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## Whistleblowing: How Courts Should Referee Constructive Discharge

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## Whistleblowing: How Courts Should Referee Constructive Discharge

### I. Introduction

Constructive discharge claims frequently arise under acts such as Title VII of the Civil Rights Act or the Age Discrimination in Employment Act.<sup>1</sup> That is, many such claims result from harassment or discrimination in the workplace.<sup>2</sup> While retaliation claims for whistleblowing often arise from cases where an employee is fired by her employer, “constructive” discharge occurs where the employer makes the working conditions intolerable in a conscious, or unconscious, effort to make the employee resign.<sup>3</sup> However, in the recent case of *Smith v. LHC Grp., Inc.*, the Sixth Circuit analyzed the meaning of constructive discharge in relation to “whistleblowing” for fraud under the False Claims Act, and the decision raises some distinct issues under that statute.<sup>4</sup> Not only did the court notably clarify that constructive discharge is in fact prohibited by the anti-retaliation clause of the False Claims Act, but it also clarified that management’s ignoring a whistleblower’s claims may render continuing employment untenable.<sup>5</sup> In that situation, the False Claims Act offers a potential remedy should the employee decide to resign.<sup>6</sup>

The Sixth Circuit addressed the issue in *Smith* of what constitutes constructive discharge.<sup>7</sup> One question was whether an employer must have had a specific intention for the employee to resign in order for the doctrine to apply.<sup>8</sup> With that question in mind, the court explained three separate approaches towards constructive discharge, two objective approaches and one subjective approach. The first objective approach, which was ultimately adopted by the *Smith* court, requires

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<sup>1</sup> Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et. seq.* (1967); Title VII of the Civil Rights Act of 1964, 42 U.S.C §§ 2000e, *et. seq.* (1964).

<sup>2</sup> See 1 LARSON on EMPLOYMENT DISCRIMINATION § 15.08 (2018).

<sup>3</sup> See e.g., *Smith v. LHC Grp., Inc.*, 727 F. App’x 100 (6th Cir. 2018).

<sup>4</sup> *Smith*, 727 F. App’x 100 (6th Cir. 2018).

<sup>5</sup> *Id.*

<sup>6</sup> Civil actions for false claims, 31 U.S.C.S. § 3730 (2018).

<sup>7</sup> *Smith v. LHC Grp., Inc.*, 727 F. App’x 100 (6th Cir. 2018).

<sup>8</sup> *Id.* at 104.

only an employee's resignation to be a reasonably foreseeable consequence of the employer's actions.<sup>9</sup> The second objective approach acknowledged by the court ignores employer intent and finds constructive discharge solely when the working conditions were so intolerable that a reasonable person would resign; it does not consider the employer's viewpoint at all once the protected conduct has taken place.<sup>10</sup> The third, subjective approach, requires the employer to have a subjective intent for the employee to quit.<sup>11</sup>

Part I of this note gives a full background and overview of relevant topics and issues. First, it will discuss the history and relevant provisions of the False Claims Act. The note will next discuss whistleblowing and retaliatory discharge. Then, the note will outline constructive discharge. Part I will conclude by discussing the *Smith* case, its facts, analysis, and holding. Part II will then turn to the different approaches towards constructive discharge. The note questions whether an employee can be "made whole" if an objective, foreseeable consequences test is not adopted, as in *Smith*. The note advises against a subjective intent test and argues that the Sixth Circuit test creates the best balance for both employees and employers, and also encourages the "right" amount of whistleblowing. Part III will further evaluate and recommend a legislative approach going forward. Part IV, the Conclusion, will quickly summarize this note's views.

## II. History and Relevant Provisions of the False Claims Act

The False Claims Act ("FCA") has often been amended throughout its existence.<sup>12</sup> It originated in 1863 when it was passed by Congress and signed by Abraham Lincoln during the Civil War.<sup>13</sup> The FCA was directed at "that class of wretches" who were cheating the government

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<sup>9</sup> *Id.* at 106.

<sup>10</sup> *Id.* at 105.

<sup>11</sup> *Smith v. LHC Grp., Inc.*, 727 F. App'x 100, 104 (6th Cir. 2018).

<sup>12</sup> *Federal False Claims Act and Qui Tam Litigation*, L.J. PRESS § 2.01 (2018).

<sup>13</sup> Peter W. Morgan, *Legal Theory: The Undefined Crime of Lying to Congress: Ethics Reform and the Rule of Law*, 86 NW. U.L. REV. 177, 211 (citing CONG. GLOBE, 37th Cong., 3d Sess. 955 (1863)).

by presenting false claims for payment.<sup>14</sup> It is also called the “Lincoln Law.”<sup>15</sup> The core purpose of the statute is to make liable any person who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.”<sup>16</sup> But the FCA authorizes recovery for fraud either through the government itself or through individuals acting for it.<sup>17</sup> Therefore, the FCA allows an individual to bring an action on behalf of herself and the United States government.<sup>18</sup> This is known as a “qui tam” action.<sup>19</sup> The FCA incentivizes such action by offering a substantial portion of the government’s recovery to the individual bringing the qui tam action.<sup>20</sup>

But Congress has enacted several amendments to the FCA, and one important amendment occurred in 1986 when Congress provided protection for whistleblowers.<sup>21</sup> Thus, the FCA provides relief for employees who resist fraud against the Government by an employer.<sup>22</sup> An employee who is “discharged, demoted, suspended, threatened, harassed, or in any other manner

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<sup>14</sup> *Id.*

<sup>15</sup> *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 736 (1998).

<sup>16</sup> 31 U.S.C.S. § 3729(a)(1)(A) (2018).

<sup>17</sup> 31 U.S.C.S. § 3730 (2018).

<sup>18</sup> 31 U.S.C.S. § 3730(c) (2018).

<sup>19</sup> The term “qui tam” refers to the Latin expression “qui tam pro domino rege quam pro se ipso in hae parte sequitur,” which translates to, “he who brings an action for the king as well as for himself.” BLACK’S LAW DICTIONARY 1251 (7th ed. 1999).

<sup>20</sup> 1-6 WHISTLEBLOWING and RETALIATION § 6.2 (2014). The individual does not even have to be personally harmed by the alleged wrongful act.

<sup>21</sup> 31 U.S.C.S. § 3729 (Amendments); *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 736 (1998) (citing S. REP. NO. 99-345, at 8 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5273).

<sup>22</sup> 31 U.S.C.S. § 3730(h) provides:

(1) In general.--Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) Relief-- Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

discriminated against” is entitled to any relief necessary to make herself whole, and this is in addition to any share in the proceeds of a successful qui tam suit.<sup>23</sup>

Recognizing the utility of whistleblowers, many states have also enacted their own state law False Claims Acts with qui tam provisions.<sup>24</sup> For example, New Jersey’s False Claims Act closely mirrors the federal False Claims Act.<sup>25</sup> The New Jersey FCA also offers a financial reward to any whistleblowers who bring an ultimately successful claim.<sup>26</sup> Overall, the False Claims Act has proved very successful for the United States Government since its enactment, recovering billions of dollars by whistleblowers bringing FCA law suits.<sup>27</sup>

### III. Whistleblowing and Retaliatory Discharge in the United States

Most people have a common understanding of what a whistleblower is, though many might be under the impression you have to go to the police or the media. Generally a whistleblower is someone who exposes activity, usually by an employer, that she believes to be illegal, against policy, or even morally abhorrent.<sup>28</sup> A famous example of a whistleblower in United States history is Mark Felt, the FBI agent who provided information to the Washington Post that led to the exposure of President Richard Nixon’s involvement in the Watergate scandal that eventually led

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<sup>23</sup> 31 U.S.C.S. § 3730 (h).

<sup>24</sup> James B. Helmer Jr. & Erin M. Campbell, *Jury Instructions for False Claims Act Cases*, 84 U. CIN. L. REV. 943, 951 (2016).

<sup>25</sup> N.J. Stat. § 2A:32C-1 – 2A:32C-18 (2018).

<sup>26</sup> N.J. Stat. § 2A:32C-7. Under N.J. Stat. Section 2A:32C-7(a), if the Attorney General proceeds with the action and prevails, the court can order the distribution to the whistleblower between 15 – 25% of the proceeds recovered. Under N.J. Stat. Section 2A:32C-7(d), if the Attorney General does not proceed with the action and the whistleblower proceeds with the action himself, the court may distribute between 25 – 30% of the proceeds to the person who brought the action.

<sup>27</sup> Marc S. Raspanti & David M. Laigaie, *Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act*, 71 TEMP. L. REV. 23, 42 (1998).

<sup>28</sup> Black’s Law Dictionary defines Whistle-Blower as “An employee who reports employer wrongdoing to a governmental or law-enforcement agency.” BLACK’S LAW DICTIONARY FIFTH POCKET EDITION (1996).

to the President's resignation.<sup>29</sup> Felt's involvement as an informant was so controversial that it remained a secret for over thirty years before Felt's identity was revealed.<sup>30</sup>

Despite the Mark Felt controversy, views on whistleblowing have often changed. More recently, whistleblowing is encouraged to keep people honest and keep employers in line for fear of "being told on." However, whistleblowing is still burdened with resistance and complications. The most common obstacle is fear of retaliation by one's employer (i.e. termination). Other concerns revolve around fear of retaliation from colleagues, such as harassment or hazing.<sup>31</sup> Hence, many states and federal statutes have implemented protection for whistleblowers to combat these exact concerns.

While whistleblower statutes have been around for a while, the False Claims Act is one of the more recent laws in the United States that has adopted anti-retaliatory provisions to protect whistleblowers who disclose fraud against the government.<sup>32</sup> The act safeguards both internal whistleblowers, those who report violations within the company to their superiors, and external whistleblowers, those who report externally to the government—not just those who report to the media or police.<sup>33</sup>

Further whistleblower protection was enacted following the Enron scandal in the early 2000s, which led to the Sarbanes-Oxley Act ("SOX") in 2002.<sup>34</sup> Following SOX, several other whistleblower protections were introduced, including provisions in the Dodd-Frank Act ("Dodd-

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<sup>29</sup> Tim Weiner, *W. Mark Felt, Watergate Deep Throat, Dies at 95*, THE NEW YORK TIMES (Dec. 19, 2008), <https://www.nytimes.com/2008/12/19/washington/19felt.html>.

<sup>30</sup> *Id.*

<sup>31</sup> *See e.g.* Simas v. First Citizens' Fed. Credit Union, 170 F.3d 37, 52 n.12 (1st Cir. 1999) ("While social ostracism alone is rarely actionable, professional ostracism may be, at least where the plaintiff can show that defendants incited or encouraged coworkers to shun him, and plaintiff suffered some material harm resulting from his inability to consult with his colleagues on matters of business.")

<sup>32</sup> Richard Fincher, *Mediating Whistleblower Disputes; Integrating the Emotional and Legal Challenges*, DISPUTE RESOLUTION JOURNAL (AAA) 64, 1, 62 (2009).

<sup>33</sup> Lex K. Larson, 3 UNJUST DISMISSAL § 11.03 (2018).

<sup>34</sup> 1-1 WHISTLEBLOWING and RETALIATION § 1.1-1.2 (2014).

Frank”), which seeks to provide incentives to report on fraud in publicly traded companies.<sup>35</sup> Somewhat similar to the FCA, Dodd-Frank includes a “bounty” provision, which allows a whistleblower to collect a portion of the government’s recovery.<sup>36</sup> The trend of active enforcement of whistleblower claims by government agencies has only increased over the years.<sup>37</sup>

Whistleblower provisions have not been limited to federal statutes and regulation, given the limitations of federal statutes, and a great deal of protection remains rooted in state law.<sup>38</sup> As with any state regulations, the states widely vary in the protections and remedies offered, who is covered (for example, public vs. private employees), what conduct is protected, and the standard of belief that is required before disclosure is protected.<sup>39</sup> On top of the New Jersey False Claims Act mentioned above, for instance, New Jersey also has the Conscientious Employee Protection Act (“CEPA”), also known as the “Whistleblower Act.”<sup>40</sup> CEPA prohibits employers from retaliating against employees who disclose, object to, or refuse participation in activities that the employee “reasonably believes” is illegal or abhorrent to public policy.<sup>41</sup> To state a prima facie case under CEPA, a plaintiff must establish that:

- (1) he or she reasonably believed that his or her employer’s conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy;
- (2) he or she performed a “whistle-blowing” activity described in [NJ CEPA];
- (3) an adverse employment action was taken against him or her; and
- (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.<sup>42</sup>

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<sup>35</sup> 1-1 WHISTLEBLOWING and RETALIATION § 1.2 (2014).

<sup>36</sup> *Id.*

<sup>37</sup> 1-1 WHISTLEBLOWING and RETALIATION § 1.4 (2014). This includes agencies such as the Securities and Exchange Commission, Department of Labor, Department of Justice, and Internal Revenue Service.

<sup>38</sup> 1-8 WHISTLEBLOWING and RETALIATION § 8.1 (2014).

<sup>39</sup> 1-8 WHISTLEBLOWING and RETALIATION § 8.2 (2014).

<sup>40</sup> N.J. Stat. § 34:19-3 (2018).

<sup>41</sup> David Rich, *What are the Elements of a New Jersey Conscientious Employee Protection Act Claim?* (Oct 26, 2015), <https://www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-blogs/posts/what-are-the-elements-of-a-new-jersey-conscientious-employee-protection-act-claim>.

<sup>42</sup> *Dzwonar v. McDevitt*, 177 N.J. 451, 462 (N.J. 2003).

CEPA has proven its broad range of protection over New Jersey whistleblowers, especially with the New Jersey Supreme Court showing willingness to accept an objectively reasonable belief of a violation of law, rather than proving such a violation actually occurred.<sup>43</sup> The legislature and judiciary are becoming increasingly employee-friendly.

In order to establish a claim for unlawful retaliation under most federal standards, an employee typically must establish three elements: (1) the employee engaged in a protected activity; (2) the employer took some sufficiently serious adverse action against the employee; and (3) a causal connection existed between the protected activity and the adverse action.<sup>44</sup> For example, the employee may be discharged *because of* her lawful acts seeking to stop what is reasonably perceived to be violations of law, rather than for some legitimate, non-retaliatory reason.<sup>45</sup> Whistleblowing has become a common practice in the United States, protecting the government from fraud and saving it money along the way. However, whistleblowing frequently poses challenges for the informant's job security.

#### IV. Constructive Discharge

Employment in the United States is, typically, on an "at-will" basis.<sup>46</sup> This means "an employee may be terminated for a 'good reason, bad reason, or no reason at all.'"<sup>47</sup> However, many federal and state laws identify particular discriminatory or unlawful reasons as exceptions

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<sup>43</sup> *Dzwonar v. McDevitt*, 177 N.J. 451, 464 (2003) ("[A] plaintiff must set forth facts that would support an objectively reasonable belief that a violation has occurred. In other words, when a defendant requests that the trial court determine as a matter of law that a plaintiff's belief was not objectively reasonable, the trial court must make a threshold determination that there is a substantial nexus between the complained-of conduct and a law or public policy identified by the court or the plaintiff.") See also, 1 LITTLER MENDELSON'S THE NATIONAL EMPLOYER § 7.3 (2014).

<sup>44</sup> 1-2 WHISTLEBLOWING and RETALIATION § 2.1 (2014); see also *Pickett v. Sheridan Health Care Ctr.*, 610 F.3d 434, 441 (7th Cir. 2010).

<sup>45</sup> See generally, *Smith v. LHC Grp., Inc.*, 727 F. App'x 100, 109-110 (6th Cir. 2018) (Bush, concurring).

<sup>46</sup> National Conference of State Legislatures, *The At-Will Presumption and Exceptions to the Rule* (last visited Feb. 8, 2019), <http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx>.

<sup>47</sup> *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 606 (2008).



from the at-will rule.<sup>48</sup> Constructive discharge is one of those exceptions if applicable under the specific circumstances, such as following sufficiently pervasive harassment and retaliation. The constructive discharge concept originated in the labor-law field in the 1930's by the National Labor Relations Board (“NLRB”).<sup>49</sup> The NLRB introduced the doctrine to combat situations in which employers pressured employees to resign, often by creating intolerable working conditions, in retaliation for employees' engaging in concerted activities or to discourage employees from unionizing.<sup>50</sup> The NLRB requires employees to establish two elements to prove a constructive discharge.<sup>51</sup> First, an employer burdens the employee in a way that is intended to cause, and ultimately creates, a change in his condition “so difficult or unpleasant as to force him to resign.”<sup>52</sup> Second, it must be shown that those burdens were imposed because of the employee's protected activities.<sup>53</sup>

By 1964, the year Title VII was enacted, the doctrine was solidly established in the federal courts for National Labor Relations Act cases.<sup>54</sup> But it was not until 2004 that the Supreme Court determined that Title VII also encompasses employer liability for a constructive discharge.<sup>55</sup> In *Pa. State Police v. Suders*, the plaintiff alleged that her supervisors sexually harassed her so severely that she was forced to resign.<sup>56</sup> The Court determined that, to show constructive discharge, Suders must show that the abusive working environment was so intolerable that her

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<sup>48</sup> XPERTHR EMPLOYMENT LAW MANUAL 3329 (2018); *see also* Nguyen v. Tech. & Sci. Application, Inc., 981 S.W.2d 900, 902 (Tex. App. 1998) (holding that the *Sabine Pilot* exception to the employment-at-will doctrine applies to employees who are constructively discharged for the sole reason that they refuse to commit a crime.)

<sup>49</sup> *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 152. (Thomas, J., dissenting).

<sup>52</sup> *Id.* at 152 (quoting *Crystal Princeton Refining Co.*, 222 N. L. R. B. 1068, 1069 (1976)).

<sup>53</sup> *Id.* at 152-53 (quoting *Crystal Princeton Refining Co.*, 222 N. L. R. B. 1068, 1069 (1976)).

<sup>54</sup> *Id.* at 142.

<sup>55</sup> *Pa. State Police v. Suders*, 542 U.S. 129, 133 (2004) (“Although this Court has not had occasion earlier to hold that a claim for constructive discharge lies under Title VII, we have recognized constructive discharge in the labor-law context.”)

<sup>56</sup> *Suders*, 542 U.S. at 133.

resignation was a fitting response.<sup>57</sup> It was not enough that the harassment was sufficiently severe or pervasive enough to be actionable; rather, it must also be so intolerable that a reasonable person in Suders' position would have felt compelled to resign.<sup>58</sup> The Court also held that the inquiry is objective under a "reasonable person in the employee's position" standard.<sup>59</sup>

As the constructive discharge doctrine has developed, determining a constructive discharge occurred is often difficult. The circumstances may not be as clear-cut as they were in *Suders*, where the Supreme Court classified the working conditions as "a 'worse case' harassment scenario, harassment ratcheted up to the breaking point."<sup>60</sup> Because the employer does not fire the employee in a constructive discharge, it is often difficult to assess retaliation given the less than "clear-cut" evidence of intent to force the employee to resign or foreseeable consequence that the employee may quit. It is also difficult to determine when retaliation is sufficiently severe enough to justify resigning in the first place. An employer's action may clearly constitute retaliation, but may not clear the threshold of being "sufficiently severe." Overall, while constructive discharge claims are difficult to win, the courts have begun to show more leniency in favor of employees in contemporary opinions.<sup>61</sup>

Generally speaking, constructive discharge occurs when an employee resigns given intolerable or hostile working conditions.<sup>62</sup> The conditions must be "so intolerable that a reasonable person would resign."<sup>63</sup> There is not one concrete definition of what constitutes

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<sup>57</sup> *Id.* at 134.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 141 (The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?)

<sup>60</sup> *Id.* at 147-48.

<sup>61</sup> For example, in 2016 the Supreme Court held that the trigger date for the statute of limitations is the date the employee resigns, rather than the date of the last alleged discriminatory act. *Green v. Brennan*, 136 S. Ct. 1769, 1772 (2016) ("[A] constructive-discharge claim is no different from an ordinary wrongful-discharge claim, which accrues only after the employee is fired.")

<sup>62</sup> XPERTHR EMPLOYMENT LAW MANUAL 3329 (2018).

<sup>63</sup> *Green v. Brennan*, 136 S. Ct. 1769, 1779 (2016).

constructive discharge. “Intolerable working conditions” therefore vary depending on the context or the applicable statute, and are generally coupled with employer intent or foreseeability that these conditions or actions may lead to the employee’s resignation. For example, under the Americans with Disabilities Act, intolerable conditions may include, but are not limited to, (1) actual threats of discharge, (2) coercive conduct relating to an employee’s retirement or use of disability or medical leave, or (3) requests to submit to medical examinations.<sup>64</sup> Under Title VII, sufficiently egregious sexual harassment often creates an intolerable working condition.<sup>65</sup> In the Age Discrimination in Employment Act context, an example of intolerable working conditions might be threatening by the employer of a drastic increase in hours if the employee does not retire.<sup>66</sup> Under the False Claims Act, as seen in *Smith*, disregarding an employee’s concerns of fraud can create an intolerable condition.<sup>67</sup> While there are many ways to create intolerable working conditions, courts consider that every job has its frustrations and that employees are not guaranteed an entirely stress-free work environment.<sup>68</sup>

All circuits require the conditions to be intolerable or unbearable. In addition, circuits view the intolerability of the conditions from the perspective of a reasonable person under similar circumstances.<sup>69</sup> Therefore, an employee is not justified in quitting if he is unreasonably or irrationally sensitive to his working conditions.<sup>70</sup>

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<sup>64</sup>Kurtis A. Kemper, Annotation, *What Constitutes "Constructive Discharge" Under Americans with Disabilities Act of 1990* (42 U.S.C.A. § 12101), 182 A.L.R. Fed. 609, 2a.

<sup>65</sup> Thomas Fusco, Annotation, *What constitutes constructive discharge of employee due to sex discrimination so as to violate Title VII of Civil Rights Act of 1964* (42 U.S.C.A. § 2000e-2), 116 A.L.R. Fed. 1, 5a.

<sup>66</sup> Alan G. Skutt, Annotation, *Circumstances which warrant finding of constructive discharge in cases under Age Discrimination in Employment Act* (29 U.S.C.A. § 621 et seq.), 93 A.L.R. Fed. 10, 2a.

<sup>67</sup> *Smith v. LHC Grp., Inc.*, 727 F. App'x 100, 104 (6th Cir. 2018).

<sup>68</sup> *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985).

<sup>69</sup> *Id.* (“Intolerability of working conditions, as the circuits uniformly recognize, is assessed by the objective standard of whether a “reasonable person” in the employee's position would have felt compelled to resign.”)

<sup>70</sup> *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981).

Courts differ, however, in their approaches to whether the employer must have intended to cause resignation by rendering the conditions intolerable.<sup>71</sup> Some circuits require proof that the employer deliberately intended to make the employee resign by making the working conditions unbearable, such as with the test by the NLRB listed above.<sup>72</sup> Other circuits apply the test found in *Suders*, which looks only at whether a reasonable person would have found the conditions unbearable.<sup>73</sup> Lastly, some circuits, such as the court in *Smith*, make a broad reading of “intent” and inquire whether the employer could have reasonably foreseen that its conduct and the working conditions would result in the employee’s resignation.<sup>74</sup>

V. Overview of *Smith v. LHC Grp., Inc.*

*Smith v. LHC Grp., Inc.*, decided by the Sixth Circuit in March 2018, involved defendants LHC Group (“LHC”) and Kentucky LV, LLC (collectively “Defendants”), home healthcare providers in Kentucky that provide services to referred patients in exchange for payments from Medicare, Medicaid, or private payors.<sup>75</sup> Sue Smith (“Plaintiff”) worked for her employers, the Defendants, as Director of Nursing.<sup>76</sup> Smith was involved in the enrollment process for accepting new patients.<sup>77</sup> She alleged that she discovered that other employees regularly bypassed the proper procedures for admitting new patients.<sup>78</sup> For example, if LHC could not accommodate patients’ medical needs, the employee would admit them regardless and change the doctor’s order to match the availability of clinical staff.<sup>79</sup> Other employees admitted patients without the proper

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<sup>71</sup> 1 Larson on Employment Discrimination § 15.08 (2019)

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Smith v. LHC Grp., Inc.*, 727 F. App’x 100, 104 (6th Cir. 2018).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 102-03.

<sup>79</sup> *Id.* at 103.

documentation from a medical doctor.<sup>80</sup> When Smith reported the fraud to management, it allegedly ignored her complaints, continued to tolerate the fraud, and actually welcomed the profit it brought to LHC.<sup>81</sup> According to Smith, the scheme brought in an extra \$6 million each year.<sup>82</sup> Eventually, Smith resigned because she felt it was her only option to avoid personal liability for committing fraud and violating the FCA.<sup>83</sup>

Smith sued her employers, LHC Group, Inc. and Kentucky LV, LLC, on claims of violating the False Claims Act by constructively discharging her in retaliation for her reports and for violating Kentucky state law for wrongful discharge.<sup>84</sup> Defendants filed a motion to dismiss under the Federal Rule of Civil Procedure 12(b)(6), which the district court granted on all counts.<sup>85</sup> Smith appealed the dismissal.<sup>86</sup> The main issue on appeal was whether Smith adequately alleged that she suffered an adverse employment action when she felt it necessary to resign her job as Director of Nursing because her employer continued to defraud the government.<sup>87</sup>

LHC claimed it did not fire or demote Smith, nor seek her resignation or take any adverse employment action that could possibly equate to discharge or liability under the FCA.<sup>88</sup> Smith did not dispute this other than to claim that, because Defendants ignored her complaints, she had to quit to avoid being implicated in any legal action against her employer.<sup>89</sup> She claimed this was constructive discharge.<sup>90</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> *Smith v. LHC Grp., Inc.*, 727 F. App'x 100, 103 (6th Cir. 2018).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Smith v. LHC Grp., Inc.*, 727 F. App'x 100, 103 (6th Cir. 2018).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 103-04 (citing *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1983) (“Constructive discharge occurs when ‘working conditions would have been so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign.’”))

The Sixth Circuit found that a jury could reasonably find that the employers created intolerable conditions by ignoring Smith’s complaints, using a “reasonable person in the [p]laintiff’s position” test.<sup>91</sup> The court distinguished between the three commonly applied approaches to constructive discharge: (1) an objective standard where the employer should have been able to reasonably foresee the working conditions would cause an employee to resign, (2) an objective standard that does not consider the employer’s intent or foreseeability at all, and (3) a subjective standard that looks at the employer’s specific, or subjective, intent to cause the employee to resign.<sup>92</sup> The Sixth Circuit ultimately decided that the constructive discharge test should follow the first approach, an objective standard that considers the foreseeable consequences of the employer’s actions.<sup>93</sup> The reasons and implications of this decision will be discussed in detail below.

## VI. Analysis

The threshold question was whether constructive discharge is a form of prohibited retaliation in the anti-retaliation provision of the False Claims Act.<sup>94</sup> The Sixth Circuit in *Smith* answered that question in the affirmative.<sup>95</sup> The court held that a reasonable jury could find that an employee is seriously harmed when her employer continues its fraud and subjects the employee to possible prosecution, loss of her nursing license, and loss of her reputation.<sup>96</sup> Therefore, ignoring a whistleblower’s disclosures is not merely a passive act, but instead an affirmative choice that can give rise to a retaliation claim.

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<sup>91</sup> *Smith*, 727 F. App’x at 104 (6th Cir. 2018).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 104-06.

<sup>94</sup> 31 U.S.C.S. § 3730. (“Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee”).

<sup>95</sup> *Smith v. LHC Grp., Inc.*, 727 F. App’x 100 (6th Cir. 2018).

<sup>96</sup> *Id.* at 106.

The other leading question in *Smith* therefore became whether the constructive discharge doctrine requires that the employer have a conscious specific intention for the employee to resign.<sup>97</sup> The Sixth Circuit answers that question in the negative.<sup>98</sup> The analysis below will discuss the different views about this requirement, the implications of each variation of the doctrine, and why all courts should adopt the Sixth Circuit’s objective approach in *Smith*.

A. Constructive Discharge –Objective, Foreseeable Consequence view in *Smith*

Constructive discharge occurs “when working conditions would have been so difficult or unpleasant that a reasonable person in a similar position would have felt compelled to resign.”<sup>99</sup> This must be analyzed from the perspective of a “reasonable person in the position that [the plaintiff] was in at the time of the discharge.”<sup>100</sup> Circuits often attempt to address what is reasonable. The Eleventh Circuit, for example, states that “while ‘hurt feelings’ can form part of a constructive discharge scenario, it is not reasonable for an employee to resign after one day’s disappointment given the circumstances which were present” in that particular case.<sup>101</sup> Furthermore, “[p]art of an employee’s obligation to be reasonable is an obligation not to assume the worst, and not to jump to conclusions too fast.”<sup>102</sup> Some courts will not find constructive discharge if the employee does not provide a reasonable amount of time for the employer to amend the situation or take corrective action.<sup>103</sup> For example, if a plaintiff complains of sexual harassment by a fellow employee but quits before allowing the employer to conduct an internal investigation,

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Held v. Gulf Oil Co.*, 684 F.2s 427, 432 (6<sup>th</sup> Cir. 1982) (quoting *Borque v. Powell Elec. Mfg.* 617 F.2d 61, 65 (5<sup>th</sup> Cir. 1980)).

<sup>100</sup> *Williams v. Caterpillar Tractor Co.*, 770 F.2d 47, 50 (6<sup>th</sup> Cir. 1985).

<sup>101</sup> *Garner v. Wal-Mart Stores*, 807 F.2d 1536, 1539 (11<sup>th</sup> Cir. 1987).

<sup>102</sup> *Id.*

<sup>103</sup> *See e.g. Trierweiler v. Wells Fargo Bank*, 639 F.3d 456, 460-61 (8<sup>th</sup> Cir. 2011); *Duncan v. GMC*, 300 F.3d 928, 935 (8<sup>th</sup> Cir. 2002).

a court may not find a constructive discharge.<sup>104</sup> Other courts have found that no constructive discharge exists when an employee refuses an offer by the employer to be moved or transferred from the intolerable or harassing environment.<sup>105</sup> Lastly, courts have held that, even if other employees undergoing the same harassment or issues do not quit, a constructive discharge claim does not automatically fail.<sup>106</sup>

Courts acknowledge that constructive discharges fully depend on the facts of the case.<sup>107</sup> In *Smith*, the plaintiff quit her job to avoid suspicion and potential future investigation by the United States Government.<sup>108</sup> As Director of Nursing, Smith was required to allocate clinical staff to new patients and fill out health insurance paperwork.<sup>109</sup> Smith was aware that other employees regularly bypassed the proper procedures for admitting patients and ensuring patients had the proper evaluations and documentation.<sup>110</sup> Given her knowledge that her employers were perpetuating health care fraud regardless of her complaints, the plaintiff felt she could either quit or continue to participate in a scheme she believed was defrauding the government.<sup>111</sup> Therefore, Smith quit her job to avoid implication in fraud, which the Sixth Circuit found any reasonable person in those circumstances would have done to protect her nursing license and reputation.<sup>112</sup> To show the reasonableness of Smith's actions, the Sixth Circuit distinguished Smith's circumstances from a different case where a nurse quit because of unhygienic conditions at the

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<sup>104</sup> *Duncan v. GMC*, 300 F.3d 928 (8th Cir. 2002) (“[S]o a person may out of desperation or simple stubbornness cling to his job despite provocations that would cause the average person to quit in disgust.”)

<sup>105</sup> *Wonders v. United Tax Grp., Ltd. Liab. Co.*, No. 13-80148-CIV, 2013 U.S. Dist. LEXIS 154892, at \*18-19 (S.D. Fla. Oct. 29, 2013).

<sup>106</sup> *Hunt v. City of Markham*, 219 F.3d 649, 655 (7th Cir. 2000).

<sup>107</sup> *Held v. Gulf Oil Co.*, 684 F.2s 427, 432 (6th Cir. 1982)

<sup>108</sup> *Smith v. LHC Grp., Inc.*, 727 F. App'x 100, 101 (6th Cir. 2018).

<sup>109</sup> *Id.* at 103.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 106.



facility.<sup>113</sup> The court in *U.S. ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.* found that the nurse herself was not required to provide substandard care or involve herself in her coworker's substandard care.<sup>114</sup> Smith, on the other hand, could not distance herself from the fraud taking place and was left to worry about being charged with fraud by the government if she were to continue her everyday activities and duties.<sup>115</sup>

Once a court determines that a reasonable person in the plaintiff's position would have felt compelled to resign, a court must determine the proper standard for employer intent. In *Smith*, the Sixth Circuit ultimately adopted a broad reading of intent and focused primarily on *foreseeable consequences*.<sup>116</sup> With this, the court first analyzed the Restatement (Second) of Torts as persuasive authority on the fraudulent issue, which states:

Intent is not . . . limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.<sup>117</sup>

The court used the Restatement as a starting point to discuss the history of constructive discharge in the Sixth Circuit, which generally holds that an employer has the requisite intent when it can be shown that quitting was a foreseeable consequence of the employer's actions.<sup>118</sup> This constructive discharge conceptualization originated from developments in the Tenth Circuit in *Irving v. Dubuque Packing Co.*<sup>119</sup> The court in *Irving* used two tests, looking at whether (1) a reasonable person in similar circumstances would view the working conditions as intolerable and

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<sup>113</sup> *Id.* at 104. (analogizing to *U.S. ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 716 (7th Cir. 2014)).

<sup>114</sup> *U.S. ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 716 (7th Cir. 2014).

<sup>115</sup> *Smith*, 727 F. App'x at 104.

<sup>116</sup> *Id.*

<sup>117</sup> *Smith*, 727 F. App'x at 104-05 (quoting RESTATEMENT (SECOND) OF TORTS § 8A cmt. B (AM. LAW INST. 1995)).

<sup>118</sup> *Id.* at 105. *see also* *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1080-81 (6th Cir. 1999).

<sup>119</sup> *Smith*, 727 F. App'x at 105 (citing *Irving v. Dubuque Packing Co.*, 689 F.2d 170, 172 (10th Cir. 1982)).

(2) the employer deliberately created the conditions to force the employee to quit.<sup>120</sup> The Tenth Circuit in *Derr v. Gulf Oil Corp.* revised the concept back to one, objective standard similar to the one used by the Fifth Circuit in *Bourque v. Powell Elec. Mfg. Co.*<sup>121</sup>

In *Bourque*, the plaintiff filed suit under Title VII of the Civil Rights Act and claimed constructive discharge when her employer discriminated against her on the basis of her sex for failing to pay the plaintiff an equal amount to her male counterparts.<sup>122</sup> The Fifth Circuit framed the general rule for constructive discharge as an employer making an employee's working conditions so intolerable that the employee is forced into an involuntary resignation.<sup>123</sup> "The trier of fact must be satisfied that the ... working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign."<sup>124</sup> The employee alleging constructive discharge does not need to prove that her employer took actions with the subjective intention of forcing her to quit.<sup>125</sup> Instead, the intent requirement can be satisfied if the employee's resignation was a reasonably foreseeable consequence of the employer's actions.<sup>126</sup>

In adopting this standard from *Borque*, the Sixth Circuit determined that Smith's repeated complaints to LHC management regarding the illegal activity, and management's failure to correct the violations, should have put LHC on notice that a foreseeable consequence might be Smith's resignation.<sup>127</sup> Not only would she be at risk of losing her nursing license if the fraud was realized,

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<sup>120</sup> Irving, 689 F.2d at 172.

<sup>121</sup> *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 343 (10th Cir. 1986) (citing *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61 (5th Cir. 1980)).

<sup>122</sup> *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 63 (5th Cir. 1980).

<sup>123</sup> *Id.* at 65.

<sup>124</sup> *Id.* (citing *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977)).

<sup>125</sup> *Bourque*, 617 F.2d at 65.

<sup>126</sup> *Id.* see also *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986); *Held v. Gulf Oil Co.*, 684 F.2s 427, 432 (6th Cir. 1982).

<sup>127</sup> *Smith v. LHC Grp., Inc.*, 727 F. App'x 100, 106 (6th Cir. 2018).

but she would be at risk of committing fraud against the United States government through her continued participation.<sup>128</sup> As the Director of Nursing, Smith relied on clinical staff members' submissions to determine which patients needed what treatment.<sup>129</sup> Smith knew these employees were committing fraud, so even though she was not primarily responsible, her participation in the procedure implicated her in the scheme. Smith repeatedly complained to management about the fraud, meaning her employers were on notice that her resignation would be a reasonable, foreseeable consequence of the fraud.<sup>130</sup>

#### B. Constructive Discharge – Objective Test with No Additional Requirement

Some circuits apply a more precise objective test that determines only whether the working conditions became so intolerable that a reasonable person would feel compelled to resign.<sup>131</sup> Most notably, the United States Supreme Court has omitted employer intent from its definition of constructive discharge.<sup>132</sup> This objective test is similar to the test above, but these courts do not add either an intent or foreseeability requirement on the part of the employer after the protected conduct has occurred.<sup>133</sup> In *Suders*, the Supreme Court explained that a constructive discharge does not need to be effected through an official act of the company.<sup>134</sup> In addition, the Court declined to impose any specific intent or reasonable foreseeability requirement on the part of the employer.<sup>135</sup> Therefore, this standard is entirely objective, as the courts do not put weight on employer intent or on the employee's subjective beliefs, "no matter how sincerely held."<sup>136</sup> The

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<sup>128</sup> *Id.* at 104.

<sup>129</sup> *Id.* at 102.

<sup>130</sup> *Id.* at 103.

<sup>131</sup> *See e.g.* Knappenberger v. City of Phoenix, 566 F.3d 936, 940 (9th Cir. 2009); Saxton v. Am. Tel. & Tel. Co., 10 F.3d 526, 536 (7th Cir. 1993).

<sup>132</sup> Pa. State Police v. Suders, 542 U.S. 129, 153 (2004).

<sup>133</sup> Smith v. LHC Grp., Inc., 727 F. App'x 100, 105 (6th Cir. 2018).

<sup>134</sup> *Suders*, 542 U.S. at 148.

<sup>135</sup> *Id.* at 153 (Thomas, J., dissenting).

<sup>136</sup> EEOC v. Kohl's Dep't Stores, Inc., 774 F.3d 127, 134 (1st Cir. 2014) (quoting Marrero v. Goya of P.R., Inc., 304 F.3d 7, 28 (1st Cir. 2002)).

First Circuit court calls the test the objective “reasonable person” standard.<sup>137</sup> The focus, therefore, is not on the employer at all; instead, the decision falls on whether the decision to resign, from the employee’s perspective, was objectively reasonable.<sup>138</sup>

### C. Constructive Discharge – Subjective Intent Requirement

The United States District Court for the Eastern District of Kentucky adopted a subjective intent test when first deciding *Smith*.<sup>139</sup> In earlier cases, the Sixth Circuit had set forth a few rules. First, the employee must show evidence that the employer deliberately created intolerable working conditions, as perceived by a reasonable person, such that a reasonable person would have felt compelled to resign.<sup>140</sup> The employer must have done so with the intention of forcing the employee to resign.<sup>141</sup> Factors to assess can include (1) a demotion ; (2) a reduction in salary; (3) a reduction in job responsibilities; (4) a reassignment to menial or degrading work; (5) a reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee’s resignation; or (7) offers of early retirement or continued employment on terms less favorable than the employee’s former status.<sup>142</sup>

In earlier cases, the Sixth Circuit required the employee to also prove the employer did these actions with the intention of forcing the employee to quit.<sup>143</sup> The actions must be deliberate and followed by the employee’s actual resignation.<sup>144</sup> Some courts applying a subjective intent

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<sup>137</sup> EEOC v. Kohl’s Dep’t Stores, Inc., 774 F.3d 127, 134 (1st Cir. 2014).

<sup>138</sup> 1 LARSON ON EMPLOYMENT DISCRIMINATION § 15.08 (2018)

<sup>139</sup> *Smith v. LHC Grp., Inc.*, No. 5:17-15-KKC, 2017 U.S. Dist. LEXIS 101742 (E.D. Ky. June 30, 2017).

<sup>140</sup> *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446 (6th Cir. 2005).

<sup>141</sup> *Id.* at 451.

<sup>142</sup> *Logan v. Denny’s, Inc.*, 259 F.3d 558, 569 (6th Cir. 2001).

<sup>143</sup> *Saroli*, 405 F.3d 446. The Sixth Circuit in *Smith* did not say that the test from *Saroli* is no longer applicable. Rather, the court in *Smith* explains how the district court read the intent requirement much too narrowly, in that it failed to account for any foreseeable consequences of the employer’s actions. *Smith*, 727 F. App’x at 104.

<sup>144</sup> *Elnashar v. Speedway SuperAmerica, LLC*, 484 F.3d 1046, 1058 (8th Cir. 2007) (quoting *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1159 (8th Cir. 1999) (“Constructive discharge occurs when an employer deliberately creates ‘intolerable working conditions with the intention of forcing the employee to quit’ and the employee does quit.”))

standard will not consider the foreseeable consequences against the employee; rather, they will focus on the outcome the employer itself desired.<sup>145</sup> However, when intent is critical, it is more likely that foreseeable consequences may be at least a factor in ascertaining employer intent.

The ultimate problem for Smith in the district court was that she did “not allege facts that show Defendants did anything directly towards *her* to make *her* quit *her* job.”<sup>146</sup> LHC never expressed any desire for her to quit, never changed her job title, and did not meet any of the seven factors listed above.<sup>147</sup> Yet, she quit anyway because she objected to working for a company whose business model was centered on fraud.<sup>148</sup> Another argument for the subjective intent standard in the False Claims Act context in *Smith*, revolved around a strict reading of the statute itself.<sup>149</sup> The defendants argued that the False Claims Act’s anti-retaliatory provision specifically requires the employer to have a retaliatory motive when making an adverse employment action “because of the lawful acts done by the employee”.<sup>150</sup> This seems to require some sort of intent element on the part of the employer, which is true in all whistleblower cases.

It is clear how the subjective intent test makes the burden on the employee much more difficult to satisfy in court. Given recent trends of trying to further protection for employees, it is no surprise that this subjective test is followed by only a minority of federal courts.<sup>151</sup> It is also no surprise the Sixth Circuit disagreed with the Kentucky Eastern District Court’s understanding of the constructive discharge doctrine. The Sixth Circuit ultimately disagreed with the lower court’s “narrow reading of intent” because it failed to account for the foreseeable consequences of the

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<sup>145</sup> See *Smith v. LHC Grp., Inc.*, 727 F. App’x 100, 104 (6th Cir. 2018) (“We disagree with the district court’s narrow reading of intent because it focuses only on the outcome LHC specifically desired—profits from the scheme—and fails to take into account the foreseeable consequences of their actions.”)

<sup>146</sup> *Smith*, 727 F. App’x at 102 (emphasis in original).

<sup>147</sup> *Smith v. LHC Grp., Inc.*, No. 5:17-15-KKC, 2017 U.S. Dist. LEXIS 101742, at \*8 (E.D. Ky. June 30, 2017).

<sup>148</sup> *Id.* at \*9.

<sup>149</sup> *Smith*, 727 F. App’x at 106.

<sup>150</sup> 31 U.S.C.S. § 3730(h).

<sup>151</sup> XPERTHR EMPLOYMENT LAW MANUAL 3329 (2018).

employer's actions.<sup>152</sup> While the factors listed are a good way to analyze whether a constructive discharge occurred, they are not an exhaustive list, and the foreseeable consequences must be analyzed as well. The Sixth Circuit also disagreed with the district court's analysis of intolerable working conditions in Smith's case—specifically that a jury could find that Smith's employers created intolerable conditions by ignoring her fraud complaints.<sup>153</sup>

#### D. Courts and Regulations Should Follow the Foreseeable Consequences Objective Test Used by the Sixth Circuit

There are advantages and disadvantages to each of the three constructive discharge tests. One can understand how circuits are often split on which test to apply, especially given different judge or court tendencies towards being “employee-friendly” or “employer-friendly.” Overall, it is difficult to prevail on a constructive discharge claim given the high level of proof necessary.<sup>154</sup> The objective standards make it more difficult for both employers and employees, but levels the playing field. Not only do employees' subjective perception of the harassment or tolerability of work conditions not matter, but the employer's subjective intent to force the employee to quit is also irrelevant. The Sixth Circuit adopts what one can see is a fair “middle ground” approach that should be adopted court-wide and state-wide.

In *Smith*, the Eastern District Court of Kentucky took a much too narrow view of “intention of forcing the employee to quit.” The district court failed to consider the foreseeable consequence aspect of the objective test, and required deliberate intention on the employer's part, thereby following the subjective intent test. In fully analyzing the different outlooks on constructive discharge, courts should follow the Sixth Circuit's lead in asking whether an employer could

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<sup>152</sup> *Smith v. LHC Grp., Inc.*, 727 F. App'x 100, 104 (6th Cir. 2018).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

foresee that its behavior would lead to an employee's resignation. While the test is "objective," it adds an extra, appropriate element for deciding whether or not the employer responded appropriately, or at the very least, could have foreseen that the employee might resign given the circumstances.

In making the consideration to adopt the "foreseeable consequence" test, a few reasons for taking this stance stand out. First, a court can "hardly be said to provide 'all relief necessary' if it should impose a subjective intent requirement."<sup>155</sup> In order to make the employee whole, the court needs to follow a test that will further enable it to find that the employer committed some wrong. Otherwise, negligent employers can escape liability simply because they did not "intend" to create unworkable conditions. In *Smith*, taking the Plaintiff's facts as true, LHC clearly violated the FCA with its encouragement of fraudulent activities. If a subjective test were employed, there would be no way to show that Smith was constructively discharged and retaliated against for whistleblowing. At no point did LHC encourage her to quit, demote her, or harass her in a way that made her physical presence intolerable.

However, arguably no reasonable person can look at this case and say that Smith was not in some way forced to quit in order to avoid potential liability for fraud. The court seems to take on a test just short of a "shock the conscience" standard with its final quote listed above ("a court can hardly be said to provide all relief necessary"). Smith is entitled to relief and the only way she will receive it is if the court adopts this less stringent test in favor of the employee. While this may be true, one might also argue that *Smith* is actually a radical decision by the Sixth Circuit. An opponent of the constructive discharge doctrine applied in *Smith* could easily say that the

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<sup>155</sup> *Id.* at 106.

employers did absolutely nothing to Smith. While LHC allowed fraud to continue, they took no adverse action Smith herself.

The defendants in *Smith* argued that a clear reading of the statute requires “retaliatory” motive when it says that the employer must take adverse employment action “because of lawful acts done by the employee” to counteract the employer's fraud.<sup>156</sup> However, as the Sixth Circuit correctly points out, this reading of the statute directly contradicts the motive of the statute to make the employee “whole” following any discrimination on terms of employment.<sup>157</sup> It is clear through the many statutes enacted to protect whistleblowers, and the rewards that come with successful claims of fraud, that both legislatures and the judiciary want to allow employees to feel guarded enough to come forward with their claims.

Presumably one could argue that *Smith* would have had the same outcome if the Sixth Circuit followed the objective test without intent or foreseeability requirements. Courts currently treat the two tests as different, though more often than not both tests will likely lead to the same result. If a reasonable employee would find it necessary to quit and notifies her employer of her concerns, generally a reasonable employer should be able to foresee that resignation is a reasonable consequence. While true, there might be pitfalls to the strictly objective, reasonable person standard. By neglecting to incorporate some sort of foreseeability for the employer, many companies might fall into the trap of being held liable for constructive discharge with very little warning signs—assuming the employer is not negligent in its handling of employee complaints. For example, imagine an employee who alerts her supervisor that she thinks the employer’s billing practices may be illegal. This does not necessarily put the employer on notice that the employee may resign given potentially fraudulent billing practices. If that employee quits before the

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<sup>156</sup> *Id.* see also 31 U.S.C.S. § 3730(h).

<sup>157</sup> *Smith v. LHC Grp., Inc.*, 727 F. App’x 100, 106 (6th Cir. 2018).



employer seeks to investigate the fraud and then brings a retaliation claim under FCA pretenses for violations of fraud that ring true, this employer could be held liable. If there was a foreseeability requirement, however, the court would likely find otherwise, thereby protecting the employer appropriately.

If a strictly objective or subjective test is used, there will likely be consequences for employees. The test for finding subjective intent, as seen in the district court's finding for Smith, creates a more stringent test for an employee to win on his or her claim. Rarely will there be direct evidence that an employer subjectively intended an employee to quit, as most employers do not shout from the rooftops that they purposely created intolerable work conditions for an employee. This may dissuade an employee from reporting the employer or going so far as to bring suit, given the chance that the employer can find a way to show that in no way did it intend for the employee to quit. Therefore, even in the subjective intent test it is likely foreseeability is at least a factor the court must consider.

On the other side of the coin, a strictly objective test might be too lenient. As long as an employee puts forth enough evidence that he or she found the conditions intolerable in the same way a reasonable person might, the employer's intentions or foreseeability do not play a role. One might be inclined to argue that if the workplace is objectively intolerable, then the employer should be held responsible to take notice and cure it. However, given the broad scope of ways in which employment conditions can be intolerable unbeknownst "to the naked eye," it seems unrealistic to expect employers to always know the exact moment working conditions become unfavorable for one particular employee. Once the employee, such as Smith, reports the problem, the employer should foresee that a reasonable person might quit depending on the severity of the circumstances. Therefore, using the foreseeability test brings a balance between the two tests and for both parties.

The employee has more protection because she does not have to totally prove that the employer actively intended her resignation. Likewise, the foreseeability rule gives the employer more of a chance to act to make changes before the employee can sue. Rather than only looking at the perspective of a reasonable person following a complaint, the mental state of the employer is given a fair standard as well.

While the court does not want to per se “encourage” whistleblowing, it also does not want to do the opposite. The purpose of the False Claims Act is to protect the federal government from fraudulent activity and offer employees and the government itself recourse for such acts.<sup>158</sup> Employees who are aware of such fraudulent activity in their companies—activities that affect the federal government and therefore the nation as a whole—should feel protected enough by the law and implementation of standards in the court to take action to both leave their company and seek recovery. With a wholly subjective standard, there is more room for an employee to second-guess whether her claim will succeed in court. This test leaves more room for a “he-said, she-said” argument as to what the employer said and did to cause the employee to resign. With an objective test with a foreseeability component, an employee may feel more comfortable taking the steps necessary to report such fraudulent acts and therefore help the government cease fraudulent schemes such as the one in *Smith* in the long run. LHC allegedly gained about \$6 million per year on its scheme—just one company alone cheating the government out of money that would not otherwise be realized if a lone employee did not bring her claim or, in the alternative, sue as a relator.

## VII. Future Legislation

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<sup>158</sup> 3 UNJUST DISMISSAL § 11.03 (2018).

Moving forward, both federal and state lawmakers should consider a number of items when creating such statutes and legislation. First and foremost, lawmakers should make sure it is clear in statutes and regulation which standard of constructive discharge will be applied. Courts are constantly flooded with questions of statutory interpretation, which is why issues like the one surrounding constructive discharge arise in the first place.<sup>159</sup> If the language in the statute clearly states a standard to be followed, then it will not be left up to judicial interpretation whether an objective or subjective standard should be met. Along those same lines, retaliatory provisions protecting whistleblowers should explicitly state that constructive discharge is prohibited.<sup>160</sup> The Sixth Circuit in *Smith* inferred that constructive discharge is included in the anti-retaliatory provisions of the False Claims Act, but it would make all courts' jobs easier if there was unambiguous inclusion.<sup>161</sup> It is worth noting that *Smith* is an unpublished opinion, meaning it lacks precedential value and will not bind courts going forward. While this is surprising given the arguably radical decision, it only further shows the necessity of clear statutory standards going forward.

The next recommended course of action would be for states to adopt just one comprehensive whistleblower statute that covers all occupations and industries. As of right now, there are several distinctions in jurisdictions among professions. Not only are there numerous federal laws governing whistleblowers and retaliation, like Title VII, the False Claims Act, and SOX, to name a few, but states have also adopted their own collection of laws and statutes. The New Jersey CEPA, for example, seems to be a comprehensive measure to protect

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<sup>159</sup> See generally Carols E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C.L. REV. 585, 587 (1996).

<sup>160</sup> See *Nguyen v. Tech. & Sci. Application, Inc.*, 981 S.W.2d 900, 901 (Tex. App. 1998) (“Several statutes prohibit the discharge of employees in certain circumstances. Even though no statute specifically allows relief for a **constructive discharge**, several courts have assumed that a **constructive discharge** would satisfy the discharge requirement of these statutes.”)

<sup>161</sup> *Smith v. LHC Grp., Inc.*, 727 F. App'x 100 (6th Cir. 2018).

whistleblowers.<sup>162</sup> However, the New Jersey False Claims Act mentioned above also has provisions in place regarding whistleblowers.<sup>163</sup> Consider the confusion it could create by having different statutes trying to accomplish the same goal in the same jurisdiction. Adopting one broad and fully inclusive whistleblower statute will cause for less confliction among laws and further promote the public interest that coincides with whistleblower protection.

Lastly, as discussed in detail above, both federal and state governments should adopt a foreseeable consequence objective constructive discharge standard. This test is the most balanced approach towards protecting employers and employees alike. While it is not in the public's best interest to have the courts flooded with frivolous whistleblower claims by disgruntled employees or those seeking to reap the benefits of a successful action, it is also not in the public's best interest to have companies overstepping their bounds and getting away with acts like fraud and harassment in the workplace. The foreseeable consequences objective test finds the right balance.

#### VIII. Conclusion

As demonstrated through this note, there is much work to be done in the whistleblower, retaliation, and constructive discharge statutory schemes. Both lawmakers and courts alike have come a long way in protecting employees during these claims. By creating more comprehensive statutes and tightening up the standards that should be applied in court, both employees and employers' expectations will be rightfully set and the government and public interests should be further aligned.

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<sup>162</sup> N.J. Stat. § 34:19-3 (2018).

<sup>163</sup> N.J. Stat. § 2A:32C-1 – 2A:32C-18 (2018).