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Deconstructing Constructive Discharge: The Misapplication of Constructive Discharge Standards in Employment Discrimination Remedies

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ARTICLES

Deconstructing[1] Constructive Discharge: The Misapplication of Constructive Discharge Standards in Employment Discrimination Remedies

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INTRODUCTION

Two federal courts ruled that Gail Derr was discriminatorily demoted because of her sex when her employer moved her from a lease analyst position to a clerical job.[2] Her superior had criticized her for working despite having two children[3] and had told her that women with too much education create problems.[4] Yet Gail could recover nothing for her injuries.[5] The U.S. Court of Appeals for the Tenth Circuit held that her resignation from the clerical job, although motivated by her desire to escape continuing discrimination, could well cut off her right to recover back pay and other relief.[6] Such a resignation will cut off a discrimination victim's right

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1 Deconstruction is a philosophical theory that originated with the French postmodernist philosopher, Jacques Derrida, and has developed into a leading method of literary criticism. *See generally* Peter C. Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 KAN. L. REV. 815, 821-33 (1990); Ben Yagoda, *Retooling Critical Theory: Buddy, Can You Paradigm?*, N.Y. TIMES, Sept. 4, 1994, § 4 (Week in Review Desk), at 6.

Deconstructionists take the ordinary interpretation of a text and expose the unrecognized assumptions which underlie that interpretation in an effort to demonstrate that these assumptions are social constructs, not universally accepted principles. Schanck, *supra*, at 823. These assumptions therefore often favor powerful societal interests. *Id.* at 824. The first legal academics who used this method to examine judicial decisions and statutory interpretation were adherents of the Critical Legal Studies movement. *Id.*

More recently, deconstruction has been defined in an informal and popular manner as encompassing "any undermining of an accepted or orthodox notion." *Id.* at 822 n.38 (citing Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989)). As Professor Schanck points out, "Deconstruction thus serves a critical . . . function" above all. *Id.* at 821; *see also* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 191 (1990); Anthony D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy With One Bold Thought*, 85 NW. U. L. REV. 113 (1990).

This Article critically examines court decisions that have relied on constructive discharge principles to cut off the back pay of discrimination victims.

2 Derr v. Gulf Oil Corp., 796 F.2d 340, 341 (10th Cir. 1986). The Tenth Circuit affirmed a district court ruling that Ms. Derr's employer had discriminated against her. *Id.* at 342.

3 *Id.* at 341-42.

4 *Id.* at 342.

5 *Id.* at 344.

6 *Id.* at 342. Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on account of race, religion, sex, or national origin, expressly provides for lost back pay and reinstatement as remedies. 42 U.S.C. § 2000e-5(g)(1) (1988) (providing that the court may

to relief unless the victim was constructively discharged.[7] Gail's company therefore may have benefitted by continuing to discriminate since her departure could reduce its damage payments.[8]

Many federal appellate courts have denied relief to employees who have been discriminatorily demoted, transferred, or denied a promotion, by ruling that the employee's subsequent resignation from the discriminatory circumstances barred the award of damages for back pay.[9] Like the Tenth Circuit, these courts have granted relief only when the employee has been constructively discharged—treated so intolerably that any reasonable person would have felt compelled to quit.[10] Most discriminatory demotions or promotion denials, however, are not accompanied by such extreme conditions.[11] This constructive discharge rule therefore requires

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order "reinstatement or hiring of employees, with or without back pay"). The U.S. Supreme Court in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), ruled that courts should routinely award back pay as a remedy in Title VII cases to further the statute's purpose of making discrimination victims whole. *See infra* note 29.

7 Derr v. Gulf Oil Corp., 796 F.2d 340, 342 (10th Cir. 1986). One oddity of *Derr* is that the only damages that the plaintiff would have received, had she not resigned, would have covered a period a few years after she had been discriminatorily demoted. Since she resigned prior to this period, the court's ruling that her resignation might cut off her right to recover back pay could leave her with zero damages.

8 As this Article later argues, companies may even gear their discrimination to be severe enough to cause the employee, who has already been discriminatorily demoted or denied a promotion, to quit, without making it so intolerable that it constitutes a constructive discharge. *See infra* notes 107-08 and accompanying text. At a recent conference held by the ABA Section of Labor & Employment Law, a lawyer representing the employer perspective acknowledged at a session on constructive discharge situations that "from an employer's standpoint, it may be beneficial if the complaining party is no longer in the workforce, especially if there is ongoing litigation." *Summary of Proceedings*, 2 ABA EQUAL OPPORTUNITY COMMITTEE NEWSL., at 1, 9 (1994 Mid-Winter Meeting) [hereinafter *Summary of Proceedings*].

9 *See, e.g.*, Jurgens v. EEOC, 903 F.2d 386 (5th Cir. 1990); *see also* Martin W. O'Toole, Note, *Choosing a Standard for Constructive Discharge in Title VII Litigation*, 71 CORNELL L. REV. 587, 587 n.4 (1986) ("[A]n employer may be liable for a discriminatory act, e.g., passing a woman over for a promotion on account of her sex. But if the employee cannot also show that her subsequent resignation amounted to a constructive discharge, then her employer's liability for back pay terminates on the date of her resignation."); *infra* notes 72-78 (listing cases) and accompanying text. A minority of courts, however, do not necessarily require the plaintiff to stay put in order to continue receiving back pay. *See infra* notes 85-93 and accompanying text.

10 *See, e.g.*, Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888 (3d Cir. 1984); *see infra* notes 55-61 and accompanying text (describing the constructive discharge standard as used by the federal courts). The federal circuits, however, are fiercely divided on whether an employer must have intended to force out an employee in order for there to be a constructive discharge. Sheila Finnegan, Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U. CHI. L. REV. 561, 562 (1986). Numerous articles have been written about this split. *See, e.g.*, O'Toole, *supra* note 9. However, it is merely a peripheral part of this Article.

11 The isolated discriminatory acts of most employers, such as the giving of unequal pay or an ordinary demotion, do not constitute a constructive discharge. *See, e.g.*, Pittman v. Hattiesburg Mun. Separate Sch. Dist., 644 F.2d 1071, 1077 (5th Cir. 1981). Instead, the employer must create "aggravated circumstances," such as giving the employee a severe demotion and forcing the employee to work with an alleged discriminator. *See, e.g.*, Cazzola v. Codman & Shurtleff, Inc., 751 F.2d 53, 56 (1st Cir. 1984). *But see* Schafer v. Board of Pub. Educ., 903 F.2d 243, 250 (3d Cir. 1990) (aggravating circumstances are not absolutely required to support constructive discharge finding). *See generally* Richard M. DeAgazio, Note, *Promoting Fairness: A Proposal for a More Reasonable Standard of Constructive Discharge in Title VII Denial of Promotion Cases*, 19 FORDHAM URB. L.J. 979, 994 (1992) (footnotes omitted) ("[C]ourts generally hold that the 'mere fact of discrimination, without more, is insufficient to make out a claim of constructive discharge.' Thus, to prove constructive discharge, the plaintiff must show 'aggravating factors' to make working conditions 'intolerable' to a reasonable employee." (quoting Hopkins v. Price Waterhouse, 825 F.2d 458, 473 (D.C. Cir. 1987), *rev'd on other grounds and remanded*, 490 U.S. 228 (1989))).

employment discrimination victims to remain with their companies to stay eligible for court-ordered relief.

These courts, however, do not use the constructive discharge approach to determine remedies in cases in which the employee was discriminatorily discharged, rather than merely demoted or denied a promotion. Instead, they follow the U.S. Supreme Court's suggestion in *Ford Motor Co. v. EEOC* that mitigation of damages principles apply to actual discharge cases.[12] These principles require courts to award lost back pay to discrimination victims unless they have failed to use "reasonable diligence" in searching for a "substantially equivalent" employment opportunity.[13]

Under *Ford Motor Co.*, a discriminatorily discharged employee may turn down inferior job offers from other companies without having back pay tolled, because such offers are not for substantially equivalent employment. This freedom puts discharged employees in a very different situation than victims of discriminatory demotions or promotion denials, such as Gail Derr, who presumably must remain in an inferior placement to recover back pay.[14] That Title VII would yield such seemingly contradictory results is odd.

Many federal courts apply constructive discharge principles because they believe that employees who have been discriminatorily demoted, transferred, or denied a promotion should stay and challenge the company's discrimination internally.[15] These courts also do not want employees leaving at the smallest sign of discrimination and then suing for an unjustified windfall.[16] These policy concerns do not, of course, govern discharged employees because such employees are no longer with the company that fired them; they cannot internally challenge the company's actions.

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12 458 U.S. 219 (1982). According to the Supreme Court in *Ford Motor Co.*, "An unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in § 706(g). This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment." *Id.* at 231; *see also infra* notes 36-39 and accompanying text.

13 *Ford Motor Co.*, 458 U.S. at 231-32. Employees who are discriminatorily discharged are therefore presumptively entitled to a remedy. *See infra* note 29.

14 Derr v. Gulf Oil Co., 796 F.2d 340, 342 (10th Cir. 1986).

15 As one commentary states, "[T]he *guiding principle* behind the constructive discharge rule is that discrimination should be attacked from within the existing employment relationship." DeAgazio, *supra* note 11, at 994 (emphasis added) (footnote omitted). *See infra* note 78 and accompanying text.

16 *See, e.g.*, EEOC v. Riss Int'l, 35 Fair Empl. Prac. Cas. (BNA) 423, 425 (W.D. Mo. 1982) (stating that an employee "is not entitled to back pay for periods during which he voluntarily remained in idleness" (quoting NLRB v. Brown & Root, Inc., 311 F.2d 447, 452 (8th Cir. 1963))); DeAgazio, *supra* note 11, at 1008 (footnotes omitted):

> [I]f the sole issue was mitigation of damages, arguably every employee who was denied any promotion—no matter how minor—would be entitled to postresignation relief, subject only to the employee's duty to mitigate. . . . [E]mployees would be permitted to 'quit at the first signs of discrimination'. . . and to receive postresignation relief nonetheless.

Id.; Ira M. Saxe, Note, *Constructive Discharge Under the ADEA: An Argument for the Intent Standard*, 55 FORDHAM L. REV. 963, 985 (1987) (footnotes omitted) ("[E]mployees should be discouraged from resigning when doing so deprives the employer of the opportunity to limit its liability by resolving the problems leading to the employee's resignation.").

This Article examines the use of constructive discharge principles to govern back pay awards in discrimination cases. It also looks at whether using the mitigation of damages principles from *Ford Motor Co.* in all cases would be more consistent with the purposes of Title VII than the constructive discharge doctrine. These issues are important because most companies prefer not to fire employees.[17] They fear lawsuits,[18] demoralized coworkers,[19] and employee violence.[20] Thus, employers usually prefer to dis-

17 WILLIAM MORIN & LYLE YORKS, DISMISSAL 233 (1990):

> Termination should be part of a progressive process of applying sanctions . . . . As implied above, termination should be *management's last recourse* when other disciplinary efforts have failed . . . . Other actions should initiate a progressive process in which the supervisor first counsels the employee and then gives a series of warnings, perhaps even time off from the job, before finally terminating the employee.

Id. (emphasis added); Glen M. Gomes & James F. Morgan, *Meeting the Wrongful Discharge Challenge: Legislative Options for Small Business*, J. SMALL BUS. MGMT., April 1992, at 35, 35 (emphasis added) (citations omitted) ("This uncertain environment encourages increasing numbers of employees to bring lawsuits alleging 'wrongful termination' . . . . As a result, *employers are less willing to fire even the most unproductive workers.* In other words, 'paranoia has replaced power.'"); Frank Greve, *Federal Bosses Have Fear of Firing, Managers Find That There are Too Many Deterrents to Disciplining Civil Servants*, SAN JOSE MERCURY NEWS, Nov. 25, 1993, at 1A ("Lots of federal supervisors . . . say firing anyone has become so tricky and time-consuming and the repercussions so fearsome, that getting tough simply doesn't pay."); Carol McHugh, *Employers Struggle with Liability, Privacy Issues as Violence Erupts in American Workplace*, CHI. DAILY L. BULL., Dec. 9, 1993, at 1 (emphasis added) (quoting a Chicago lawyer's statement, "All I can say is that it is easier to deny employment to somebody who does not yet have it, both in the public and private sector, *than it is to take employment away from somebody who already has it* . . . .").

18 *See* Gomes & Morgan, *supra* note 17, at 35 (noting that employers are afraid to fire employees given the explosion of wrongful termination lawsuits); *Fired Workers Get Suitable Revenge*, CHI. TRIB., Nov. 23, 1986, at 6B ("The flood of such suits has made companies more reluctant to dismiss workers . . . ."); McHugh, *supra* note 17; J. Craig Peyton, *Firms Consider Litigation Risk; Work Force Reductions*, NAT'L L.J., May 13, 1991, at 29 (counseling that firms that must cut costs can decrease the risk of litigation by careful planning, such as by trying to cut back in areas other than in the work force).

New federal statutes such as the Civil Rights Act of 1991 and the Americans With Disabilities Act also add to employer fears because they provide employees with new causes of action and with greater remedies against discrimination. Lisa A. Lavelle, Note, *The Duty to Accommodate: Will Title I of the Americans with Disabilities Act Emancipate Individuals with Disabilities only to Disable Small Businesses?*, 66 NOTRE DAME L. REV. 1135, 1135 (1991). Employees filed a record number of employment discrimination charges with the Equal Employment Opportunity Commission in 1993. *Record Number of Charges Filed in Fiscal Year 1993*, FAIR EMPL. PRAC. SUMMARY (BNA) No. 2, Jan. 31, 1994, at 9. Rather than fire employees outright, given these concerns, many firms created "voluntary" exit incentives programs in an effort to persuade employees to resign or retire. Michael C. Harper, *Age-Based Exit Incentives, Coercion, and the Prospective Waiver of ADEA Rights: The Failure of the Older Workers Benefit Protection Act*, 79 VA. L. REV. 1271, 1273 n.8 (1993).

Some businesses refuse to hire employees in these newly protected categories given their fears of lawsuits and having to make expensive accommodations for the special needs of these employees. *See* Jeanne Meserve, *The Fear of the Cost of Discrimination Lawsuits* (CNN News broadcast, July 27, 1994) (discussing employer concerns over hiring the disabled as the ADA extends to cover businesses with only 15 employees). As the U.S. Supreme Court has noted, many employers have required employees to sign arbitration agreements regarding employment disputes to ensure that the employee cannot drag them into costly litigation. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991).

19 *See, e.g.*, ROBERT COULSON, THE TERMINATION HANDBOOK at vii (1981) ("Firings are not what most people like to think about or to talk about, certainly not something to be discussed with the workers."); *id.* at 56 (explaining that there is so much guilt in firing because "[f]eelings play an important part in the working environment. People at work don't leave their emotions at home. When an employee is being fired, those relationships come to the surface."); MORIN & YORKS, *supra* note 17, at 15-16 ("[A]n important consideration is the reaction of the dismissed manager's peers and associates. If they perceive the manager as a victim who has been treated unfairly, *morale can plummet* and turnover increase. 'What does the future hold for me?' and 'Should I be looking elsewhere in self-defense?' are typical reactions among employees who have

cipline or to demote an employee, perhaps in the hope that the employee will become discouraged and quit, rather than to fire the employee outright.[21] The issues are also timely because the U.S. Supreme Court in *McKennon v. Nashville Banner Publishing Co.*[22] has recently decided a case involving an employment discrimination victim's right to continue receiving back pay. This is the so-called after-acquired evidence case.

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worked closely with a manager who has been fired.") (emphasis added); Charles Caulkins & James J. McDonald, Jr., *Lawyer Terminations: Increasingly the Subject of Employment Discrimination Suits*, FLA. B.J., Feb. 1991, at 27, 27 (noting that "dismissal of unproductive lawyers may be a painful experience"); Peyton, *supra* note 18 ("News of terminations may damage the firm's reputation among potential recruits and rival firms.").

20 *See, e.g.*, Roy Rivenburg, *What Do You Do With a Worker Nobody Wants Around Anymore, But One You Can't Fire?*, L.A. TIMES, June 26, 1992, at E1 ("Executives at a Los Angeles electronics company, for instance, are afraid to fire one manager who acts deranged at work and once held his wife hostage at home. They're fearful he'll hunt down and shoot the CEO in retaliation."). There have been several recent incidents involving workplace shootings by individuals who were just fired, many of which were related to the U.S. Postal Service. Tia Schneider Deneberg & R. V. Denenberg, *The Future of the Workplace Dispute Resolver*, 49 DISP. RESOL. J. 48 (1994). *See also* COULSON, *supra* note 19, at 5 (relating the tragic story of a recently discharged employee who reacted to his termination by killing his father and then killing several others by driving his car in a reckless manner).

A July 1994 U.S. Department of Justice report found that one in six violent crimes in the United States happens at work, and that the workplace is the scene of almost one million violent crimes every year. The report found that from 1987 to 1992 there was an average of 13,100 rapes, 79,100 robberies, 264,200 aggravated assaults, and 615,200 simple assaults per year at the workplace. *See About a Sixth of U.S. Crime is at Job Site*, N.Y. TIMES, July 25, 1994, at A10. A U.S. Department of Labor study came up with similar results. *See Crashes Top On-Job Danger: Accidents, Homicides Lead Causes of Workplace Deaths*, LANSING ST. J., Aug. 11, 1994, at 1. *See also* McHugh, *supra* note 17, at 1 ("Employers today increasingly find themselves caught between the rising tide of violence in the workplace and the privacy walls meant to shield individuals . . . . With homicide now the leading cause of workplace fatalities for women and the third leading cause of workplace deaths overall in the U.S., business owners and managers are vulnerable to suits asserting theories of liability that range from negligent hiring to premises liability to federal tort claims."). Employers have also been found liable to employees for hiring or retaining people who commit violent acts against the employees. *Id.*; *see also* Lori Mathews, *Fear Transforms Office Layouts, Changes Include Escape Routes, Panic Buttons*, DET. FREE PRESS, Sept. 23, 1994, at 1B.

21 The large number of cases in which employees are discriminated against and then resign demonstrates this workplace trend. *See infra* Part III and notes 71-78 & 83-88. The ABA's Section on Labor & Employment Law devoted one of the workshops at its March 12, 1994 Mid-Winter Meeting to "Constructive Discharge Claims: Employee and Employer Strategies in Personnel Decision-Making." *See Summary of Proceedings*, *supra* note 8, at 9.

As a former employment discrimination lawyer with the Chicago law firm of Davis, Miner, Barnhill & Galland, my colleagues and I brought many of our cases on behalf of employees who had quit their jobs after having been illegally demoted or denied a promotion. *See, e.g.*, Plaintiff's Memorandum of Law at 5, Cotten v. Merrill Lynch & Co., No. 86-C-1578 (N.D. Ill. 1989) (settling an age discrimination case at trial after plaintiff's evidence was presented; major issue was whether plaintiff's refusal to accept a demotion from position of Vice-President and Regional Director to job in defendant's newly created Private Capital department terminated plaintiff's right to relief); Davis v. Commonwealth Edison, Ch. No. 1984 CN 1997, ALS No. 2718 (Ill. Hum. Rts. Comm'n. Sept. 18, 1990) (interim recommended order and decision) (disability discrimination case in which Administrative Law Judge stated that plaintiff's refusal to accept demotion did not cut off his right to a remedy because the refusal was consistent with plaintiff's duty to mitigate damages); *see also* Ezold v. Wolf, Block, Schorr & Solis-Cohen, 758 F. Supp. 303, 311-12 (E.D. Pa. 1991), *rev'd on other grounds*, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88 (1993):

> That Ms. Ezold chose to leave Wolf, Block in an attempt to replenish and continue her career was not a knee-jerk reaction to a one-time discriminatory act . . . . When Wolf, Block unlawfully permitted gender to enter into its consideration of Ms. Ezold for partner, she understandably came to the conclusion that her career at the Firm would be limited . . . .

Id.

22 115 S. Ct. 879 (1995).

This Article has five Parts. Part I describes the legal principles governing damages and back pay calculations under Title VII, including a discrimination victim's statutory duty to mitigate.[23] Part II analyzes the federal courts' application of constructive discharge concepts in the remedial context. Part III describes which federal and state courts use the constructive discharge approach to cut off the right of plaintiffs to back pay, and which use mitigation or other analyses. Part III also demonstrates that scholars who have previously addressed this issue are mistaken in assuming that the federal courts have uniformly adopted the constructive discharge approach.[24]

Relying on several methods of statutory interpretation, Part IV shows that, by forcing discrimination victims to endure continuing discrimination, the constructive discharge approach contravenes Title VII's purposes, as well as those of the Civil Rights Act of 1991.[25] Denying discrimination

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23 This Article uses the term "discrimination victim" to refer to employees who resign after being discriminatorily demoted, transferred, harassed, denied a promotion, etc. The term also presumes that a court has found the employee to have been subject to illegal discrimination prior to resigning.

Although the Article analyzes Title VII, its conclusions are applicable to other antidiscrimination statutes such as the ADEA and the ADA. They certainly should apply to age discrimination victims, as the ADEA remedies have historically been more generous to plaintiffs than the Title VII remedies. *Compare* 42 U.S.C. § 2000e-5(g) (1988) (providing for reinstatement and back pay) *with* 29 U.S.C. § 626(b) (1988) (ADEA) (providing for reinstatement and back pay, as well as liquidated damages for willful violations). *See infra* note 29 (showing that the ADEA back pay provision, unlike that of Title VII, contains mandatory language).

24 The major employment treatises include cases that embody this constructive discharge approach. *See infra* note 70. Other experts in the area also assume that this approach is virtually unanimous. *See, e.g.*, Robert Fitzpatrick, *Damages and Other Remedies in Employment Cases*, ADVANCED EMPL. LAW AND LITIGATION SEMINAR (ALI-ABA Course of Study Materials, Washington D.C.), December 2-4, 1993, at 17 ("The general rule is that voluntary termination of employment after a discriminatory denial of promotion or transfer, etc., cuts off the right to damages. However, when the employee is constructively discharged, her termination will not cut off back pay liability."); ROBERT BELTON, REMEDIES IN EMPLOYMENT DISCRIMINATION LAW 375-76 (1992) ("With respect to the discriminatory denial of promotion, these courts have held that a discriminatee has an obligation, absent a constructive discharge, to remain in her current position to mitigate damages."); 3 Empl. Discrimination Coordinator (Clark, Boardman, Callaghan) Par. 43,946 - 44,008.5 (1994). As this Article demonstrates, however, these experts are mistaken. The federal courts are not all committed to the constructive discharge approach. *See infra* notes 83-84 & 87-94.

25 The employee is subjected to a continuing violation of the federal antidiscrimination laws for as long as she is kept in an inferior position due to a discriminatory decision. *See, e.g.*, DeAgazio, *supra* note 11, at 997 ("Hence, Jolly was placed into a Catch-22 position: if he remained, he would be locked in an inferior position; if he resigned, he would risk becoming unemployed and forfeiting a make-whole remedy."); *see also infra* notes 89-92 and accompanying text.

Title VII embodies the twin aims of deterring discrimination and making discrimination victims whole. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976) ("Congress . . . ordained that its policy of outlawing [discrimination on the basis of race, religion, sex, or national origin] should have the 'highest priority'. . . ."); Rodriguez v. Taylor, 569 F.2d 1231, 1237-38 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978):

> Monetary awards exacted from employers who practice unlawful discrimination serve two primary functions. First, the prospect of economic penalties . . . certainly deters illegal employment practice[s] . . . . Second, economic exactions recompense individuals for injuries inflicted by employers' discriminatory conduct. These prophylactic and compensatory purposes are the basis of most recent anti-employment discrimination legislation, including the ADEA and Title VII.

Id. Title VII even seeks to have courts act against the discrimination quickly. *See* Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 483 (1992) (noting that Title VII specifies that the judge shall assign the case for hearing "at the earliest practicable date and . . . cause the case to be in every way expedited" (citing 42 U.S.C.

victims the option of resigning is also inconsistent with *Ford Motor Co.*'s admonition that employment discrimination victims should be free to reject inferior job options, without violating their duty to mitigate damages.[26]

Part V proposes a new balancing test based on mitigation standards for courts to employ in deciding whether a discrimination victim's resignation should cut off back pay. The test weighs the degree of continuing discrimination against the mitigation effort made by the plaintiff. The more egregious the discrimination, the more freedom the victim should have to resign without having her back pay cut off. When the discriminatory demotion was not to a substantially inferior position, however, the employer may be able to persuade the court to cut off back pay unless the employee resigned as part of a diligent effort to seek comparable employment. Finally, Part V looks at possible objections to such a test.

I. Back Pay and Mitigation of Damages Under the Employment Discrimination Statutes

Congress crafted the remedial provisions of the federal antidiscrimination statutes to "make whole" the victims of discrimination.[27] The provi-

§ 2000e-5(f)(5) (1988))); *see also* 29 U.S.C. §§ 626(d), 633(b) (1988) (allowing plaintiffs to file concurrently with the appropriate state and federal agencies in order to expedite the process); Gonzalez v. Carlin, 907 F.2d 573 (5th Cir. 1990) (permitting magistrate trials to speed things up); Morse v. Marsh, 656 F. Supp. 939 (N.D. Ill. 1987) (same).

The Civil Rights Act of 1991 made these statutory aims even clearer by strengthening the remedies available to employment discrimination victims. In Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1235 n.23 (3d Cir. 1994), *vacated on other grounds and remanded*, 115 S. Ct. 1397 (1995), the Third Circuit stated:

> One overriding lesson the 1991 Act tutors all but its most unmindful reader is that Congress was unhappy with increasingly parsimonious constructions of Title VII. Essentially, Congress forcefully reminded courts of the canon that Title VII and ADEA, as remedial statutes, are to be construed liberally to promote their welfare purposes, equality of treatment and employment opportunities.

Id.

26 Ford Motor Co. v. EEOC, 458 U.S. 219 (1982). Furthermore, courts that require the employee to stay put to be eligible for back pay cause the employee to turn down promising job opportunities at other companies where there is no discrimination. This result is inconsistent with Title VII's mitigation principles. In addition, requiring an employee to stay at the company and fight discrimination from within amounts to an intra-company exhaustion of remedies provision. Yet no such provisions exist in the federal antidiscrimination laws. Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act all require plaintiffs to file a charge of discrimination with the EEOC or with a state civil rights agency to commence a discrimination lawsuit. *See* 42 U.S.C. § 2000e-5(e), 2000e-5(f) (1988); 29 U.S.C. § 626(b) (1988); 42 U.S.C. § 12117 (Supp. V 1993) (adopting the procedures of Title VII). The EEOC is supposed to investigate the charge to determine if it has any merit. This requirement is not exhaustive, however, because these statutes permit the plaintiff to cut off the administrative investigation after a certain period and then to file a federal court lawsuit. These statutes have no intra-company exhaustion of grievance procedures. *See, e.g.*, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 762 (1979); Love v. Pullman, 404 U.S. 522 (1972); *see also* Scelsa v. City Univ. of N.Y., 806 F. Supp. 1126, 1139 (S.D.N.Y. 1992); Holt v. Continental Group, Inc., 631 F. Supp. 653, 659 (D. Conn.), *aff'd*, 788 F.2d 3 (2d Cir.), *cert. denied*, 479 U.S. 839 (1985); Patsy v. Board of Regents, 457 U.S. 496 (1982) (rejecting an exhaustion requirement in § 1983 civil rights cases).

27 In Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975), the Supreme Court stated, "The 'make whole' purpose of Title VII is made evident by the legislative history." The Court elaborated by explaining that the statute was meant to provide "the most complete relief possible" to put the discrimination victim in the position that she would have been in but for the discrimination. *Id.* at 421; *see also* 29 U.S.C. § 626(b) (1988) (adopting the remedial provisions of the Fair Labor Standards Act to advance the "make whole" purpose).

sions permit courts to award back pay, compensatory damages, and injunctive relief, such as reinstatement. Title VII and the ADEA also give courts the power to award punitive damages to punish and deter malicious and willful discrimination.[28]

Virtually all discrimination victims who lose wages and fringe benefits are entitled to receive back pay to compensate for these losses.[29] The back pay period usually runs from the date of the discriminatory conduct until the final court judgment.[30] In simple cases, courts calculate back pay by subtracting the actual earnings made by the employee from the wages and fringe benefits that the employee would have received, had there been no discrimination.[31]

Determining what pay the plaintiff would have earned from the defendant had there been no discrimination is a difficult part of any back pay calculation. Courts often base that figure on the average earnings of the defendant's employees who have job assignments and seniority similar to what the plaintiff would have had, absent discrimination.[32] Expert testimony projecting salaries or wages that the employee would have earned

28 Since its inception, the ADEA has included a liquidated damages provision that permits plaintiffs who demonstrate that an employer's discrimination is willful to recover double damages. 29 U.S.C. § 626(b) (1988). The Civil Rights Act of 1991 added a punitive damages provision to Title VII. 42 U.S.C. § 1981a(a)(1) (Supp. V 1993).

29 *See, e.g.*, Maxfield v. Sinclair Int'l Corp., 766 F.2d 788, 794 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 626 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984); Walters v. City of Atlanta, 610 F. Supp. 715, 728 (N.D. Ga. 1985) (holding that a Title VII claimant is presumptively entitled to back pay), *aff'd in part, rev'd in part*, 803 F.2d 1135 (11th Cir. 1986); JOEL FRIEDMAN & GEORGE STRICKLER, JR., THE LAW OF EMPLOYMENT DISCRIMINATION 652-53 (3d ed. 1993) (discussing the leading cases showing that fringe benefits are part of back pay awards, and also showing that federal courts generally award prejudgment interest on the amounts of wages lost).

The ADEA states that "[a]mounts owing to a person as a result of a violation of this chapter *shall* be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of [section 16 of the Fair Labor Standards Act]: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter." 29 U.S.C. § 626(b) (1988) (first emphasis added). Section 16 of the Fair Labor Standards Act provides in part that any violating employer "*shall* be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b) (1988) (emphasis added). One of the few exceptions is for an employer who was acting in accordance with state law when the discrimination occurred. *See, e.g.*, Alaniz v. California Processors, Inc., 785 F.2d 1412 (9th Cir. 1986); Le Beau v. Libbey-Owens-Ford Co., 727 F.2d 141 (7th Cir. 1984). In Albermarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975), the Court rejected the argument that the employer should not be liable for back pay absent a showing of bad faith.

30 Thorne v. City of El Segundo, 802 F.2d 1131, 1136 (9th Cir. 1986). One problem arises when the victim has endured a continuing violation, such as discriminatory pay rates, that has occurred over many years but has only recently filed a discrimination charge. The question presented by this situation is whether the victim can recover lost wages from the time of the first act of discrimination or whether there is some limitation on going back in time that is connected to when the discrimination charge was filed. Section 706(g) of Title VII does contain such a limitation, providing that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of the charge with the [EEOC]." 42 U.S.C. § 2000e-5(g)(1) (1988).

31 "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. § 2000e-5(g)(1) (1988). *See* NLRB v. Gullett Gin Co., 340 U.S. 361, 363 (1951).

32 *See, e.g.*, Merriweather v. Hercules, Inc., 26 Fair Empl. Prac. Cas. (BNA) 590 (N.D. Ala. 1979), *aff'd*, 631 F.2d 1161 (5th Cir. 1980).

also may help.[33] Any doubts regarding back pay projections must be resolved against the defendant wrongdoer, but pure speculation must be avoided.[34] Back pay calculation is further complicated by disagreements between the federal courts over what constitutes interim earnings.[35]

The threat of back pay awards, however, does not leave employers at the whim of their employees. To continue being eligible for back pay under Title VII, discrimination victims must use "reasonable diligence" in obtaining interim earnings. This obligation is an extension of the common-law duty to mitigate damages.[36]

The Supreme Court in *Ford Motor Co. v. EEOC* elaborated on this mitigation duty by requiring an employee who is discriminatorily denied a position with a company to seek alternative "suitable employment."[37] The Court stated that, "[A]lthough the unemployed or underemployed claimant *need not* go into another line of work, *accept a demotion,* or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied."[38] According to the Court, a new job is not substantially equivalent if it does not fit the employee's "particular skills, background, and experience" or if it involves "substantially more onerous" conditions than the former job.[39] A new job is also not

33 *See, e.g.*, Blum v. Witco Chem. Corp., 829 F.2d 367, 372 (3d Cir. 1987); Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1438 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985).

34 Wooldridge v. Marlene Indus. Corp., 875 F.2d 540, 549 (6th Cir. 1989); Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 628 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984); EEOC v. Blue & White Serv. Corp., 674 F. Supp. 1579, 1580 (D. Minn. 1987). *See also* Bonura v. Chase Manhattan Bank, 629 F. Supp. 353, 361 (S.D.N.Y. 1986) (refusing to award lost bonuses as back pay because such an award would be too speculative). *But see* Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1446-47 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985).

35 Interim earnings are those monies obtained by a discrimination victim from other sources after separation from the discriminatory employer. Courts agree, for example, that any salaries earned at new jobs should count as interim earnings that reduce any back pay award. *See, e.g.*, Nord v. United States Steel Corp., 758 F.2d 1462, 1472 (11th Cir. 1985); Merriweather v. Hercules, Inc., 631 F.2d 1161 (5th Cir. 1980). Courts disagree, however, on whether unemployment compensation payments received should reduce the award. *Compare* Brown v. A.J. Gerrard Mfg. Co., 715 F.2d 1549, 1551 (11th Cir. 1983) (en banc) (refusing to deduct unemployment compensation payments from back pay awards) *with* EEOC v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977) (holding that such benefits should reduce back pay award). The issue really turns on how the "collateral source" rule is interpreted. This rule specifies that earnings made after the employee is discharged cannot be deducted if they come from a collateral source to which the employee was entitled independent of the firing. *See, e.g.*, Knafel v. Pepsi-Cola Bottlers of Akron, Inc., 899 F.2d 1473, 1480 (6th Cir. 1990); Smith v. Office of Personnel Mgmt., 778 F.2d 258, 263 (5th Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986). This issue, however, is beyond the scope of this Article and has been written about elsewhere extensively. *See generally* Fitzpatrick, *supra* note 24; Linda L. House, Note, *Section 1983 and the Collateral Source Rule*, 40 CLEV. ST. L. REV. 101 (1992); Thomas W. Lee, Comment, *Deducting Unemployment Compensation and Ending Employment Discrimination: Continuing Conflict*, 43 EMORY L.J. 325 (1994).

36 *See, e.g.*, CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 33 (1935):

> Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided.

Id.

37 Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982).

38 *Id.* at 231-32 (emphasis added) (footnotes omitted).

39 *Id.* at 231 n.16 (quoting NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1320-21 (D.C. Cir. 1972)).

comparable if the employee would receive reduced benefits or work a more inconvenient shift.[40]

The lower federal courts have generally interpreted *Ford Motor Co.* as imposing on the employer the burden to plead and prove that the plaintiff has failed to mitigate damages. The Ninth Circuit, for example, has ruled that a plaintiff's failure to mitigate damages is an affirmative defense, and that a defendant must show both: (1) that suitable positions which the plaintiff could have discovered were available; and (2) that the plaintiff "failed to use reasonable care and diligence in seeking them out."[41] The lower federal courts have ruled inconsistently, however, on what constitutes reasonable diligence. Some courts have emphasized that the employee need only make reasonable efforts to get comparable employment.[42] Others have stressed that the employee must look diligently for equivalent work.[43]

The federal courts agree, however, that a plaintiff's right to back pay is tolled on the date the plaintiff could have obtained such employment with a reasonably diligent search.[44] The Supreme Court followed this consensus in *Ford Motor Co.*, and ruled that the plaintiffs' right to back pay was tolled as of the date that they turned down an unconditional offer of the job that

40 The federal circuit courts have interpreted the suitable job standard to mean that the new job must offer virtually the same promotional opportunities, compensation, job responsibilities, working conditions, and status as the position from which the plaintiff was discharged or for which the plaintiff was not hired. *See, e.g.*, Sellers v. Delgado Community College, 839 F.2d 1132, 1138 (5th Cir. 1988); Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 624 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984). Ordinarily, employment that requires the employee to relocate or to work a different shift is not comparable. *See, e.g.*, Spagnuolo v. Whirlpool Corp., 717 F.2d 114, 118 (4th Cir. 1983); Daniels v. City of Alcoa, 732 F. Supp. 1467, 1477 (E.D. Tenn. 1989).

41 Jackson v. Shell Oil Co., 702 F.2d 197, 202 (9th Cir. 1983); *see also* Ford v. Nicks, 866 F.2d 865, 873 (6th Cir. 1989). One court has ruled, however, that the employer does not have to demonstrate the availability of comparable employment if the employer can prove that the claimant did not use reasonable efforts to look for employment. *Sellers*, 839 F.2d at 1132.

42 *See, e.g.*, Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061 (8th Cir. 1988) (holding that an employee who sought employment only for a month after his discharge by making a few phone calls mitigated damages by then starting his own business even though he later turned down job offers comparable to his former job); Wheeler v. Snyder Buick, Inc., 794 F.2d 1228 (7th Cir. 1986) (holding that limited search for other employment by woman car salesperson was understandable because her previous employer had blacklisted her); Hanna v. American Motors Corp., 724 F.2d 1300 (7th Cir.), *cert. denied*, 467 U.S. 1241 (1984); Orzel v. Wauwatosa Fire Dep't, 697 F.2d 743 (7th Cir.) (holding that one temporary job, one employment application, and registration with state job service was not vigorous effort but did not constitute violation of duty to mitigate), *cert. denied*, 464 U.S. 992 (1983).

43 *See, e.g.*, Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461 (5th Cir.) (holding that establishment of part time business and ending job search does not constitute reasonable diligence), *cert. denied*, 493 U.S. 842 (1989); Hunter v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986) (ruling that an employee failed to mitigate damages when he did no alternative work and applied for only 16 jobs (other than the four jobs he had lost) in the five years after he was fired). Courts are split on whether self-employment constitutes a failure to mitigate. *See, e.g.*, Smith v. Great Am. Restaurants, Inc., 969 F.2d 430, 438 (7th Cir. 1992); Carden v. Westinghouse Elec. Corp., 850 F.2d 996, 1005 (3d Cir. 1988); Stuart v. Normandy Osteopathic Ctr., 52 Fair Empl. Prac. Cas. (BNA) 1552, 1554 (E.D. Mo. 1990); Blumrosen v. Bethlehem Steel Corp., 47 Fair Empl. Prac. Cas. (BNA) 1261, 1264 (E.D. Pa. 1987). Courts are also divided on whether going back to school or switching fields constitutes a failure to mitigate. Fitzpatrick, *supra* note 24, at 378-79 nn.160-66.

44 Ford Motor Co. v. EEOC, 458 U.S. 219, 231-32 (1982).

they had been discriminatorily denied in the first place.[45] The federal courts also generally toll back pay if the employee finds other comparable employment but is then fired for misconduct,[46] or if the employee is unavailable for work, such as due to a disability.[47]

The law of mitigation is less clear regarding employees who have been discriminatorily demoted, transferred, harassed, or denied a promotion. Some federal courts have ruled that such employees must mitigate their damages by staying and vigorously fighting to get the position to which they claim entitlement.[48] Other courts have said that employees who depart in such circumstances may still be acting reasonably—the cornerstone of the duty to mitigate.[49]

II. The Development of the Constructive Discharge Theory

The constructive discharge theory was first developed in National Labor Relations Board cases involving discrimination against union members.[50] It was designed to prevent employers from discriminating indirectly against union members when the employers could not discriminate directly.[51] The federal courts appropriated the theory from these NLRB cases when employers had treated employees poorly, but had not fired them.[52]

The Tenth Circuit's 1975 decision in *Muller v. United States Steel Corp.*[53] was one of the first federal appellate applications of the constructive discharge concept in an employment discrimination case. In *Muller*, the court explained that an employee who quit and alleged discrimination could prevail if the employee could show that the employer designed its adverse actions to get the employee to leave.[54] Although the court did not clarify what kind of employer mistreatment was necessary to be actionable, the Fifth Circuit did so later that year in *Young v. Southwestern Savings & Loan Ass'n.*[55] In *Young*, the court stated that "if the employer *deliberately* makes an employee's working conditions *so intolerable* that the employee is forced into an involuntary resignation, then the employer has encompassed a con-

45 Ford's offer, however, lacked any restoration of seniority to the plaintiffs. The Court felt that this still did not permit the plaintiff to decline the offer since the plaintiff could accept the job and continue seeking the restoration of seniority from the trial court. *Id.* at 232-34.

46 *See, e.g.*, Brady v. Thurston Motor Lines, 753 F.2d 1269 (4th Cir. 1985).

47 *But see* Thorne v. City of El Segundo, 802 F.2d 1131, 1133-34 (9th Cir. 1986); Wells v. North Carolina Bd. of Alcoholic Control, 714 F.2d 340 (4th Cir. 1983).

48 Gomez v. Great Lakes Steel, 803 F.2d 250, 256 (6th Cir. 1986); *see infra* notes 72-80 and accompanying text.

49 *See, e.g.*, Di Salvo v. Chamber of Commerce, 568 F.2d 593, 598 (8th Cir. 1978).

50 NLRB v. Holly Bra, Inc., 405 F.2d 870, 872 (9th Cir. 1969). *See generally* Finnegan, *supra* note 10, at 567-68; O'Toole, *supra* note 9, at 589-96.

51 Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 894 (1984). The doctrine was designed to make it illegal for an employer to harass a union employee into resigning by making the working conditions terrible. It was felt that such actions were just as illegal as those of an employer who directly fired the employee due to his union membership. Finnegan, *supra* note 10, at 567.

52 O'Toole, *supra* note 9, at 591; Finnegan, *supra* note 10, at 567.

53 509 F.2d 923 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975).

54 *Id.* at 929.

55 509 F.2d 140 (5th Cir. 1975).

structive discharge and is as liable for any illegal conduct therein as if it formally discharged the aggrieved employee."[56]

In *Bourque v. Powell Electrical Manufacturing Co.*,[57] the Fifth Circuit retained *Young*'s intolerable working conditions standard but ruled that an employee did not have to show that the employer's actions were deliberate. Instead, the *Bourque* court stated that a plaintiff must show that the conditions were so intolerable that a "reasonable person in the employee's shoes" would have felt compelled to resign.[58] Virtually all of the other federal appellate courts have adopted the *Bourque* standard.[59] The intent requirement has been retained only by the Fourth[60] and Eighth Circuits.[61]

Bourque is a seminal decision for this Article because it extended the constructive discharge analysis to the remedial stage of employment discrimination cases.[62] In *Bourque*, the district court ruled that the plaintiff

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56 *Id.* at 144 (emphasis added).

57 617 F.2d 61, 65 (5th Cir. 1980). Courts also have not been unanimous on what constitutes intolerable conditions. Most courts agree, however, that an illegal reduction in salary or the illegal denial of a promotion does not amount to a constructive discharge. Aggravating circumstances, such as harassment by the employer, are needed as well. Jan A. Buckner, Comment, *Help Wanted: An Expansive Definition of Constructive Discharge Under Title VII*, 136 U. PA. L. REV. 941, 948 n.26 (1988). *See also* Calcote v. Texas Educ. Found., Inc., 578 F.2d 95, 97 (5th Cir. 1978); Parker v. Siemens-Allis, Inc., 601 F. Supp. 1377, 1389 (E.D. Ark. 1985).

58 *Bourque*, 617 F.2d at 65.

59 Sanchez v. City of Santa Ana, 915 F.2d 424 (9th Cir. 1990), *cert. denied*, 502 U.S. 815 (1991); Spulak v. K-Mart Corp., 894 F.2d 1150 (10th Cir. 1990); Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989); Hopkins v. Price-Waterhouse, 825 F.2d 458, 472-73 (D.C. Cir. 1987), *rev'd on other grounds and remanded*, 490 U.S. 228 (1989); Martin v. Citibank, 762 F.2d 212, 221 (2d Cir. 1985); Goss v. Exxon Office Sys. Co., 747 F.2d 885, 887-88 (3d Cir. 1984); Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982); Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977). These courts have not interpreted the reasonable employee test in precisely the same way, and the Second Circuit in particular has some contrary authority. *See* DeAgazio, *supra* note 11, at n.51.

60 Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).

61 Craft v. Metromedia, Inc., 766 F.2d 1205, 1217 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986).

62 The decision in Muller v. United States Steel Corp., 509 U.S. 923 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975), was not exactly on point because the demotion that occurred in that case was not itself found discriminatory. In Derr v. Gulf Oil Corp., 796 F.2d 340, 343 n.3 (10th Cir. 1986), the Tenth Circuit acknowledged that "*Bourque* has become the leading case on the subject of constructive discharge under Title VII."

Courts commonly use constructive discharge principles in making remedial determinations. As one commentator states:

> The constructive discharge issue arises frequently in the relief phase of Title VII employment discrimination litigation. Typically, a former employee alleges an underlying discriminatory act—such as unlawful demotion, harassment, or failure to promote—and also claims that her subsequent resignation was involuntary because it resulted from intolerable working conditions associated with the discrimination. To be eligible for any relief at all, the plaintiff must of course prove the underlying Title VII violation. To be eligible for post-resignation relief, however, the plaintiff usually must prove constructive discharge.

DeAgazio, *supra* note 11, at 986-87; *see also id.* at 987 n.48 ("The issue more commonly arises in the relief phase of the lawsuit."); O'Toole, *supra* note 9, at 587 n.4:

> An allegation of constructive discharge can arise in two different contexts. First, an employee may allege that the constructive discharge was the discriminatory act. If she is unable to prove this claim, then her employer is not liable. Alternatively, an employer may be liable for a discriminatory act, e.g. passing a woman over for a promotion on account of her sex. But if the employee cannot also show that her subsequent resignation amounted to a constructive discharge, then her employer's liability for back pay terminates on the date of her resignation. This discussion should not suggest that there

had been subjected to illegal wage discrimination.[63] The plaintiff argued that her subsequent resignation from that job was a constructive discharge and she therefore should get damages for the loss of her job in addition to those for the wage discrimination. The district court disagreed, ruling that the plaintiff did not show that the employer intended for her to resign.[64]

On appeal, the plaintiff argued that she should not have to show that her employer intended for her to resign in order to prove constructive discharge. She also argued that her employer's wage discrimination entitled her to recover full back pay because limiting her remedy solely to the discriminatory wage differential while she held the position would be inconsistent with Title VII. Finally, she argued that even if her resignation was not justified under the constructive discharge doctrine, she should have been paid the wage differential until she obtained permanent employment.[65]

The Fifth Circuit agreed that the plaintiff did not have to prove the employer's hostile intent.[66] The court also ruled, however, that the employer's unequal wages did not create the kind of objectively intolerable conditions that justified the plaintiff's departure.[67] The court then said that its refusal to grant a damage award for the plaintiff's back pay after her resignation was not inconsistent with Title VII because "society and the policies underlying Title VII will be best served if, wherever, possible, unlawful discrimination is attacked within the context of existing employment relationships."[68] This public policy argument became very popular in later cases.[69]

The Fifth Circuit also rejected the plaintiff's argument that her back pay for the differential in wages should continue running until she obtained permanent employment. Because constructive discharge was the only theory that the plaintiff advocated, however, the court never considered any other theory under which the plaintiff's right to back pay might continue after she resigned. This Article proposes such a theory.

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are two *types* of constructive discharge; it merely illustrates that different consequences result depending upon the nature of the constructive discharge allegations.

Id. (emphasis added).

63 Bourque v. Powell Elec. Mfg. Co., 445 F. Supp. 125, 128-29 (S.D. Tex. 1977) (accepting plaintiff argument that she was being discriminated against in that she was being paid lower wages than men despite doing identical work), *aff'd*, 617 F.2d 61 (5th Cir. 1980).

64 *Id.* at 129.

65 The plaintiff argued that "the proper measure of damages would be the difference between the rate at which she was compensated and the rate at which male buyers were paid and that the back pay period should have continued until she obtained permanent employment." *Bourque*, 617 F.2d at 66 n.8.

66 *Id.* at 65.

67 *Id.* at 66.

68 *Id.*

69 *See infra* notes 71-79. That *Bourque's* public policy argument became so generally accepted is ironic given that the court in that case may have adopted it only because the plaintiff failed to offer any contrary rationales. Once again, the problems resulting from poor lawyering on behalf of a plaintiff in a civil rights case have been felt by the whole civil rights bar.

III. The Judicial Divisions Regarding the Duration of Back Pay Remedies for Discrimination Victims

Most scholars assume that the federal courts uniformly follow the constructive discharge rule for determining whether the back pay of a discriminatorily demoted or transferred employee, or an employee who is discriminatorily denied a promotion, should be tolled when the employee resigns.[70] Although most federal appellate courts are committed to this approach, several are not. In fact, many federal district courts have gone their own way. One reason other scholars hold this view may be that courts have not developed a uniform alternative test. Instead, several alternative analyses exist.

The First,[71] Fifth,[72] Sixth,[73] Ninth,[74] Tenth,[75] and D.C.[76] Circuits[77] have followed the constructive discharge analysis. In 1993, the Wisconsin

70 *See Fitzpatrick, supra* note 24; O'Toole, *supra* note 9; *see also* Belton, *supra* note 24, at 376; Paul N. Cox, Employment Discrimination ¶ 17.04, at 17-19 (2d ed. 1992). The major employment discrimination treatises also include decisions embodying this rule and do not discuss contrary cases. *See, e.g.*, Friedman & Strickler, *supra* note 29, at 700; Michael Zimmer et al., Cases and Materials on Employment Discrimination 1143 (1994).

71 Alicea Rosado v. Garcia Santiago, 562 F.2d 114 (1st Cir. 1977); *see also* Marley v. United Parcel Serv., Inc., 665 F. Supp. 119 (D.R.I. 1987).

72 Jurgens v. EEOC, 903 F.2d 386 (5th Cir. 1990); Pittman v. Hattiesburg Mun. Separate Sch. Dist., 644 F.2d 1071, 1077 (5th Cir. 1981).

73 Gomez v. Great Lakes Steel Div. Nat'l Steel, 803 F.2d 250, 256 (6th Cir. 1986) ("Absent constructive discharge Gomez had a duty to mitigate his damages by remaining on the job."); Leonard v. City of Frankfort Elec. & Water Plant Bd., 752 F.2d 189, 195 (6th Cir. 1985). Two Sixth Circuit cases, however, do not seem to embrace fully the constructive discharge approach and appear to be more sympathetic toward discrimination victims. These cases are: Shore v. Federal Express Corp., 777 F.2d 1155 (6th Cir. 1985); and Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984). Ironically, *Leonard* relies on *Rasimas* for support even though the two cases reach very different conclusions. *Leonard*, 752 F.2d at 195.

74 Satterwhite v. Smith, 744 F.2d 1380, 1381 (9th Cir. 1984); Heagney v. University of Wash., 642 F.2d 1157, 1166 (9th Cir. 1981), *overruled by* Antonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987), *aff'd*, 490 U.S. 642 (1989); *see also* Wagner v. Sanders Assocs., Inc., 638 F. Supp. 742 (C.D. Cal. 1986). At first glance, the decision in Thorne v. City of El Segundo, 802 F.2d 1131 (9th Cir. 1986), appears to reject the constructive discharge approach and use a mitigation analysis. However, the Ninth Circuit described the case as involving a refusal to hire. *Id.* at 1134. While one can quibble with this description, it means that the case does not clearly reject the constructive discharge approach. Moreover, *Thorne* suggests that constructive discharge principles should apply in promotion denial cases. *Id.* Several other Ninth Circuit decisions raise questions about the constructive discharge approach in varied circumstances. Richardson v. Restaurant Mkt. Assocs., Inc., 527 F. Supp. 690, 696-97 (N.D. Cal. 1981); Sangster v. United Air Lines, 438 F. Supp. 1221 (N.D. Cal. 1977), *aff'd*, 633 F.2d 864 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981).

75 Derr v. Gulf Oil Corp., 796 F.2d 340 (10th Cir. 1986); *see also* Lucy v. Manville Sales Corp., 680 F. Supp. 353 (D. Colo. 1987); *cf.* Whatley v. Skaggs Cos., 707 F.2d 1129, 1133 n.3 (10th Cir. 1983) (describing case as involving actual discharge and rehire followed by resignation; therefore, the constructive discharge principles that would apply to demotion cases were inapposite); Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975). The distinctions drawn by the court in *Whatley*, however, have been criticized as meaningless. *See, e.g.*, Davis v. Commonwealth Edison, Ch. No. 1984 CN 1997, ALS No. 2718, (Ill. Hum. Rts. Comm'n. Sept. 18, 1990) (interim recommended order and decision) ("Neither the *Whatley* court nor respondent has offered any authority in support of the purported distinction between demotion and discharge with rehire, however, nor does any logic appear to support such a distinction.").

76 Clark v. Marsh, 665 F.2d 1168, 1172-75 (D.C. Cir. 1981).

77 *See* DeAgazio, *supra* note 11, at 986-87 ("To be eligible for post-resignation relief [when the employee resigned in reaction to some other illegal conduct by the employer], however, the

Supreme Court also adopted this view, despite having voted against it only a year earlier.[78] Courts using the constructive discharge standard frequently adhere to *Bourque*'s public policy argument that employees should attack discrimination within their existing employment relationship.[79] The First Circuit has reasoned that allowing an employee who resigns to receive back pay would enable the employee to "set himself up as the judge of every grievance; and the [company or] public taxpayer would end up paying for periods of idleness while the grievance was being adjudicated."[80] Other courts have suggested that permitting an employee to resign and still get back pay would allow the employee to obtain a windfall by quitting.[81]

A minority of federal appellate courts are not committed to the constructive discharge approach.[82] The Fourth Circuit has relied mainly on

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plaintiff usually must prove constructive discharge."); *see also* Adler v. John Carroll Univ., 549 F. Supp. 652, 656 n.1 (N.D. Ohio 1982).

78 Marten Transp., Ltd. v. Department of Indus., Labor & Human Relations, 501 N.W.2d 391, 394 (Wis. 1993). *But see* Kelley Co. v. Marquardt, 493 N.W.2d 68 (Wis. 1992).

In *Kelley*, the Wisconsin Supreme Court analyzed a Wisconsin statute which guaranteed that an employee who took a leave of absence due to a medical or family emergency would receive equivalent employment upon returning. The court ruled that an employee who was illegally placed in an inferior position upon returning from leave was entitled to receive lost wages, even after resigning from the position. The court rejected a constructive discharge requirement and stated:

> Kelley Company also argues that it cannot be liable for reinstatement or back pay because Marquardt quit and was not constructively discharged. The FMLA does not state that a constructive discharge is a requirement for reinstatement or back pay. Kelley Company cites nothing from the legislative history indicating that a constructive discharge is a prerequisite to reinstatement or an award of back pay. We conclude that the only prerequisite to an order for reinstatement and back pay is that the employer violated the FMLA.

Id. at 78.

More recently, however, the Wisconsin Supreme Court in *Marten* adopted the constructive discharge requirement in an employment discrimination case where the employee quit rather than accept a discriminatory transfer. The court's main reason for adopting the requirement was the apparent prevalence of this rationale in the federal courts, as well as the public policy favoring the attack on discrimination from within existing employment relationships. *Marten*, 501 N.W.2d at 395-98. The court's decision was issued over a passionate dissent and reversed an eloquent appellate court ruling that rejected the constructive discharge standard.

79 In a pre-*Bourque* case involving a government employee who resigned after a demotion in violation of the First Amendment, the First Circuit stated that "the employee has no right simply to walk out; he must accept the orders of his superior, even if felt to be unjust, until relieved of them by judicial or administrative action." Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977). Both Derr v. Gulf Oil Corp., 796 F.2d 340, 343-44 (10th Cir. 1986), and Jurgens v. EEOC, 903 F.2d 386, 389-91 (5th Cir. 1990), for example, discuss *Bourque* at length.

80 *Alicea Rosado*, 562 F.2d at 119.

81 *Id.*; *see supra* note 16. In Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 66 (5th Cir. 1980), the Fifth Circuit stated that "[u]nequal pay is not a sufficient justification to relieve Ms. Bourque of her duty to mitigate damages by remaining on the job." *See also* Gomez v. Great Lakes Steel Div. Nat'l Steel, 803 F.2d 250, 256 (6th Cir. 1986); Clark v. Marsh, 665 F.2d 1168, 1173-74 (D.C. Cir. 1981); Pittman v. Hattiesburg Mun. Separate Sch. Dist., 644 F.2d 1071, 1077 (5th Cir. 1981).

82 Two employment discrimination treatises question the public policy rationale that lies behind *Bourque* without, however, offering any contrary case authority. *See, e.g.*, MICHAEL ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 136 (1994) (Teacher's Manual) (discussing Jurgens v. EEOC, 903 F.2d 386 (5th Cir. 1990)):

> In reaching this conclusion, the court gave great weight to encouraging employees to attack discrimination in the context of an existing employment relationship. What ultimate purpose is this policy intended to serve? Economic efficiency? Shouldn't the court be more concerned with allowing employees to avoid the effects of ongoing discrimination? . . . Even if Gordon was not constructively discharged, why didn't the court simply reduce his back pay award by the amount of earnings he voluntarily relinquished

mitigation of damage principles to determine whether back pay should be tolled after the discrimination victim resigns.[83] Moreover, the Second and Eighth Circuit have appeared on both sides of the issue. In *Carrero v. New York City Housing Authority*,[84] the Second Circuit relied on mitigation principles and held that an employee who took a voluntary leave of absence after being discriminatorily demoted was entitled to back pay. A year earlier, however, in a different case, the Second Circuit had accepted plaintiff's resignation date as the point at which the liability period ended.[85] Conversely, although recently following the constructive discharge approach,[86] the Eighth Circuit in *Di Salvo v. Chamber of Commerce* stated that the plaintiff's back pay should not be cut off as long as the resignation was part of a good faith effort to obtain a comparable job elsewhere and was based on "mitigative motives."[87] In applying mitigation principles, these courts assess the reasonableness of the employee's resignation given her circumstances.[88]

The strongest reasoning in favor of this minority approach is that it allows victims to escape discrimination without forfeiting substantial remedies. As poignantly noted by a Wisconsin appellate court, requiring a discrimination victim to stay put to mitigate damages was like requiring "victims of legal malpractice to continue being serviced by their negligent

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by retirement? Although other courts agree that the back pay period ends upon voluntary resignation, this approach arguably prevents a discriminatee from recovering some amounts he actually lost due to discrimination. Perhaps *Ford* requires this approach. However, 'requiring' an un- or underemployed person to accept an offer of employment may have more economic efficiency than 'requiring' an employee not to retire.

Id.; *see also* FRIEDMAN & STRICKLER, *supra* note 29, at 705 ("But does this rationale make sense where the victim of discrimination has no opportunity, within the employment relationship, to overcome discrimination? Is *any* interest served by making plaintiff stay on the job while she sues her employer?").

83 Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1114 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981); *cf.* Wells v. North Carolina Bd. of Alcoholic Control, 714 F.2d 340, 342 (4th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984).

84 890 F.2d 569, 580 (2d Cir. 1989).

85 Cowan v. Prudential Ins. Co. of Am., 852 F.2d 688, 690 (2d Cir. 1988).

86 Maney v. Brinkley Mun. Waterworks & Sewer Dep't, 802 F.2d 1073, 1075 (8th Cir. 1986); *see also* Parker v. Siemens-Allis, Inc., 601 F.Supp. 1377, 1389 (E.D. Ark. 1985).

87 Di Salvo v. Chamber of Commerce, 568 F.2d 593, 598 (8th Cir. 1978) (holding that employer's payment of unequal wages may make employer liable for back pay due to employee's resignation if plaintiff's resignation was based on mitigative motives). Several district courts agree. *See, e.g.*, Ezold v. Wolf, Block, Schorr & Solis-Cohen, 758 F. Supp. 303, 310 (E.D. Pa. 1991) (reasoning that restriction on postresignation relief "would discourage a plaintiff from mitigating damages by accepting a position at another employer where he or she would be permitted to advance without discrimination" (citing Harrison v. Dole, 643 F. Supp. 794 (D. D.C. 1986))), *rev'd on other grounds*, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88 (1993); Daines v. City of Mankato, 754 F. Supp. 681, 702 (D. Minn. 1990); Taylor v. Ford Motor Co., 392 F. Supp. 254, 255-56 (W.D. Mo. 1974) (holding that employee who was discriminatorily denied a promotion did not have to remain in assembly line job and that court could determine back pay entitlement using mitigation principles). The fact that the Eighth Circuit has decisions on both sides of this issue demonstrates the confusion that exists. *See also* cases cited *supra* note 74.

88 *See, e.g., Carrero*, 890 F.2d at 580; Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1114 (4th Cir. 1981), *cert. denied*, 464 U.S. 1044 (1984); *Di Salvo*, 568 F.2d at 598. What is surprising, however, is that these courts do not generally address or even acknowledge the federal appellate court decisions employing constructive discharge standards, and the courts employing constructive discharge standards do not usually address the possibility of using general mitigation standards.

lawyer in order to give the lawyer the chance to improve his or her skills."[89] Although the Wisconsin Supreme Court reversed the decision of the appellate court, one dissenting justice pursued this theme when he rhetorically asked, "Do victims of domestic assault have to stay in an abusive marriage in order to give the abusive spouse a chance to change his or her behavior or risk damages to which they may be entitled?"[90] The mitigation oriented courts have also reasoned that requiring discrimination victims to stay put, to remain eligible for back pay, forces them to turn down jobs elsewhere with substantial advancement opportunities.[91] In the words of the Second Circuit, such a requirement places the employee "in the same spot as the sailor caught between the devil and the deep."[92]

Other courts, including the Fourth Circuit, have used tort law principles to resolve the issue. They have generally refused to toll the discrimination victim's right to back pay after the victim resigns, reasoning that the employer's earlier illegal act proximately caused the employee's resignation.[93] Finally, some courts and scholars compromise by suggesting that constructive discharge standards should apply but that the standard for de-

89 Marten Transp., Ltd. v. Department of Indus., Labor, & Human Relations, 491 N.W.2d 96, 99 (Wis. Ct. App. 1992). The decision, however, has been reversed. 501 N.W.2d 391, 397 (Wis. 1993). For further discussion of this case, see *supra* note 78 and accompanying text.

90 *Marten Transp.*, 501 N.W.2d at 400 (Bablitch, J., dissenting).

91 *See Ezold*, 758 F. Supp. at 310 ("The elimination of the availability of relief past the date of a Title VII plaintiff's resignation . . . would discourage a plaintiff from mitigating damages by accepting a position at another employer where he or she would be permitted to advance without discrimination."), *rev'd on other grounds*, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88 (1993); *Harrison*, 643 F. Supp. at 796-97:

> Failure to grant Ms. Howard back pay for the period after she left MarAd conflicts with both parts of this duty—it neither compensates Ms. Howard for her injury, nor deters MarAd from its discrimination. Furthermore, it would discourage a claimant from mitigating damages by accepting a position at another agency. Terminating back pay relief upon resignation, for instance, would penalize Ms. Howard for moving to ACTION where she was allowed to advance without discrimination.

Id.

92 *Carrero*, 890 F.2d at 580. *Carrero* was unique in that the employee was placed on an unpaid leave of absence which she had to continue to remain eligible for a job with the Housing Authority that discriminated against her. One of the leave's conditions was that she could not obtain income elsewhere. She therefore could not look for paid employment without abandoning her chances at the Housing Authority. Thus, she was "caught" since she had no income source and yet could not work elsewhere.

93 Wells v. North Carolina Bd. of Alcoholic Control, 714 F.2d 340 (4th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984); Bertrand v. Orkin Exterminating Co., 454 F. Supp. 78 (N.D. Ill. 1978); *see also* Helbling v. Unclaimed Salvage & Freight Co., 489 F. Supp. 956, 963 (E.D. Pa. 1980) (holding that plaintiff is entitled to post-resignation backpay because she quit due to disagreements with the man hired for the position which she was discriminatorily denied). This decision is similar to Hairston v. McLean Trucking Co., 520 F.2d 226 (4th Cir. 1975), which involved a company that illegally segregated job classifications by race.

In *Hairston*, the company sought to remedy its conduct by offering transfers and promotions to the injured minority employees to predominantly white jobs. Because the employees would have to give up the seniority they had obtained in their earlier jobs, they therefore rejected the offers. The company then argued that these employees' back pay should be cut off. The Fourth Circuit, however, ruled for the employees and said that their back pay could be cut off only if their refusal of these offers was a "free and voluntary act," as opposed to an effort to avoid the company's discriminatory policy. *Id.* at 232. As one commentator summarizes the case, "The court reasoned that the employees were justifiably reluctant to expose themselves to further ill effects of a discriminatory employment policy." Laurie A. Lewis, Note, *Diluting Relief Under Title VII: Ford Motor Co. v. Equal Employment Opportunity Commission*, 32 CATH. U. L. REV. 665, 675 (1983).

termining what constitutes a constructive termination should be lessened, especially in promotion cases.[94] One court ruled, for example, that an employee was free to leave, after she was discriminatorily denied a promotion. She did not lose her back pay, since there was no hope that the employer would change its mind.[95]

The federal courts are not of one mind over whether discrimination victims who resign may continue to recover back pay. The federal appellate courts have generally adopted the constructive discharge approach, but a healthy minority of federal courts disagree. Failure to recognize these differing approaches obscures recognition of how the constructive discharge approach defeats Title VII's purposes.

IV. Problems with Extending Constructive Discharge Principles to Back Pay Determinations

Title VII's text is vague regarding many important issues.[96] Courts and scholars, however, have adopted several statutory construction techniques to determine the meaning of ambiguous statutes. These techniques shed light on whether Title VII supports extending constructive discharge principles to back pay determinations. They also make possible an in-depth analysis that is missing from most of the cases.[97] This detailed statutory analysis reveals the problems in using the constructive discharge approach as a means of fulfilling Title VII's remedial goals.

A. The Process-Oriented Approach to Statutory Interpretation

Courts that use a process-oriented method of statutory interpretation seek to determine the unitary purposes embodied in statutes. When a statute is subject to multiple interpretations in a particular case, the court

94 Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987), *rev'd on other grounds and remanded*, 490 U.S. 228 (1989); Ezold v. Wolf, Block, Schorr, & Solis-Cohen, 758 F. Supp. 303, 310 (E.D. Pa. 1990), *rev'd on other grounds*, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88 (1993); Nobler v. Beth Israel Medical Ctr., 715 F. Supp. 570, 572-74 (S.D.N.Y. 1989); DeAgazio, *supra* note 11. This line of decisions makes resignation easier for employees who are discriminated against in promotions than it is for employees who are demoted. This is odd because most courts have ruled that employees who lose jobs that they have held suffer more severe injuries than those who do not obtain jobs that they wanted. The employees who are demoted suffer a greater injury because they have an expectation interest in their job that can even border on a property right. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986). Thus, these courts may have it backwards. It should be easier for the demoted employee to resign and continue to recover back pay because the demoted employee has suffered a greater discriminatory injury. This is another example of how confused the courts and scholars are on these issues.

95 *Nobler*, 715 F. Supp. at 572-74. This is similar to the futility exception to exhaustion of remedies doctrines. *See* Scelsa v. City Univ. of N.Y., 806 F. Supp. 1126, 1139 (S.D.N.Y. 1992); Holt v. Continental Group, Inc., 631 F. Supp. 653, 659 (D. Conn.), *aff'd*, 788 F.2d 3 (2d Cir. 1985), *cert. denied*, 479 U.S. 839 (1986).

96 Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. Colo. L. Rev. 37, 58-59 (1991) (discussing ambiguities in Title VII's text and in other civil rights laws); Burt Neuborne, *Background Norms for Federal Statutory Interpretation*, 22 Conn. L. Rev. 721, 726 (1990) ("Title VII, as a political compromise in 1964, was consciously vague on many delicate issues.").

97 The Ninth Circuit in Satterwhite v. Smith, 744 F.2d 1380, 1381 n.1 (9th Cir. 1984), for instance, did not analyze the issue but simply followed another court.

selects the interpretation that best fulfills these purposes.[98] The U.S. Supreme Court used this process approach in *Ford Motor Co.*, analyzing the "transcendental" purposes embodied in Title VII's remedial provisions to resolve a mitigation issue.[99] This analysis is the key to determining whether the courts that use the constructive discharge approach are correct given that *Ford Motor Co.* is the Court's seminal decision on how to apply mitigation principles to employment discrimination back pay awards.

In *Ford Motor Co.*, the Court required two women, who had been discriminatorily denied jobs at Ford, to accept Ford's unconditional offers of reinstatement or their right to recover back pay would be tolled.[100] The Court acknowledged that the Ford offer did not provide the injured women with their lost seniority and their lost back pay.[101] The Court ruled, however, that the women were still free to seek those remedies in their pending case.[102] The Court added that the women would not have been required to accept a demotion.[103]

Justice O'Connor's opinion found Title VII to have twin aims.[104] "The 'primary objective' of Title VII," according to Justice O'Connor, "is to bring employment discrimination to an end,"[105] or to deter discrimination. When deterrence fails, "Title VII's secondary, fallback purpose is to compensate the victims for their injuries. To this end, § 706(g) aims " 'to make the victims of unlawful discrimination whole' " by restoring them, " 'so far as possible . . . to a position where they would have been were it not for the unlawful discrimination.' "[106] The key question is whether these purposes are well served by the constructive discharge rule.

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98 Professor Reynolds describes this approach:

> [T]he Hart and Sacks acolyte does not ask what the individual legislators "thought" or "intended" about the specific problem up for resolution. Rather, the acolyte asks what *good* did they seek to achieve (or what *evil* did they attempt to eliminate). The interpreter then construes the statutes to further that goal, at least if that can be done without doing violence to statutory language.

William L. Reynolds, *A Practical Guide to Statutory Interpretation Today*, 94 W. VA. L. REV. 927, 930 (1992). This approach has been severely criticized as involving a great amount of subjectivity. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 427-28 (1989) ("The characterization of legislative purpose is an act of creation rather than discovery. . . . Interpretation that brings the legislature into the present will . . . inevitably involve a large measure of discretion and a corresponding danger of judicial abuse."). The more popular approach is the textual analysis. Nonetheless, in Ford Motor Co. v. EEOC, 458 U.S. 219 (1982), the Court clearly used the process-oriented approach.

Courts use this methodology in addressing other Title VII issues as well. In Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992), *vacated and reh'g en banc granted*, 32 F.3d 1489 (11th Cir. 1994), the Eleventh Circuit rejected a draconian interpretation of the after-acquired evidence defense in employment discrimination cases because such a defense was inconsistent with Title VII's basic purposes.

99 *See* Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1374 (1990).

100 *Ford Motor Co.*, 458 U.S. at 241.

101 *Id.* at 222.

102 *Id.* at 227 n.9.

103 *Id.* at 231.

104 *Id.* at 230.

105 *Id.* at 228. She also noted that "[d]elays in litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them." *Id.*

106 *Id.* at 230 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (quoting 118 CONG. REC. 7168 (1972) (remarks of Sen. Williams))).

1. The Deterrence Purpose

Employers are less likely to discriminate when the aggregate cost of discriminating increases. High costs are therefore a powerful deterrent to discrimination. The constructive discharge rule, however, contravenes Title VII's deterrent purpose by cutting off the damages that discrimination victims who resign otherwise could continue recovering. The rule reduces the overall cost of discrimination for the employers and thus reduces Title VII's deterrent effect.

The constructive discharge rule also has a more subtle and insidious effect on how discriminatory employers treat particular injured employees who refuse to resign. It decreases employer incentives to rectify and to avoid discriminating because the employer knows that the employee may wear down and resign because of the continuing discrimination.[107] It may even lead employers to engage in *worse* discrimination against such employees in the hopes of obtaining their resignation and cutting off their right to recovery.[108] The employer then no longer needs to deal with a disgruntled employee who has sued the company. These kinds of employer actions would be the antithesis of Title VII's deterrent purposes, and yet they are facilitated by the constructive discharge rule.

One response is that employers do not have incentives to continue discriminating because their damages will increase as long as they discriminate. This argument has merit, however, only as to employers who do not expect their discrimination to result in a resignation. Under any other circumstances, employers can reasonably expect these increased short term damages will be outweighed by the long term savings brought about by both the employee's resignation and the resulting termination of the employee's right to recover long term damages.[109]

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107 As the district court in *Ezold* stated:

> Application of the constructive discharge rule here would give employers a free hand to engage in a careful campaign of subtle discrimination against an employee—such as inferior work assignments, etc.—which so long as it does not rise to the level of making working conditions intolerable, would not make the employer responsible for its unlawful actions past the date at which the victimized employee surrenders by resigning.
>
> . . . Title VII is no less empowered to eradicate those discriminatory acts which are subtly disguised and carefully implemented as it is with respect to those acts of blatant discrimination which make working conditions intolerable . . . .

Ezold v. Wolf, Block, Schorr & Solis-Cohen, 758 F. Supp. 303, 312 (E.D. Pa. 1991), *rev'd on other grounds*, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88 (1993); *see also* DeAgazio, *supra* note 11, at 997-98. Moreover, in Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992), *vacated and reh'g en banc granted*, 32 F.3d 1489 (11th Cir. 1994), the Eleventh Circuit refused to permit employers to use after-acquired evidence as a liability defense because such a rule "invites employers to establish ludicrously low thresholds for 'legitimate' termination" and thus permits employers to "sandbag" an employee. *Id.* at 1180.

108 *See supra* note 11. The district court in *Ezold* stated that "no matter how severe an employer's discrimination is . . . an employee would be forced to remain in the inferior employment position so long as the employer does not permit the working conditions of the inferior position to become intolerable." *Ezold*, 758 F. Supp. at 308. Although the *Ezold* case dealt with the denial of a promotion, the court said that its reasoning would also cover "the demoralizing stagnation of a discriminatory demotion, to the more subtle discrimination contained in subjection to different working conditions." *Id.* at 310.

109 It could be argued that the Civil Rights Act of 1991 takes care of this deterrence problem because it permits courts to award punitive damages against defendants in order to deter particularly egregious discrimination. *See* 42 U.S.C. § 1981a(b)(1) (Supp. V 1993). Thus, any employer

The rigid constructive discharge doctrine therefore permits employers to accomplish the effect of a discriminatory discharge without risking the same ongoing liability. The employer who illegally fires an employee continues paying damages until the employee can find substantially equivalent employment. Such severe long term penalties are a substantial deterrent to discrimination. In contrast, the company that succeeds in having an employee resign from a discriminatory demotion also ousts the employee, but only pays damages for a limited period.

Perhaps most perverse, the constructive discharge standard not only lessens the incentives of employers not to discriminate, it actually forces employees to experience more discrimination. By requiring discrimination victims to stay in their discriminatory placement to remain eligible for back pay,[110] this standard contravenes Title VII's purpose of deterring such injuries.[111] As a dissenting justice on the Wisconsin Supreme Court recently stated, "The constructive discharge doctrine ignores the reality of discrimination. Discrimination is a degrading, humiliating, debilitating experience for its victims. Requiring a victim to stay in that setting or lose what they are entitled to is . . . outrageous . . . ."[112] The justice compared the effect of the doctrine to requiring incest victims to stay with their parents so that the parents would get a second chance to get over their problems.[113]

2. The "Make Whole" Purpose

The Supreme Court in *Ford Motor Co.* stated that discrimination victims did not have to accept demotions to mitigate damages because those jobs do not make the employee whole.[114] Relying on *Ford Motor Co.*, the Second Circuit in *Carrero v. New York City Housing Authority*[115] ruled that an illegally demoted employee had no obligation to accept a demotion. The court held that the plaintiff "was not required to accept a demotion to mitigate damages and that the Heating Plant Technician position was a demotion" from her probationary Assistant Superintendent job.[116]

According to the constructive discharge rule, however, employees must accept inferior jobs with their current employer unless the job cir-

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who avoids paying the discrimination victim's back pay could still owe a large punitive judgment with a powerful deterrent effect. There are several problems with this argument.

First, the Act's punitive damage provisions contain a cap and thus courts may not be able to assess an amount sufficiently large to deter. *See id.* at § 1981a(b)(3)(A)-(D) (Supp. V 1993). Second, punitive damages were never intended to serve as a substitute for inadequate backpay remedies. Those remedies are supposed to make up for all of the back pay that was lost and thus have a specific deterrent effect in that area. Finally, interpreting the Civil Rights Act in a manner that leads to a reduction in a discrimination victim's right to relief would constitute Orwellian doublespeak given that statute's goal of providing more effective remedies. *See supra* note 25; *infra* note 134.

110 *See supra* notes 71-79 and accompanying text.

111 *See supra* note 105.

112 Marten Transp., Ltd. v. Department of Indus., Labor & Human Relations, 501 N.W.2d 391, 401 (Wis. 1993).

113 *Id.* at 400.

114 Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982).

115 890 F.2d 569, 580 (2d Cir. 1989).

116 *Id.*

cumstances are intolerable.[117] In *Jurgens v. EEOC*,[118] the Fifth Circuit declared that *Ford Motor Co.*'s statement that employees need not accept demotions refers to employees who are not with the company that discriminated against them. According to the Fifth Circuit, employees whose companies have demoted them must remain in the inferior position to mitigate damages.[119] This view receives some support from the facts in *Ford Motor Co.* since the plaintiffs in that case were not employed by Ford when they incurred the discrimination.

Jurgens' narrow reading, however, lacks support in the Court's language, as *Carrero* demonstrates,[120] and is inconsistent with the compensatory goal of Title VII. *Ford Motor Co.* broadly states that the duty to mitigate does not encompass demotions, and the opinion does not limit that statement solely to situations in which the position was at another company. More importantly, *Jurgens*' interpretation would not make discrimination victims whole. The rule penalizes victims of discrimination by forcing them to either stay and accept additional discrimination or resign and risk cutting off their right to back pay and reinstatement. Under *Jurgens*, employees who resign to escape continuing discrimination are left jobless and likely will not be able to recover full back pay, even though their joblessness is causally related to their employer's discriminatory action.[121] Such a result is antithetic to the "make whole" purpose of Title VII.[122]

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117 *See supra* notes 56-61.

118 903 F.2d 386, 389 n.4 (5th Cir. 1990).

119 *Id.* at 389.

120 *Carrero* expressly interprets the language in *Ford Motor Co.* to preclude a discrimination victim from having to remain in an inferior job with the discriminating employer. Carrero v. New York City Hous. Auth., 890 F.2d 569, 580-81 (2d Cir. 1989). It is noteworthy that the Fifth Circuit in *Jurgens* was uncomfortable with the constructive discharge test as it characterized that test as part of the employee's duty to mitigate. *Jurgens*, 903 F.2d at 389.

121 *See, e.g.*, Bertrand v. Orkin Exterminating Co., 454 F. Supp. 78, 84 (N.D. Ill. 1978) (holding that employee's resignation did not toll back pay where it was "proximately caused" by discriminatory demotion).

122 Professor Kotkin has pointed out that "the employee denied a promotion who files suit, but remains in her position, probably has jeopardized her advancement and lost opportunity far beyond that compensable by the pay differential between the two positions." Kotkin, *supra* note 99, at 1371. She added:

> Even without statutory modification, the Title VII remedial scheme could be applied more flexibly by the courts to permit compensation for economic harm that does not take the form of lost pay. Such relief could be viewed as equitable restitution for the loss of employment opportunity. It would be particularly appropriate in the following circumstances, assuming a finding of discrimination: the employee who is rejected for a position, but accepts another job with an equivalent salary and does not wish to return to the original position; the employee who is denied a promotion for which the pay differential is not great; the employee who is harassed but suffers no monetary consequences; and the employee who is terminated, shortly thereafter obtains comparable work, and does not wish reinstatement . . . . Finally, the terminated employee may be suffering or may suffer in the future economic consequences as a result of a job change stemming from a discharge.

Id. Professor Kotkin, however, wrote this article prior to passage of the Civil Rights Act of 1991.

3. A Process-Oriented Argument Favoring the Constructive Discharge View

The constructive discharge courts disagree with much of the above reasoning, proclaiming that Title VII seeks to promote, above all, the internal resolution of discrimination complaints. These courts are unquestionably correct in stating that the antidiscrimination statutes were designed to facilitate voluntary compliance. The EEOC administrative conciliation mechanism created by Title VII shows this,[123] and the Supreme Court has recognized this intent as well.

In *Ford Motor Co.*, Justice O'Connor stated that the preferred method of ending discrimination complaints and making deserving plaintiffs whole was through voluntary compliance and cooperation.[124] A recent Supreme Court decision required a plaintiff who signed an arbitration agreement to submit his employment discrimination claims for private arbitration, rather than go to court.[125] Moreover, *Ford Motor Co.* suggests that Title VII's "make whole" language need not be taken literally since the Court in that case actually ruled that the plaintiff's right to back pay could be cut off even though she had not been offered full relief (e.g., back pay and seniority).[126]

These constructive discharge courts misinterpret Title VII and *Ford Motor Co.*, however, by mistakenly elevating Title VII's procedural preferences over its fundamental substantive purposes of deterring discrimination and making discrimination victims whole.[127] Justice O'Connor's reference to the private resolution of disputes and lower court references to the EEOC conciliation mechanism show only that such methods of resolution are preferred when acceptable to all parties since they are cheaper and faster than going to court.[128] Nothing in these authorities suggests that private resolution of disputes is to be encouraged when it would pro-

123 *See* 42 U.S.C. § 2000e-5(b) (1988).

124 Ford Motor Co. v. EEOC, 458 U.S. 219, 228-30 (1982).

125 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). *But see* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (holding that a discrimination complaint that was connected to a collective bargaining agreement's arbitration clause did not have to be arbitrated because Title VII is not limited by the agreement's arbitration procedures).

126 *Ford Motor Co.*, 458 U.S. at 231-34.

127 Ezold v. Wolf, Block, Schorr & Solis-Cohen, 758 F. Supp. 303, 310 (E.D. Pa. 1991) ("The elimination of the availability of relief past the date of a Title VII plaintiff's resignation would conflict with the remedial duty specified above in that the plaintiff could neither be compensated for his or her injury, nor would a defendant be deterred from further discrimination."), *rev'd on other grounds*, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88 (1993); Harrison v. Dole, 643 F. Supp. 794, 796-97 (D.D.C. 1986) ("Failure to grant Ms. Howard back pay for the period after she left MarAd conflicts with both parts of this duty—it neither compensates Ms. Howard for her injury, nor deters MarAd from its discrimination."). The Supreme Court has reaffirmed these twin aims on numerous occasions in Title VII cases. *See, e.g.*, McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 884 (1995) ("Deterrence is one object of these statutes. Compensation . . . is another."). Others have confirmed the importance of not losing sight of Title VII's primary goals. *E.g.*, James G. Babb, Comment, *The Use of After-Acquired Evidence as a Defense in Title VII Employment Discrimination Cases*, 30 HOUS. L. REV. 1945, 1973-75 (1994).

128 Ford Motor Co. v. EEOC, 458 U.S. 219, 228-30 (1982) (stating that in a better world discrimination cases would proceed more quickly because of their importance).

mote discrimination and frustrate a plaintiff's desire to be made whole.[129] Indeed, after a certain time period, an employment discrimination plaintiff can automatically obtain a "right to sue" letter and bypass the administrative conciliation machinery of Title VII with a federal court lawsuit.[130] Moreover, Title VII, like most civil rights statutes, has no exhaustion of remedies requirement.[131]

This voluntary cooperation argument also mistakenly assumes that an employee and employer cannot privately resolve a discrimination complaint after the employee has left the position. The company still can make the employee an offer to settle, and the employee still can accept. The only difference is that the employee probably has more freedom to turn down the offer and continue negotiating since the discriminating employer is no longer the boss and therefore lacks the ability to pressure the employee at the workplace in a variety of subtle and not-so-subtle ways (e.g., changing workshifts, office locations, etc.). This increased freedom is consistent with Title VII which should not be interpreted to give a company that discriminates the power to restrict the victim's flexibility.[132]

The Civil Rights Act of 1991 also shows that a cooperative process should not take precedence over strong remedies. The Act seeks to provide more comprehensive remedies to employment discrimination victims.[133] It permits Title VII plaintiffs to seek punitive damages and compensatory damages, such as for emotional distress. As noted by the Third Circuit, a parsimonious interpretation of the Title VII remedies provisions is no longer justifiable in light of the Act.[134] The constructive discharge standard exemplifies such a narrow interpretation.

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129 *See* Sunstein, *supra* note 98, at 497-98 (arguing that in trying to prioritize and harmonize various statutory purposes, those purposes which "favor [the] broad interpretation of statutes protecting disadvantaged groups" should often be favored).

130 42 U.S.C. § 2000e-5(f)(1) (1988).

131 *Cf.* Patsy v. Board of Regents, 457 U.S. 496 (1982) (noting that the leading federal civil rights statute, 42 U.S.C. § 1983, has no requirement that non-judicial remedies be exhausted). Title VII requires the plaintiff to initiate an administrative action but does not require the plaintiff to wait until the final completion of all stages of that action. *See supra* note 26.

132 Requiring the victim to remain with the discriminating employer for internal resolution restricts the victim's flexibility. Specifically, it becomes financially difficult for the victim to accept jobs at other companies because acceptance means abandoning the discriminating employer and losing the right to back pay. *See, e.g.*, Harrison v. Dole, 643 F. Supp. 794, 796-97 (D.D.C. 1986):

> Failure to grant Ms. Howard back pay for the period after she left MarAd . . . would discourage a claimant from mitigating damages by accepting a position at another agency. Terminating back pay relief upon resignation, for instance, would penalize Ms. Howard for moving to ACTION where she was allowed to advance without discrimination.

Id. See supra notes 91-92; *see also supra* note 82 (quoting employment treatises critiquing this rule).

133 *See, e.g.*, Jody R. King, Comment, *A Case Frozen in Time: Does Title VII's 1991 Amendment Strip* United States v. Burke *of Its Precedential Value?*, 28 NEW ENG. L. REV. 109, 124 (1993); Michael A. Zubrensky, Note, *Despite the Smoke, There is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 STAN. L. REV. 959, 983 (1994).

134 Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1235 n.23 (3d Cir. 1994), *vacated on other grounds and remanded*, 115 S. Ct. 1397 (1995); *see also* DeAgazio, *supra* note 11, at 991 n.66:

> It is unclear what effect the Civil Rights Act of 1991 will have on the constructive discharge rule's prohibition of postresignation relief. The 1991 Act permits Title VII plaintiffs to sue for compensatory and punitive damages in disparate treatment cases . . . in addition to those remedies already available . . . . However, it does seem logical to infer

B. The Canons of Statutory Construction

The canons of statutory construction are rules that courts use to interpret ambiguous statutes.[135] A common example is the rule that courts should construe statutes to avoid constitutional problems.[136] Karl Llewellyn almost singlehandedly destroyed the canons by showing that in any situation, courts could determine the result arbitrarily by choosing between two equally applicable yet conflicting canons.[137] Despite his critique, courts have continued to use the canons, and an increasing number of scholars are finding the canons to be instructive.[138] Two canons are relevant here.

First, many courts have said that statutes are to be liberally construed if remedial in nature.[139] This liberal construction ensures that remedial statutes are effective.[140] This approach clearly seems warranted with respect to Title VII. Not only is the statute remedial in nature, section 309 of the Civil Rights Act of 1991 expressly specifies that Title VII should be liberally construed.[141] The constructive discharge rule, however, is contrary to this stat-

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that, where the plaintiff has been constructively discharged, any damage award will be more than would be the case where the plaintiff was not constructively discharged. Therefore, constructive discharge will likely remain a hotly disputed issue in employment discrimination litigation.

Id.; Mark S. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Woman Partners*, 46 HASTINGS L.J. 17, 39-40 n.87 (1994); *supra* note 25 (quoting *Mardell*, 31 F.3d at 1235 n.23); *infra* notes 157-61 & accompanying text.

135 BLACK'S LAW DICTIONARY 207 (6th ed. 1990) defines the canons as, "[T]he system of fundamental rules and maxims which are recognized as governing the construction or interpretation of written instruments." They have a long historical pedigree. *See, e.g.*, S. S. PELOUBET, A COLLECTION OF LEGAL MAXIMS IN LAW AND EQUITY (Fred B. Rothman & Co. 1985) (1884); HERBERT BROOM, BROOM'S LEGAL MAXIMS (7th ed. 1874).

136 SUNSTEIN, *supra* note 1, at 147-50.

137 Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950). For example, Llewellyn said that for the maxim that courts should adhere to the plain meaning of the text, there is a countermaxim that courts should vindicate the spirit of the law. *Id.* at 401. A more recent critique can be found in Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805-17 (1983).

138 SUNSTEIN, *supra* note 1, at 149. According to Professor Sunstein:

> [T]he canons of construction continue to be a prominent feature in the federal and state courts. The use of guides to interpretation—in the form of principles requiring a clear statement from Congress to reach certain results and background understandings—can be found in every area of modern law. And there is no sign that canons are decreasing in importance.

Id. For a case that shows the process-purposive school of legislative interpretation, see Rowland v. California Men's Colony, 113 S. Ct. 716, 726 n.12 (1993). A good "plain meaning" case is Friedrich v. City of Chicago, 888 F.2d 511, 514 (7th Cir. 1989), *vacated and remanded*, 499 U.S. 933 (1991). A case that uses legislative intent is Train v. Colorado Pub. Interest Group, 426 U.S. 1 (1976). A case that appears to use an approach similar to the new canons is Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (presumption favoring state sovereignty is crucial to holding).

139 Llewellyn, *supra* note 137, at 401-06.

140 *See supra* note 122 (discussing Professor Kotkin's article and the fact that the antidiscrimination statutes have not fully compensated discrimination victims for their injuries). This interpretation is also consistent with the canon, "Where the law gives a right, it gives a remedy to recover." EDWARD J. BANDER, DICTIONARY OF SELECTED LEGAL TERMS AND MAXIMS 123 (2d ed. 1979).

141 Section 309 has two other relevant provisions. First, it states that where the Civil Rights Act can be given alternative interpretations, courts should use the one which most effectively advances Congress' underlying purposes. Second, it states that the Act's amendments to Title VII and to other civil rights statutes should not be interpreted to mean that Congress approves of all

utory canon because the rule makes Title VII's remedial provisions less effective.[142]

A second canon counsels that courts should restrictively interpret statutes in derogation of the common law.[143] This canon appears on the surface to favor the restrictive constructive discharge approach because Title VII can be viewed as in derogation of the common law. The Supreme Court, however, has taken a different view of the mitigation language. According to *Ford Motor Co.*, Title VII's mitigation principles are derived from the common law.[144] By definition, therefore, these principles need not be restrictively interpreted.

C. The Legislative Intent Approach

To determine a statute's meaning, courts and scholars often rely on "legislative history," including congressional floor debates, committee reports, conference reports, and other materials.[145] Justice Scalia, among others, has argued that such materials are unreliable, however, because they are generated by powerful special interest groups and because courts often rely on stray remarks in the legislative record to bolster whatever result they want.[146] Nonetheless, many courts rely on these materials to decide what statutes mean.[147] Applied to Title VII, the legislative intent approach draws into question the validity of the constructive discharge test.

Nothing in the legislative history of the Civil Rights Act of 1964, nor its 1972 and 1991 amendments, explains precisely when an illegally demoted employee's right to back pay terminates.[148] However, Title VII's requirement that discrimination victims act with "reasonable diligence" to obtain

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federal court decisions regarding issues that were not the subject of an amendment. Thus, constructive discharge proponents cannot argue that Congress' failure to nullify that approach to remedies means that Congress has accepted the approach. *See* Civil Rights Act of 1975, Pub. L. No. 102-66, 105 Stat. 1071, 1093-94 (codified as amended at 2 U.S.C. § 1209 (Supp. IV 1991)). *But see* Ankenbrandt v. Richards, 504 U.S. 689 (1992) (holding that Congress intended for federal court jurisdiction not to cover domestic relations matters because Congress revised federal judicial statute and did not repudiate earlier decisions finding a domestic relations jurisdictional exception).

142 This view is also consistent with the canon which specifies that ambiguous statutes should be interpreted in light of the spirit behind the statute and by the use of equitable principles. BANDER, *supra* note 140, at 118. A rigid interpretation would not follow this rule.

143 BANDER, *supra* note 140, at 134 ("Things which are derogate from the common law are to be strictly interpreted."); SUNSTEIN, *supra* note 1, at 5-6; Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438 (1950).

144 The Court referred to mitigation doctrine as having an "ancient" heritage. Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982).

145 *E.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989); *see also* Greenberger, *supra* note 96, at 67-68 (discussing the value of good legislative history materials in construing statutes).

146 Reynolds, *supra* note 98, at 940; Greenberger, *supra* note 96, at 66-67.

147 *See, e.g.*, UAW v. Johnson Controls, Inc., 499 U.S. 187, 205 (1991) ("The legislative history confirms what the language of the [Pregnancy Discrimination Act] compels. Both the House and Senate Reports accompanying the legislation indicate that this statutory standard was chosen to protect female workers from being treated differently from other employees simply because of their capacity to bear children.").

148 Given this omission, the rest of this section looks at the legislative history of the mitigation provisions of Title VII. This analysis does not beg the question because courts that have adopted the constructive discharge approach acknowledge that it is simply an interpretation of the mitigation duties which Title VII places on discrimination victims. *See, e.g.*, Jurgens v. EEOC, 903 F.2d 386, 389 (5th Cir. 1990).

interim earnings appears to be based on cases brought under the National Labor Relations Act, which in turn drew on common-law mitigation of damages principles.[149]

One of the most important NLRA cases, which applied mitigation of damage principles to illegal employment discharges, was the Supreme Court's decision in *Phelps Dodge Corp. v. NLRB.*[150] In *Phelps*, the Court ruled that an employee who had been discriminatorily discharged for being a union member should only lose his right to back pay if the employer demonstrates that the employee had engaged in "a *clearly* unjustifiable refusal to take desirable new employment."[151] *Phelps'* lenient view of when back pay is available should apply to Title VII because *Ford Motor Co.* suggests that *Phelps* is one source of Title VII's duty to mitigate.[152]

The common-law mitigation principles upon which the NLRA drew clarify the employee's duty. The seminal treatise on remedies under the common law is by Professor Dan Dobbs.[153] He writes that the defendant must show both that the plaintiff did not make reasonable efforts at minimizing damages and that if plaintiff had made such efforts, the plaintiff would have succeeded at reducing the damages.[154] As to what constitutes reasonable efforts, Professor Dobbs explains:

> The plaintiff is not required to accept great risks, undertake heroic measures, or accept great personal sacrifice to minimize damages for the benefit of the defendant. . . . [S]imilarly . . . if the plaintiff is wrongly discharged from employment, . . . she is not required to accept substan-

149 Scholars believe that Title VII's remedial provisions were based to some extent on the National Labor Relation Act. Kotkin, *supra* note 99, at 1315-27. The Supreme Court has been more definite, stating that Title VII's "backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act." Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 n.11 (1975). *Albemarle* cites to relevant portions of Title VII's legislative history. Id. The Court in Ford Motor Company v. EEOC, 458 U.S. 219, 231-33 nn.15-19, 21-22 (1982), also cited to numerous NLRA cases in explaining Title VII's mitigation of damages provision.

However, *Ford Motor Co.* suggests that the original source of Title VII's "reasonable diligence" language is common law principles of mitigation. *Id.* at 231 n.15 (citing C. McCormick, Law of Damages 127-58 (1935) (describing general mitigation rule)). The Court also stated, "This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment." *Id.* at 231. Professor Sunstein concluded that Title VII's mitigation language is based above all on common law principles. Sunstein, *supra* note 1, at 208-09.

150 313 U.S. 177, 198 (1941). As discussed earlier, much of Title VII's remedial provisions were drawn from the NLRA, 110 Cong. Rec. 3044 (1964). Professor Kotkin has written that Title VII was designed to be more favorable to plaintiffs than the NLRA as Title VII was supposed to eliminate discrimination whereas the NLRA was supposed to reconcile the competing interests of unions and management. Kotkin, *supra* note 99, at 1317-18. As numerous scholars have also pointed out, however, Title VII's mitigation obligations still leave many employment discrimination victims without full compensation. *E.g., id.*; Sunstein, *supra* note 1, at 201-07.

151 *Phelps*, 313 U.S. at 199-200 (emphasis added).

152 *Ford Motor Co.*, 458 U.S. at 231 n.15. Many NLRB cases other than those listed in footnotes 15-19 and 21-22 of *Ford Motor Co.* use mitigation principles. *See, e.g.*, W.C. Nabors v. NLRB, 323 F.2d 686, 690-91 (5th Cir. 1963), *cert. denied*, 376 U.S. 911 (1964); NLRB v. Armstrong Tire & Rubber Co., 263 F.2d 680, 683 (5th Cir. 1959).

153 Dan B. Dobbs, Law of Remedies (2d ed. 1993).

154 *Id.* at 382. He elaborates by stating, "What is important is whether the plaintiff did earn money or could reasonably have done so. If he didn't and couldn't then the fact that he spent the dreary days of unemployment watching soap operas does not really seem relevant at all." *Id.* at 222 n.100. The federal courts have adopted this standard in many employment discrimination cases. *See supra* notes 42-43 and accompanying text.

> tially different employment, or a much lower salary, or a humiliating or demeaning position.[155]

Thus, the legislative foundations of Title VII's reasonable diligence requirement (the NLRA and common-law mitigation principles) support giving the requirement a flexible interpretation.[156]

The legislative history of the Civil Rights Act of 1991 buttresses this conclusion. The House Judiciary Committee Report on the Act shows that the Act was written to "strengthen civil rights laws that ban discrimination in employment."[157] It was crafted to overturn a series of 1990 U.S. Supreme Court decisions that "cut back dramatically on the scope and effectiveness of civil rights protections . . . . and *to strengthen existing remedies*, to provide more effective deterrence and ensure compensation."[158]

Title VII's legislative history shows that it was also designed to encourage the private resolution of discrimination complaints or settlement at the administrative stage.[159] Moreover, one provision of the Civil Rights Act of 1991 was aimed at ensuring the finality of discrimination consent decree settlements by prohibiting certain members of racial groups who might be burdened by their provisions from challenging them.[160] Yet, this congressional endorsement of settlement finality cannot reasonably be interpreted as showing that Congress wanted unwilling plaintiffs to resolve problems internally rather than seek a trial. Such a result would defeat the

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155 DOBBS, *supra* note 153, at 382.

156 State employment contract cases contemporaneous with Title VII's consideration and passage also support this flexible conception of common law mitigation of damage principles. *See, e.g.*, Schiller v. Keuffel & Esser Co., 124 N.W.2d 646, 650 (Wis. 1963); Asbell Bros., Inc. v. Nash-Davis Mach. Co., 382 P.2d 57, 59 (Wyo. 1963). The Supreme Court has used contemporaneous understandings of statutory terms to determine the meaning of those terms on several occasions. *See, e.g.*, Saint Francis College v. Al-Khazraji, 481 U.S. 604, 609, 613 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987). Many mitigation cases in the early 1950s and 1960s are cited in 15 AM. JUR., *Damages* § 28, at 424 (1938).

157 H.R. REP. NO. 102-40(I), 102d Cong., 1st Sess. 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 549.

158 *Id.* at 556 (emphasis added). The cases that hurt civil rights plaintiffs included: Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989) (limiting attorney fee awards to civil rights plaintiffs); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (prohibiting the use of 42 U.S.C. § 1981 to challenge discriminatory discharges or racial harassment); Lorance v. AT&T Technologies, 490 U.S. 900 (1989) (stringently interpreting Title VII statute of limitations, making it impossible to attack most seniority systems as discriminatory); Martin v. Wilks, 490 U.S. 755 (1989) (ruling that reverse discrimination suits could be brought challenging consent decrees despite the doctrine ordinarily precluding collateral attacks); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (effectively shifting the burden of proof to plaintiffs in disparate impact employment discrimination cases).

159 A Senate Judiciary Committee Report on a precursor to Title VII states that "the measure speaks on the problem solving level with primary reliance placed on voluntary and local solutions. Only when these efforts break down would the residual right of enforcement come into play." S. REP. NO. 872, 88th Cong., 2d Sess. 2 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2356. *See also* H. R. REP. NO. 914, 88th Cong., 1st Sess. 18 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2393. This House Report section was cited by the U.S. Supreme Court in United Steelworkers v. Weber, 443 U.S. 193, 203-04 (1979). Many other sources of authority exist on this point as well. *See, e.g.*, 110 CONG. REC. 15,893 (1964) (statement of Rep. MacGregor on Civil Rights Act of 1964) ("When we drafted this bill we excluded these issues largely because problems raised by these controversial questions are more properly handled at a government level closer to the American people and *by communities and individuals themselves.*"), *quoted in* Local Number 93 v. City of Cleveland, 478 U.S. 501, 520 (1986) (emphasis added).

160 42 U.S.C. § 2000e-2(n)(1) (Supp. V 1993). Congress overturned the Supreme Court's decision in Martin v. Wilks, 490 U.S. 755 (1989). *See supra* note 158.

twin substantive aims of Title VII, which are reflected in the 1991 Act's legislative history—stopping discrimination and making victims whole.[161]

D. The Textualist Approach

Textualists argue that the only legitimate method available to courts for deciding what a statute means is to look at the statute's text.[162] Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit and Professor Frederick Schauer are leading proponents of this methodology.[163] While there are many vociferous critics,[164] the U.S. Supreme Court has said on several recent occasions that the plain meaning of the text is controlling, absent a clear legislative intent to the contrary.[165]

Although Title VII's text does not address the precise issue addressed in this Article, it also does not support a restrictive view of remedies.[166] Section 706(g)(1) of Title VII states 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."[167] This language imposes a duty on the employee only to act reasonably and provides that a failure to do so will reduce the employee's award. It does not state that the employee must remain with the discriminatory company to recover back pay.[168]

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161 H.R. REP. No. 102-40(I), 102d Cong., 1st Sess. 14 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 552. *See supra* note 109.

162 Sunstein, *supra* note 98, at 415-16.

163 Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988); Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231. Relevant to the title of this Article, Professor Schauer comments that "[t]he Justices have not been reading their Derrida." *Id.*

164 SUNSTEIN, *supra* note 1, at 113-23; Greenberger, *supra* note 96, at 57; Reynolds, *supra* note 98, at 935. One of the most common observations about textualism is that it fulfills a particular vision of the separation of powers in which courts are clearly subordinate to legislatures because courts using such an approach will not extend "a statute beyond its uncontroversial meaning unless Congress has made that determination in the statute." Greenberger, *supra* note 96, at 60. *See also* SUNSTEIN, *supra* note 1, at 122 ("Although textualism properly draws on the democratic primacy of the legislature, in some cases legislative instructions, taken in context, are unclear and the claim of command is a myth.").

165 Freytag v. Commissioner, 501 U.S. 868, 869 (1991); Kaiser Alum. & Chem. Corp. v. Bonjorno, 494 U.S. 827, 838 (1990). Several Justices have suggested that textualism must be the primary methodology used in construing statutes. Greenberger, *supra* note 96, at 55. *But see* Train v. Colorado Pub. Interest Research Group, 426 U.S. 1, 9-10 (1976) (stating that no matter how clear the statute's language, aids to construction may be used).

166 Several scholars have acknowledged that Title VII's broad prohibitions are subject to numerous interpretations and require courts to fill in the textual gaps by using background norms. SUNSTEIN, *supra* note 1, at 118; Neuborne, *supra* note 96, at 726.

167 42 U.S.C. § 2000e-5(g)(1) (1988) (emphasis added).

168 The Supreme Court of Wisconsin rejected the constructive discharge standard by using this kind of textual analysis in a case involving Wisconsin's Family Leave Act. The issue was whether a plaintiff's right to back pay should be cut off after she resigned due to having been illegally given an inferior job after returning from leave. The court said that the back pay continued running and pointed out that: "The FMLA *does not state* that a constructive discharge is a requirement for reinstatement or back pay. Kelley Company cites nothing from the legislative history indicating that a constructive discharge is a prerequisite to reinstatement or an award of back pay." Kelley Co. v. Marquardt, 493 N.W.2d 68, 78 (Wis. 1992) (emphasis added). This reasoning applies also to Title VII.

E. The Public Values Methodology

Professors William Eskridge and Cass Sunstein, as well as other scholars, have proposed that courts interpret statutes by using substantive background norms, referred to as the new maxims or new canons.[169] These scholars reason that virtually all current statutory interpretation turns on subjective judicial preferences. Thus, they have proposed that judges acknowledge this subjectivity and agree to employ certain generally accepted rules designed to remedy the flaws in our regulatory state. The norms that they promulgate derive from several sources, including "the constitutional structure and . . . the fabric of modern public law; [the need to] improve rather than impair the operation of government institutions; and [the need to employ a] conception of politics that is likely, if adopted, to combat pathologies in regulatory practice."[170] Among the norms recognized by the public values methodology, two are relevant to the issue of Title VII remedies.[171]

Professors Eskridge and Sunstein agree that "courts should *generously* construe statutes designed to protect traditionally disadvantaged groups."[172] Such groups encompass those protected by Title VII. Nonetheless, public values methodology also recognizes the "competing principle of employer autonomy." As Professor Sunstein argues, however, the courts should treat this employer norm as subservient to the goal of protecting disadvantaged groups.[173] The norm regarding minorities is more important because it fills a large hole in our regulatory coverage. Under this reasoning, courts should reject the constructive discharge approach because that approach mistakenly favors discriminatory employers over discrimination victims.

V. Using Mitigation Standards to Determine When Back Pay of Discrimination Victims Should Be Cut Off

Most federal courts that have rejected the constructive discharge approach use a mitigation test that looks at the "reasonableness" of the employee's resignation decision. Although this standard appears vague, courts focus on two factors in these mitigation cases: whether the plaintiff was still experiencing the substantial effects of discrimination at the time she resigned and whether she resigned to search diligently for another job. This section proposes that courts decide whether a discrimination victim's resignation tolls her back pay by balancing these two factors. The worse the discrimination *or* the greater the mitigative effort, the more freedom the plaintiff should have to resign. This balancing test properly accommo-

169 Professor Reynolds describes these scholars as the "new maximists." Reynolds, *supra* note 98, at 937; *see* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007 (1989); Sunstein, *supra* note 98, at 405.

170 Sunstein, *supra* note 1, at 147.

171 *Id.* at 162.

172 *Id.* at 170-71, 179 (emphasis added); *see also* Eskridge, *supra* note 169, at 1032 (advocating as a third special rule of statutory interpretation the protection of "Carolene Groups").

173 Sunstein, *supra* note 1, at 183.

dates the discrimination victim's right to escape discrimination and the employer's right to be protected from employees seeking a windfall.

A. The Two Main Factors

Although courts that follow the mitigation approach use many factors to determine whether a plaintiff's resignation was reasonable,[174] the two central factors are the continuing impact of the discrimination by the employer, and the mitigative effort made by the employee. Several cases emphasize the continuing effects of discrimination. In *Wells v. North Carolina Board of Alcoholic Control*,[175] for instance, the plaintiff had been discriminatorily denied a promotion to a sales clerk position and had remained a stock clerk. The plaintiff had then resigned because the stock clerk position involved lifting which resulted in back problems. The Fourth Circuit granted an award of back pay accruing from the date of his resignation and reasoned that, "had he not been wrongfully denied that promotion to relatively light work, it may reasonably be inferred that he would not have suffered an injury to his back or that any back problem would have been less severe."[176]

In *Bertrand v. Orkin Exterminating Co.*,[177] the Northern District of Illinois permitted an age discrimination victim to continue receiving back pay after resigning because his resignation had been proximately caused by his discriminatory demotion from Branch Manager to the position of salesman. The court reasoned that the plaintiff's resignation was not "an unreasonable failure to mitigate his damages"[178] since he was not obliged to remain in the illegal placement.[179]

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174 These factors include: (1) the amount of discrimination that plaintiff was experiencing; (2) the causal nexus between plaintiff's resignation and the discrimination plaintiff experienced; (3) whether plaintiff's resignation was motivated by a good faith desire to more fully search for employment equivalent to what plaintiff would have had absent discrimination; (4) whether the plaintiff actively searched for comparable employment after resigning; (5) whether the plaintiff found such employment; (6) whether the plaintiff could have reasonably expected to have seen the employer correct its discrimination by remaining; and (7) ensuring that incentives for discrimination victims to leave and seek promising new jobs are not defeated.

175 714 F.2d 340 (4th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984).

176 The court elaborated:

> We think the back pay award was proper whether or not Wells was constructively discharged. It is now undisputed that the defendant wrongfully refused to promote Wells in August, 1974 to a position of Sales Clerk. . . . There was testimony indicating that the back injury was a result of strain from lifting . . . . Wells reasonably ended his employment for reasons beyond his control, reasons which were causally linked to the defendant's wrongful denial of a promotion.

Id. at 342.

177 454 F. Supp. 78, 81 (N.D. Ill. 1978).

178 *Id.*

179 The court also stated:

> In this case, however, it was not necessary to show that defendant had constructively discharged plaintiff from his position as a salesman in order to establish liability under the ADEA, because defendant had concededly removed plaintiff from his job as Branch Manager. This removal would in itself establish a violation of the ADEA, if, as the jury found, it were motivated by age, and would leave only the proper measure of damages.

Id. at 81.

In *Nobler v. Beth Israel Medical Center*,[180] the Southern District of New York granted an award of back pay to an employee who had resigned after his employer discriminatorily denied him a promotion to the position of radiation therapy director. The court found that the position was unique and that the plaintiff would have suffered permanent discrimination if he had remained at the medical center.[181] This showed that "the harm to Nobler was irremediable."[182]

Other courts have looked mainly at the plaintiff's job search efforts in assessing reasonableness rather than at the continuing effects of the discrimination. In *Spagnuolo v. Whirlpool Corp.*, the Fourth Circuit stated that the plaintiff's back pay should not be tolled because "consistent with his obligation to mitigate damages, plaintiff sought and obtained a better paying job."[183] The Eighth Circuit in *Di Salvo v. Chamber of Commerce* ruled that plaintiff's resignation was part of a reasonable and good faith effort to achieve a comparable position and therefore was "based on mitigative motives."[184] The Ninth Circuit in *Thorne v. City of El Segundo* stated that the "plaintiff had mitigated her damages by actively seeking employment following her resignation from the job with the discriminatory employer."[185] In addition, the U.S. District Court for the District of Columbia refused to cut off a plaintiff's back pay, after she quit as a result of discrimination, because of her subsequent success in obtaining equivalent employment and advancements.[186]

As these cases demonstrate, courts following the mitigation position generally have emphasized either the degree of ongoing discrimination that the plaintiff experienced, or the diligence of plaintiff's job search effort in determining whether the plaintiff's actions were reasonable. Identi-

180 715 F. Supp. 570 (S.D.N.Y. 1989).

181 *Id.* at 572.

182 *Id.* In Ezold v. Wolf, Block, Schorr & Solis-Cohen, 758 F. Supp. 303 (E.D. Pa. 1991), *rev'd on other grounds*, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88 (1993), the U.S. District Court for the Eastern District of Pennsylvania examined whether a female law firm associate, who was discriminatorily denied a partnership, was entitled to back pay after resigning. The court described the issue as whether the plaintiff's "decision to resign was reasonable under the circumstances for purposes of determining the appropriate Title VII relief for the period after her resignation." *Id.* at 312. The court found the plaintiff's resignation to be reasonable, and refused to cut off her back pay, by ruling "that her career at the Firm would be limited to a much greater extent than she could reasonably accept." *Id.* The irremediable nature of the discriminatory injury meant that the plaintiff was free to resign and still get back pay. *Id.* at 311-12. The Third Circuit later reversed the district court's ruling that the firm discriminated against the plaintiff when it rejected her for partnership. Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 538 (3d Cir. 1992). This decision, however, did not question the lower court's reasoning on the back pay termination issue. *See also* Thorne v. City of El Segundo, 802 F.2d 1131, 1134 (9th Cir. 1986).

183 641 F.2d 1109, 1114 (4th Cir. 1981), *cert. denied*, 464 U.S. 1044 (1984).

184 568 F.2d 593, 598 (8th Cir. 1978). *See also* Daines v. City of Mankato, 754 F. Supp. 681, 702 (D. Minn. 1990) (quoting Di Salvo v. Chamber of Commerce, 568 F.2d 593, 598 (8th Cir. 1978)).

185 Thorne v. City of El Segundo, 802 F.2d 1131, 1135 (9th Cir. 1986). *Thorne* is technically a refusal to hire case and its mitigation rationale derives from that factual context. Although its factual context may limit its relevance, its resemblance to a promotion denial case makes it relevant, as does its discussion of plaintiff's "resignation." *Thorne*, however, does suggest that constructive discharge principles should apply in many situations where the employee who was denied a promotion might still succeed at being able to advance at a later time. *Id.* at 1134-35.

186 Harrison v. Dole, 643 F. Supp. 794 (D.D.C. 1986).

fying these factors, however, is only the first step in the analysis. The next, and more difficult, question is how courts should balance these factors.

B. Background on Balancing Tests

Judges use balancing tests to resolve conflicting interests.[187] Courts may weigh one interest against another or strike a balance between several interests.[188] Courts can engage in ad hoc balancing or definitional balancing.[189] Ad hoc balancing means that a court must balance certain factors anew each time an issue comes up. Definitional balancing means that courts have agreed to a test that can be applied in virtually all cases, but the test is the result of a determination as to how competing interests should be balanced.[190] Courts frequently use balancing tests in employment discrimination cases and in determining mitigation issues.

In the employment discrimination context, courts frequently weigh the interests of the employer against those of the employee. Last term, for example, the U.S. Supreme Court in *McKennon v. Nashville Banner Publishing Co.*[191] reversed a Sixth Circuit decision that had allowed an employer to use after-acquired evidence of an employee's misconduct as a defense to liability for an otherwise discriminatory discharge. The Court stated, however, that such after-acquired evidence was not irrelevant since it could justify limiting or cutting off a plaintiff's right to recover damages past the date that the evidence was discovered. The Court said that its ruling was based on the need to "recognize the *duality* between the legitimate interests of the employer and the important claims of the employee."[192] One com-

187 In Hickman v. Taylor, 329 U.S. 495 (1947), the Supreme Court addressed whether an attorney work product immunity from discovery exists. The Court acknowledged that parties seeking discovery have an interest in "reasonable and necessary inquiries" while also confirming that attorneys have an interest in precluding "unwarranted excursions into the privacy of a man's work." *Id.* at 497. The Court then stated, "Properly to *balance* these competing interests is a delicate and difficult task." *Id.* (emphasis added).

188 T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 946 (1987).

189 *Id.* at 948.

190 *Id.*

191 115 S. Ct. 879 (1995), *rev'g* 9 F.3d 539 (6th Cir. 1993). The Sixth Circuit ruled that the defendant's discrimination was excused by plaintiff's illegal conduct in copying confidential employer documents before she was fired. The Supreme Court rejected that approach and instead adopted a more pro-employee approach, as the text states. The Seventh Circuit had occupied the middle ground, stating that after-acquired evidence should terminate a plaintiff's right to back pay as of the date that the evidence is discovered. Smith v. General Scanning Inc., 876 F.2d 1315, 1319 n.2 (7th Cir. 1989). The Eleventh Circuit, in contrast, had ruled that after-acquired evidence could be used only to limit the damages that an employer owes in limited circumstances. Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992). Moreover, in *Wallace*, the Eleventh Circuit said that the employer must show that it would have discovered the evidence even if it had not fired the plaintiff. *Id.* at 1182. The Eleventh Circuit's reasoning parallels the reasoning behind this Article and has distinct similarities to the approach taken by the Court in *McKennon*. The Eleventh Circuit stressed that the opposing rules "invite employers to establish ludicrously low thresholds for 'legitimate' termination" and helps employers to "sandbag" an employee. *Wallace*, 968 F.2d at 1180-81.

192 *McKennon*, 115 S. Ct. at 886 (emphasis added).

Prior to the ruling, scholars said that the Court should "balance the goal of remedying the discrimination against the public's interest in not condoning the employee's misconduct." Babb, *supra* note 127, at 1975. They stressed that "no undue windfall [should accrue] to either the employer or the employee by allowing them to escape unscathed by their respective unsavory

mentator has suggested that the best way "to lessen the conflict in this area of the law" between the competing employee and employer interests would be for courts to use "mitigation principles" more broadly.[193]

Courts also must balance an injured party's general duty to mitigate against that party's particular circumstances. For example, a party need not mitigate damages when to do so would be very costly, or when that party has "a want of sufficient funds."[194] A party's duty to mitigate therefore will vary depending on the burden involved.

C. Application of the Balancing Test

The above cases and principles lead to the conclusion that courts should take account of the legitimate interests of employers and employees by balancing the amount of ongoing discrimination that is experienced by the employee who resigns with the diligence of the employee's job search. Courts should rule in particular that "substantial discrimination" justifies an employee's resignation even if the employee does not aggressively pursue job opportunities. Courts should further rule that "diligent mitigative effort" justifies a resignation even if the continuing discrimination is not too severe. This balancing test is consistent with case law that reduces the employee's duty to mitigate and seek equivalent jobs when to do so would be unduly burdensome (e.g., due to substantial ongoing discrimination). The remaining issue is how courts should apply this test.

In applying the balancing test, courts must first distinguish between substantial discrimination and "insubstantial" discrimination. Substantial discrimination exists when an employer has discriminatorily demoted an employee to a position that pays much less than the employee's original

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actions." *Id.* at 1976; *see also* Richard G. Steele, Comment, *Rethinking the After-Acquired Evidence Defense in Title VII Disparate Treatment Cases*, 46 HASTINGS L.J. 243, 277 (1994) ("In order to *balance* these competing considerations in the after-acquired evidence context, courts should provide a carefully tailored remedy for the discrimination suffered by an employee, but they should not compensate the employee for the loss of a job which was undeserved in the first place.") (emphasis added); *id.* at 284 ("A more *balanced* approach to the after-acquired evidence problem evaluates the underlying policy of Title VII in light of the employer's right to insist upon integrity in the work force and the equitable notion that a deceitful employee should not receive a windfall.") (emphasis added).

Numerous other Title VII cases require courts to balance competing interests. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (noting that courts in sex discrimination cases may have to determine whether an employer's exclusion of women is justified as a bona fide occupational qualification based on a weighing of the employer's need for men versus the interest of women in not being excluded); Jones v. Flagship Int'l, 793 F.2d 714, 728 (5th Cir. 1986) (observing that the federal courts in retaliation cases "have required that the employee conduct be reasonable in light of the circumstances, and have held that the employer's right to run his business must be *balanced* against the rights of the employee to express his grievances and promote his own welfare") (emphasis added), *cert. denied*, 479 U.S. 1065 (1987).

193 Babb, *supra* note 127, at 1976 (citing Mitchell H. Rubinstein, *The Use of Predischarge Misconduct Discovered After an Employee's Termination as a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1, 28 (1990)).

194 15 AM. JUR. *Damages*, § 29 at 425 (1938); *see, e.g.*, Norfolk & W. Ry. Co. v. Amicon Fruit Co., 269 F. 559 (4th Cir. 1920) (holding that a property owner does not have to make expenditures to protect his property when their cost would be considerable given the possible injury); Yazoo & M.V.R. Co. v. Sultan, 63 So. 672 (Miss. 1913). In addition, an injured party must mitigate damages if he can at "trifling expense." 15 AM. JUR. *Damages* § 29, at 425 (1938).

position, or that is dramatically inferior in other ways such as prestige.[195] A demotion from lawyer to clerical employee qualifies, but a salesperson's demotion from level six to level five may not. Likewise, the discriminatory denial of a law partner position to a law firm associate seeking a promotion would be substantial,[196] whereas denying a full law partner the chance to be managing partner probably would not.[197] A finding of insubstantial discrimination would be justified when a discrimination victim had quit without asking her employer to change its discriminatory decision, especially when the employer would have done so if requested.[198]

Courts must then determine what constitutes a diligent job search. Obviously, employees who quit so they can lounge at home would not be searching diligently.[199] Where courts should draw the line is less obvious. Many courts have taken a hard line on mitigation and have required plaintiffs to pursue comparable job opportunities aggressively by, for example, submitting resumes door to door, filling out numerous job applications, and registering at employment clearinghouses.[200] These hard line decisions, rather than the more lenient ones, should be the basis for determining whether employees carried out diligent mitigation efforts when they were not experiencing substantial discrimination.[201] Otherwise, employees could continue living off their former employers despite making little or no effort to get another job. Moreover, there is nothing unduly burdensome about requiring a person to look diligently for a job. A more lenient approach to job search efforts, however, would be appropriate where the employee resigned to escape severe ongoing distribution.

Cases in which the discrimination was barely substantial, but where the employee made little or no effort to seek other jobs after quitting, will present a tough issue. Because one of the two factors permitting resignation is present in such cases, courts generally should award full back pay to the plaintiff. This result follows the principle that courts should resolve doubts against the wrongdoer when deciding whether to award back pay in employment discrimination cases.[202] Because it permits the victim to escape discrimination without being penalized, this result also fulfills Title VII's purposes of deterring discrimination and making the plaintiff whole.

This proposed balancing test has the significant advantage of being "definitional" rather than ad hoc because it specifies the two factors that are to be weighed against each other. The test therefore has substantial predictability. The illustrations provided above help to clarify how these

195 Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982) (listing indicia of inferior positions).

196 *See supra* note 91, citing Ezold v. Wolf, Block, Schorr, & Solis-Cohen, 758 F. Supp. 303, 310 (E.D. Pa. 1991), *rev'd on other grounds*, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88 (1993); *see also* Kende, *supra* note 134, at 37 n.79, 71-74.

197 *Cf.* Day v. Avery, 548 F.2d 1018 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 908 (1977) (holding that partner who was not allowed to manage Washington, D.C. office had not been ousted).

198 The Americans with Disabilities Act requires employees to seek a reasonable accommodation, and to be turned down, before an employer can be liable. *See* S. REP. NO. 116, 101st Cong., 1st Sess. 34-36 (1989).

199 *See supra* note 16.

200 *See supra* note 43.

201 The lenient cases are discussed *supra* note 42.

202 *See* Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 628 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984).

factors should be weighed. Only case-law developments can further clarify the ambiguities inherent in trying to apply these legal factors to the unforeseeable factual situations that may arise. Although these ambiguities make the test appear somewhat ad hoc, it remains definitional because courts will be guided by these two factors, which provide a level of certainty beyond the vague reasonableness test used in most mitigation cases.

D. Potential Objections to the Proposed Mitigation Balancing Test

This two part mitigation test for determining when a court should award a discrimination victim full back pay better fulfills Title VII's goals than does the constructive discharge approach. Rather than giving undue weight to the interests of the employer, it weighs these interests against the legitimate interests of the employee. The three major criticisms of the proposed balancing test are likely to be that it is vague, that it will permit plaintiffs to obtain a windfall, and that it will make employees the judges in their own causes. As the following examination reveals, none of these criticisms significantly undermines the proposed test.

1. The Vagueness Argument

A recurring criticism of balancing tests is that they are vague and leave judges with excessive discretion to evaluate the relevant factors.[203] Presented with identical facts, two different judges can arrive at different results. Critics of this approach prefer rules that supposedly reduce judges' subjectivity, such as the rigid constructive discharge approach.[204] These critics, however, exaggerate the subjectivity of balancing tests and ignore the subjectivity of more "categorical" approaches.

The balancing test proposed in this Article is largely a definitional test that specifies how courts should balance the amount of ongoing discrimination that the plaintiff experienced with the mitigative effort made.[205] It is not, for the most part, an ad hoc approach.[206] Because the test establishes balancing rules for courts to follow, it removes much of the subjectivity inherent in the reasonableness standard that most courts use to govern mitigation issues.[207]

Moreover, the constructive discharge test is no less subjective than the proposed balancing test. The constructive discharge test requires courts to determine whether the plaintiff was faced with such intolerable circum-

203 Aleinikoff, *supra* note 188, at 973-75.

204 *Id.*; *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

205 *See* Aleinikoff, *supra* note 188, at 948.

206 *See id.*

207 Professor Aleinikoff states that "ad hoc balancing may undermine the development of stable, knowable principles of law." *Id.* at 948. It undercuts these principles because there is little predictability from such an ad hoc approach. The proposed test removes the subjectivity by clearly instructing courts as to how to carry out the balancing. *But see id.* at 979 (arguing that definitional balancing appears at first glance to be a "panacea," but closer examination reveals that it is not because the definition must be adjusted to account for unforeseen interests).

Nonetheless, the balancing test proposed here is consistent with the principles that underlie the reasonableness criteria of mitigation. *See id.* at 992 ("The balancing drum beats the rhythm of reasonableness, and we march to it because the cadence seems so familiar, so sensible."). It is simply more specific.

stances that a reasonable employee would have felt compelled to resign.[208] On this matter, two judges easily could disagree.[209] Indeed, this supposed rule-based inquiry actually involves a great deal of balancing as courts must assess all aspects of the plaintiff's employment situation (such as salary, prestige, and hours) and weigh them to decide if together they present an intolerable situation. Like most rule-based critiques of balancing, the argument ignores how rule categorization itself depends on balancing.[210]

2. The Windfall Argument

Another objection to the proposed balancing test is that it will permit an employee who is discriminatorily demoted to resign and then to receive as much back pay as an employee who is discriminatorily discharged, even though the employer's conduct in the former case is less damaging. Thus, the illegally demoted employee can reap a windfall by being lazy and quitting. Support for this argument comes from case law, which states that the purpose of the mitigation rule is to encourage employees to continue working.[211]

This objection ignores the specifics of the mitigation test developed here. The test ensures that employees who resign must show either that they were suffering substantial ongoing discrimination or that they made a diligent effort to obtain suitable employment. These criteria eliminate the possibility that an employee can simply depart without reason and remain lazily at home with hopes of profiting.

The windfall argument also makes several doubtful assumptions. First, even if one assumes that employees will prevail in a fiercely litigated lawsuit, this argument ignores that employees can almost never afford to quit because they have families to feed and clothe in the interim.[212] Moreover, the assumption that they will prevail is questionable because most employ-

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208 *See supra* notes 56-61 and accompanying text.

209 *See supra* note 11. *Compare* Pittman v. Hattiesburg Mun. Separate Sch. Dist., 644 F.2d 1071, 1077 (5th Cir. 1981) (ruling that ordinary adverse discriminatory action by employer is not enough for a constructive discharge) *with* Schafer v. Board of Pub. Educ., 903 F.2d 243, 250 (3d Cir. 1990) (stating that aggravated circumstances are not needed for a constructive discharge under the facts presented).

210 Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969, 973 (1994) ("[T]he discussion about whether the balancing or the categorical approach is better to adjudicate disputes . . . reflects a false dichotomy."). Professor Sheppard's article provides an excellent summary of the critics and supporters of balancing tests.

211 *See* Ford Motor Co. v. EEOC, 458 U.S. 219, 230 n.12 (1982).

212 One scholar stated:

> Employees have no choice but to seek other work, not only because of the legal rule requiring mitigation of damages, but more compellingly because of their need to support themselves and their families until back pay is actually paid. Once the employee finds other work, there is little incentive for the employer to settle.

Summers, *supra* note 25, at 478; *see also* Valdez v. City of Los Angeles, 282 Cal. Rptr. 726, 735 (Cal. Ct. App. 1991) ("Financial circumstances may not allow the employee the luxury of resigning before finding other employment.").

In Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941), the dissent stated that one cannot assume that employees will file risky lawsuits in the hopes of winning a big verdict and not having to look for work because:

> that attributes to the employee an omniscience frequently not given to members of the legal profession [regarding the likely result of the lawsuit] . . . . This is not all. He must

ees who wish to sue for wrongful discharge are unable to find lawyers.[213] Even if they obtain legal representation, they usually are unable to recover fully.[214] Finally, this objection paints American workers as lazy and eager to defraud their employers, an assumption for which there is little support.[215]

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have capital sufficient to provide for himself and for any dependents while he awaits the back pay award, even though that may not come until several years later.

Id. at 207 (Murphy, J., dissenting in part).

Additionally, the plaintiff must pay the costs of the lawsuit, regardless of its outcome. The plaintiff's lawyer may advance, but not ultimately assume, litigation costs. *See, e.g.*, ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.8(d) (1990):

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may advance or guarantee the expenses of litigation, including, but not limited to, court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence if . . . the client remains ultimately liable for such expenses . . . .

Id.

213 Litigation costs, for example, make wrongful dismissal remedies virtually unavailable to all but middle and upper income employees. Indeed, "even if the dismissal is clearly wrongful and success in litigation certain, the lawyer may not be able to afford to take the case on contingency, if the employer is likely to force the case to trial." Summers, *supra* note 25, at 467. Middle class Americans will struggle even more to find a lawyer if legislation passed by the House of Representatives that requires losers to pay the winner's costs and attorney fees in certain lawsuits becomes law. *See, e.g.*, Neil A. Lewis, *House Approves Measure to Limit Federal Lawsuits*, N.Y. TIMES, March 8, 1995, at A1.

214 Various studies demonstrate that most plaintiffs who wish to bring successful discrimination lawsuits against their employers find the going very rough. An authoritative law review article demonstrates that "most wrongfully discharged employees obtained modest or wholly inadequate awards, even in California, where the substantive legal rules ma[k]e tort remedies available in most cases" and that "there is a wide disparity in the amount recovered by discharged employees, which often bears little relation to economic loss." Summers, *supra* note 25, at 466; *see also* Kopkin, *supra* note 99.

In enacting the Civil Rights Act of 1991, Congress made an express legislative finding that Title VII and other civil rights statutes provide inadequate remedies for discrimination victims. *See, e.g.*, H. R. REP. NO. 102-40(I), 102d Cong., 1st Sess. 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 556 ("Section 2 of the legislation also sets forth Congress'[sic] dual purposes: to respond to the Court's recent decisions by restoring the civil rights protections that were so dramatically limited and to . . . ensure compensation commensurate with the harms suffered. . . ."). *See generally* Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1 (1993). A newspaper editorial written by the publisher of the New York Jury Verdict Reporter recently suggested that verdicts are on a downward trend. Russell F. Moran, *Juries are Just Saying No*, N.Y. TIMES, Jan. 16, 1995, at A17 (reporting that from 1988 to 1994, New York product liability defendants won 62% of jury verdicts whereas they only won 51% of these verdicts from 1981 to 1987). A Supreme Court decision striking down fee multipliers has also contributed to the bleak situation facing discrimination plaintiffs and was not cured by the 1991 Act. City of Burlington v. Dague, 112 S. Ct. 2638 (1992).

215 I assumed that employers will act illegally when I stated that employers may wish to keep employees in inferior positions to wear them down and get them to quit. Yet the employers discussed in this Article are employers that have already been found guilty of discrimination since this Article is simply addressing a remedies issue. To assume that an employer who has already been found to have discriminated would discriminate again is hardly unrealistic.

In contrast, there is no justification for assuming that most employees are criminals at heart who are just waiting for the right opportunity to defraud their employer. *Cf.* Douglas C. Harper, *Spotlight Abuse—Save Profits*, 79 INDUS. DISTRIBUTION, Oct. 1990, at 47, 51 ("According to Childs from the National Business Crime Network, despite the growing incidence of employee business abuse, most employees are honest and are willing to take an active role in preventing crime."); Allen Fishman, *Employee Theft Can Steal Jobs, Destroy Business*, ST. LOUIS POST-DISPATCH, Dec. 9, 1991, Bus. Plus Sec., at 18 ("Most employees are honest and will work to keep theft down if they are aware of how it can affect job security and pay."); Renee Haines, *FBI: 500,000 Fudge Facts on Their Resumes*, HOUS. CHRON., Oct. 19, 1992, at 11A (A congressional study estimates that one-third of all job applicants commits resume fraud.); Ellyn Toney, *When Workers Steal*, BATON ROUGE

3. The "Judge In Your Own Cause" Argument

The U.S. Court of Appeals for the First Circuit raised an additional concern, reasoning that allowing discrimination victims to continue getting back pay after resigning would make victims both the judge and the jury in their disputes with employers.[216] They would be free to decide that their employers acted illegally and then to receive continuous back pay despite having abandoned their employers.

This objection reveals the confusion that lies at the heart of the constructive discharge approach. Courts following that approach extend a doctrine for proving liability in employment discrimination cases to the remedial context. Yet upon close examination, the extension does not make sense. The concern at the liability stage is that an employee could recover back pay simply by resigning from a job with an innocent employer. Such a rule would be a disaster and would improperly make the employee a judge in her own cause. At the remedial stage, however, the *court* has already found the employee to have been discriminatorily demoted, denied a promotion, or transferred.[217] In such a situation, the employee is a proven victim, not a judge or jury.

CONCLUSION

Discrimination victims must travel a hard road to receive compensation for their injury. The road is even more difficult for victims who are suing their current employers. In most cases, victims can expect long, costly battles in which the employers seek to defend their conduct and attack the victims' credibility. Employees are often victims of retaliation when they complain. Given these roadblocks, many employees cannot even find lawyers willing to take their case. Those who can hire lawyers often do not recover what they deserve.

Despite these difficulties, many federal and state courts have set up another roadblock for such employees: to recover full back pay, employees must remain with the employer who is discriminating against them. Because of the public policy favoring the internal voluntary resolution of discrimination complaints, an employee is justified in leaving, according to these courts, only when things have become so horrible that the employee has been constructively discharged.

This standard should be rejected. As a Wisconsin Supreme Court justice recently stated:

> [S]hould the law require a victim to carry the burden of changing someone's or some entity's unlawful behavior? . . . Do children who are the victims of incest need to remain with their abusive parents in the hopes

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SUNDAY ADVOCATE, Jan. 8, 1995, News Section, at 1E ("'Normally, one out of 20 or 30 employees are probably stealing,' says Sears' Brewer, who leads seminars for area businesses on how to deal with employee theft.").

216 Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977).

217 Many of the constructive discharge cases like *Rosado* do not realize the difference in the two scenarios. They place the burden on the discrimination victim to show constructive discharge when it should be on the defendant to show that the victim's right to back pay has been terminated.

> that they will be able to cure the abusive behavior? Of course not, and no one should ever suggest otherwise. The point is that victims should in no way have the obligation of changing the unlawful behavior of their assailants.[218]

Courts that use the constructive discharge standard in remedial matters are acting contrary to Title VII's purposes—to eradicate discrimination and make its victims whole. Because of this standard, discrimination victims like Gail Derr may go uncompensated for their injuries. A stringent constructive discharge test is simply a sophisticated means of providing undeserved protection to employers who discriminate.

The federal and state courts should use mitigation principles to determine whether a plaintiff's right to receive back pay continues after the plaintiff quits. A two-part test in which courts balance the level of continuing discrimination with the mitigation effort by the plaintiff would fulfill Title VII's purposes. This test also would provide substance to the general "reasonableness" standard that has governed court mitigation discussions. Adoption of this test would therefore be an important step in society's effort to eliminate discrimination in the workplace.

218 Marten Transp., Ltd. v. Department of Indus., Labor, & Human Relations, 501 N.W.2d 391, 400-01 (Wis. 1993) (Bablitch, J., dissenting).