th Cir. 1992) (quoting Smith v. Wade, 461 U.S. 30, 51 (1983)), *cert. denied*, 114 S. Ct. 58 (1993).

courts have added a requirement that claimants meet a higher threshold for constructive discharge liability, preventing many victims from recovering back pay. Furthermore, circuit courts have been applying different constructive discharge tests for well over a decade, causing inconsistent results and uncertainty for sexual harassment victims. Consequently, victims are forced to remain in abusive work environments simply because they cannot afford to risk losing back pay. This result not only rewards the employer, but it is unjust and violates public policy.

The current state of the law concerning constructive discharge in hostile environment cases should change. This Part proposes adoption of a per se rule for constructive discharge in hostile environment cases. Although the employer intent and reasonable employee tests may work well in other employment discrimination contexts, these tests do not work well in hostile environment cases. In contrast, the proposed per se rule provides a fair solution, promotes the Title VII policy in favor of voluntary compliance, and is supported by public policy.

A. The Current Tests for Constructive Discharge Are Inappropriate in Hostile Environment Cases

The two tests for constructive discharge currently applied by the circuit courts are inappropriate in the hostile environment setting. The Title VII context is different from the NLRA context where the employer intent test originated, and the test must be adjusted to fit Title VII causes of action. Although some courts have modified the employer intent test to make it less stringent, the modified test is unnecessary as it fails to add anything to the test for hostile environment liability. Finally, the reasonable employee test is misapplied in the hostile environment context, resulting in an unfair and unjust threshold for constructive discharge liability.

1. The Employer Intent Test

Requiring employer intent for a finding of constructive discharge is inappropriate in hostile environment cases. Because the constructive discharge doctrine originated in response to employers attempting to force union employees into resignation,[65] the intent element was appropriate. However, the nature of the discrimination under Title VII

65. *See supra* notes 30–32 and accompanying text.

differs from that under the NLRA. In the Title VII context, the employer does not necessarily want the victim to quit, and so the original reason for requiring employer intent does not exist. Moreover, Title VII is aimed at the consequences or effects of the employment practice and not at the motivation.[66] Therefore, the constructive discharge test should be adjusted to fit Title VII complaints.

Circuit courts applying the employer intent test in Title VII cases have recognized that proving employer intent is difficult, and have modified the intent requirement to make it less stringent.[67] Some courts infer intent when a reasonable employer would have foreseen that the employee would resign, while others infer intent when the employer failed to remedy known intolerable conditions.[68] However, neither of these tests adds anything to the standard already established for a finding of hostile work environment, and requiring a second test for constructive discharge is unnecessary and burdens scarce judicial resources.

It is always foreseeable to an employer that a hostile environment victim will resign if the employer fails to promptly stop the harassment. Studies conducted on victim response to sexual harassment suggest that victims respond to the harassment by quitting their jobs.[69] At a minimum, employers should be held to have constructive knowledge of this tendency.[70] It is not unreasonable to require personnel departments

66. Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991) (quoting Rogers v. EEOC, 454 F.2d 234, 239 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)). The Supreme Court has implicitly adopted this interpretation. *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370–71 (1993) (focusing on the effect of a hostile environment on the employee).

67. *See supra* notes 38–40 and accompanying text.

68. *See supra* notes 39–40 and accompanying text.

69. Farley, *supra* note 2, at 21 (citing surveys by the United Nations and Cornell University). *See also* Barbara Gutek, *Sex and the Workplace: The Impact of Sexual Behavior and Harassment on Women, Men and Organizations* 74 (concluding that women may quit or ask for a transfer when the harassment gets out of hand rather than report the harassment to authorities); Christine O. Merriman & Cora G. Yang, Note, *Employer Liability for Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. Rev. L. & Soc. Change 83, 84 n.6 (1984-85) (citing a 1979 study by the Working Women's Institute finding that 66% of the respondents lost their jobs as a direct result of sexual harassment and that 42% were eventually forced to quit when the working environment became intolerable). *But see* James E. Gruber, *How Women Handle Sexual Harassment: A Literature Review*, 74 Soc. & Soc. Res. 3 (1989) (noting that quitting or transferring is found infrequently as a response to sexual harassment).

Victims of sexual harassment usually seek redress outside the employment relationship only after having been fired or having quit. Farley, *supra* note 2, at 27. Although a small percentage of sexually harassed women quit immediately, approximately one-fourth first ignore the harassment and then quit after the situation worsens. *Id.* at 21–22.

70. Courts have applied a "should have known" standard for knowledge in the Title VII context, and the same standard should apply here. *See, e.g.*, Burns v. McGregor Elec. Indus., Inc., 989 F.2d

to make inquiries into why employees quit their jobs, nor is it unreasonable to assume that employers should know of this information. Employers should therefore foresee that victims of sexual harassment will quit if the hostile environment is not remedied.

Some circuit courts have also inferred employer intent from an employer's failure to remedy known intolerable conditions.[71] However, this is equivalent to the standard for employer liability under Title VII for hostile environment.[72] Therefore, a finding of a hostile environment should mean that the victim is also constructively discharged.

2. *The Reasonable Employee Test and Aggravating Factors Requirement*

The reasonable employee test as applied in hostile environment cases is also inappropriate.[73] Misapplication of the aggravating factors requirement has resulted in an unfair burden on hostile environment victims. With proper application, the test becomes redundant and unnecessary. Moreover, the reasoning behind the aggravating factors requirement is inapplicable in hostile environment cases, and, by definition, a finding of hostile environment satisfies the reasonable employee test.

The Fifth Circuit has misapplied the constructive discharge rule in concluding that the pervasiveness of the harassment necessary for a finding of constructive discharge is greater than that necessary for a finding of hostile work environment. In *Landgraf v. USI Film Products*,[74] the Fifth Circuit found a Title VII violation resulting from a sexually hostile work environment after the victim reported the harassment to her supervisor on several occasions and the employer failed to take timely corrective action.[75] However, the Fifth Circuit held

---

959, 966 (8th Cir. 1993) (holding the employer liable for sexual harassment by a co-worker when it knew or should have known of the harassment and failed to take corrective action); Yates v. Avco Corp., 819 F.2d 630, 636 (6th Cir. 1987) (holding the employer liable for sexual harassment when it knew or upon diligent inquiry should have known of harassment by supervisor); *see also supra* note 20.

71. *See supra* note 40 and accompanying text.

72. *See supra* note 18 and accompanying text.

73. However, application of the reasonable employee test may be appropriate in cases involving other forms of discrimination under Title VII. Discussion of this issue is outside the scope of this Comment.

74. 968 F.2d 427 (5th Cir. 1992), *aff'd on other grounds*, 114 S. Ct. 1483 (1994).

75. *Id.* at 429.

that the claimant was not constructively discharged because she did not satisfy the aggravating factors requirement.[76]

Contrary to the *Landgraf* holding, the reasonable employee test's aggravating factors analysis should always be satisfied in hostile environment cases. In *Landgraf*, the Fifth Circuit relied on an unequal pay case to justify its conclusion that a constructive discharge claimant must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove hostile work environment.[77] Although aggravating factors may be necessary to show constructive discharge in unequal pay cases,[78] a hostile environment is unlike an unequal pay environment in that a hostile environment involves a continuous pattern of discriminatory treatment.[79] This continuing discrimination satisfies the aggravating factors requirement.[80] Therefore, there is no need for the requirement in the hostile environment setting.

Even if courts continue to apply the aggravating factors analysis in hostile environment cases, the rationales for the requirement are inapplicable. First, circuit courts have stated that society and the policies underlying Title VII will be best served if the unlawful discrimination is attacked within the context of the existing employment relationship whenever possible.[81] In the ideal situation, a victim of discrimination will remain in the workplace while the employer attempts to fix the problem. However, the reality is that women tend to quit when they are sexually harassed.[82] Empirical data showing how women really react should be the basis for judicial decision making.

The second rationale given by circuit courts for requiring aggravating factors is that plaintiffs must fulfill their duty to mitigate damages by remaining on the job.[83] However, as some courts have noted, mitigation does not always occur by remaining on the job.[84] In the hostile environment context, forcing victims to remain on the job is likely to

76. *Id.* at 430.

77. *Id.* (relying on Pittman v. Hattiesburg Mun. Separate Sch. Dist., 644 F.2d 1071 (5th Cir. 1981)).

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

79. *See supra* note 13.

80. *See supra* note 50 and accompanying text.

81. *See supra* note 53 and accompanying text. Attacking discrimination within the context of the existing employment relationship is consistent with the Title VII policy favoring voluntary compliance. *See infra* notes 102–03 and accompanying text.

82. *See supra* note 69 and accompanying text.

83. *See supra* note 55 and accompanying text.

84. *See supra* note 58 and accompanying text.

encourage increased psychological harm and other nonpecuniary damages available under Title VII.[85] Victims of hostile work environments can mitigate damages by escaping from the abusive environment and searching for another job with "reasonable diligence."[86] This will result in less compensatory damages under Title VII and a set-off from the amount of back pay awarded.

Finally, the reasonable employee test, by definition, is satisfied by the finding of a hostile environment. The presence of a hostile environment means that a reasonable person would find the harassment sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.[87] Reasonable persons would not want to remain in an environment that is abusive and intolerable,[88] and they would feel compelled to resign from such an environment.

B. A Proposed Per Se Rule

In every case where an employer is found liable for a sexually hostile environment, a victim who has quit in response to the hostile environment should be considered constructively discharged and entitled to recover back pay from the employer. Hostile environment victims who quit for reasons other than those directly related to the harassment would not be covered by the rule. However, the rule would extend to victims who resign after the employer has remedied the hostile environment if the resignation was in response to psychological distress caused by the harassment.[89] A causal connection between the hostile

---

85. In Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987), the victim of the hostile environment suffered from such severe emotional distress at work that she was hospitalized on at least two occasions. *Id.* at 632. *See also* Llewellyn v. Celanese Corp., 693 F. Supp. 369, 375 (W.D.N.C. 1988) (noting that the sexual harassment victim suffered from depression, anxiety, seizures, vomiting and chronic diarrhea as a result of the harassment). A hostile environment victim is not required to have a nervous breakdown before Title VII relief will be awarded. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993).

86. *See supra* note 58.

87. *See supra* note 12 and accompanying text.

88. The Supreme Court's decision in *Harris* supports the conclusion that discrimination which is sufficiently severe or pervasive to create an abusive working environment is absolutely intolerable. *See Harris*, 114 S. Ct. at 371 (holding that the hostile environment claimant need not prove psychological injury for Title VII recovery).

89. This proposition does not contradict the recent Third Circuit decision in Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 110 (3d Cir. 1994). *See supra* text accompanying note 26. Only if the employer fails to provide an effective grievance procedure under *Bouton* would the proposed per se rule impose liability for constructive discharge.

environment and the resignation must be found before the per se rule comes into play.[90]

C. *The Proposed Per Se Rule Should Be Applied in Hostile Environment Cases*

The proposed per se constructive discharge rule provides a fair solution to the problems created by the current constructive discharge tests. The proposed rule does not impose an undue burden on employers and it fully compensates hostile environment victims. In addition, the rule encourages the Title VII policy of voluntary compliance. Finally, the per se rule is just, promotes prompt adjudication of hostile environment claims, and decreases burdens on the judiciary.

1. *The Per Se Rule Is Fair to Employers*

The high threshold for employer liability for hostile environment protects employers from being subjected to unfair liability under the per se rule. Circuit courts have held that an employer must have actual or constructive knowledge of the hostile environment and fail to take sufficient remedial action before it is held liable for the hostile work environment.[91] Therefore, once employer knowledge is shown, an employer may avoid liability by proving that it took prompt and adequate steps to remedy the situation.[92] This standard also allows an employer to shield itself from liability with a grievance procedure which is known to the victim and timely stops harassment.[93]

---

90. Resignation several months after the last incident of harassment is a factor in determining causation. It should be noted that a hostile environment victim may not be able to afford immediate resignation if she has no other employment opportunities. *See* Troutt v. Charcoal Steak House, Inc., 835 F. Supp. 899, 902 (W.D. Va. 1993), *aff'd*, 37 F.3d 1495 (4th Cir. 1994). Also, the harassment need not "be the straw that broke the camel's back." Barbetta v. Chemlawn Serv. Corp., 669 F. Supp. 569, 572 (W.D.N.Y. 1987) (holding that a four-month delay in resignation is not dispositive in the constructive discharge determination). However, when the resignation is unrelated to the harassment, the victim would not receive back pay under this rule.

91. *See supra* note 18 and accompanying text.

92. Dornhecker v. Malibu Grand Prix, 828 F.2d 307 (5th Cir. 1987) (holding the employer not liable for sexual harassment when it promptly responded to the complaint).

93. *See supra* note 26 and accompanying text. Although some courts have found no constructive discharge on the grounds that the victim failed to invoke the grievance procedure, *see, e.g.*, Cuestra v. Texas Dep't of Criminal Justice, 805 F. Supp. 451, 459 (W.D. Tex. 1991) (holding that plaintiff was not constructively discharged when plaintiff had other alternatives to resigning, such as invoking the grievance procedure), whether a victim invoked the grievance procedure is a factor in

An employer can further insulate itself from liability by structuring its grievance procedure so as to encourage victims to come forward.[94] Many victims of sexual harassment perceive that filing a formal complaint will be ineffective. Studies reveal that most female victims of sexual harassment are unwilling to use internal grievance procedures because they believe that nothing will be done.[95] Some women will not complain or use grievance procedures because of the male domination of the workplace and the difficulty of pitting their word against that of their supervisor or other high-ranking perpetrator.[96] The validity of the belief that a formal complaint procedure would have been ineffective is litigated as part of the sexual harassment claim, and employers can avoid liability by addressing these concerns.

2. *The Per Se Rule Is Fair to Hostile Environment Victims*

Victims of hostile environment can be fully compensated for their losses only by receiving back pay awards. The Supreme Court has stated that one purpose of Title VII is to "make whole" victims of unlawful employment discrimination.[97] Because many victims of sexual harassment quit their jobs in response to the harassment,[98] many victims lose their source of income when they resign. A sexual harassment allegation coupled with a claim for constructive discharge may not reach judgment for a few years, and a victim of hostile work environment who quits her job as a result of the harassment may be without income for that period of time. These victims can be "made whole" only by receiving back pay awards.

Awarding back pay to victims of hostile environment is also consistent with the Court's position regarding back pay awards under Title VII. The Court has held that a finding of employer liability for employment discrimination under Title VII triggers a rebuttable

---

determining employer liability. Therefore, the sexual harassment doctrine addresses the effectiveness of the grievance procedure.

94. *See supra* note 25 and accompanying text.

95. Farley, *supra* note 2, at 22; Gutek, *supra* note 69, at 72. Women also fail to use internal grievance procedures because they fear the public exposure that might jeopardize future employment opportunities. Gutek summarized the situation as follows: "In many cases, the woman simply decides that leaving the job is the least painful alternative for her, even though her own career will suffer." *Id.* at 74.

96. Farley, *supra* note 2, at 23.

97. Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). The statute is intended to give the courts the discretion to fashion the most complete remedy possible. *Id.* at 421.

98. *See supra* note 69 and accompanying text.

presumption that the claimant is entitled to back pay.[99] Back pay awards should be denied only for reasons which would not frustrate the central statutory purposes of both eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.[100] Not only does the per se rule help make victims whole, but adding back pay to hostile environment liability under Title VII increases the incentive for employers to eradicate sexual harassment in the workplace, since financial liability is substantially less without back pay.[101]

3. *The Per Se Rule Supports Title VII Policies*

An additional Title VII goal is voluntary compliance.[102] Currently, the interposition of a constructive discharge claim frustrates this goal by permitting employers to escape liability with little more than a slap on the hand. In contrast, the per se rule acts as a general deterrent, encouraging employers to make every effort to avoid liability by implementing effective grievance procedures and working with victims to remedy any alleged sexual harassment.[103] Voluntary compliance will decrease court time and costs for all parties involved, as well as decrease burdens on the court system. Moreover, out-of-court resolution of sexual harassment disputes preserves the reputation of both the employer and employee and lets the victim escape the trauma of having to testify on the stand about a very personal and emotional experience.

4. *Public Policy Calls for a Per Se Rule*

The per se rule satisfies our sense of justice by preserving human dignity. At least one court has recognized that a woman does not have to endure a hostile environment in order to keep her job until she can find

---

99. United States v. City of Chicago, 853 F.2d 572, 575 (7th Cir. 1988) (citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 359 & n.45 (1977)).

100. *Albermarle Paper Co.*, 422 U.S. at 421. Although this statement was made in a context where the victims of discrimination had not quit their jobs, the same reasoning applies where the victims have quit.

101. *E.g.*, Satterwhite v. Smith, 744 F.2d 1380, 1383 (9th Cir. 1984) (awarding $94,000 in back pay to a claimant constructively discharged on the basis of race).

102. Ford Motor Co. v. EEOC, 458 U.S. 219, 228–29 (1982).

103. Although victims of sexual harassment have tended to quit their jobs before making an effort toward settlement, *see supra* note 69 and accompanying text, the threshold for employer liability for hostile environment is currently high enough so that per se constructive discharge will not encourage more employees to quit. *See supra* notes 91–94 and accompanying text.

other work.[104] Requiring hostile environment victims to remain in the work place means requiring them to remain in conditions that are hostile or abusive. It is likely that some victims who cannot afford to risk losing back pay will be forced to endure continuing psychological and possibly physical injury before the environment is remedied. In fact, the situation may not be remedied until judgment. Imposing such abuse on victims of hostile environments undermines human dignity and violates our sense of justice.

Finally, the per se rule promotes other public policies, including the policies in favor of prompt adjudication of claims, minimal court costs, and a decreased burden on the judiciary. The rule is easy to apply and will create uniformity in redressing hostile environment violations of Title VII. The current state of the law requires choosing one standard for constructive discharge over another, often based on the inconsistent and confusing language of earlier decisions. Constructive discharge rules are difficult to apply in hostile environment cases because the tests have not been adequately modified for the hostile environment setting. A uniform rule is easier to understand and easier to apply, encouraging prompt adjudication of claims and minimizing the costs of trial. Uniform standards for Title VII damages provisions also increase the predictability of Title VII awards and decrease the burden on the judiciary.

III. CONCLUSION

Courts currently require a higher threshold for constructive discharge liability than that required for finding a sexually hostile environment. As a result, these victims are required to prove a higher level of harassment than other Title VII victims in order to be found constructively discharged, forcing them to remain in hostile and abusive conditions. This treatment is patently unfair. In sexually hostile environment cases, the current constructive discharge tests are inappropriate and wrong. The per se rule provides a just result for employers and victims, supports Title VII policies, reinforces human dignity, and furthers our sense of justice.

104. *See* Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 965 (8th Cir. 1993).