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Turner v. Anheuser-Busch, Inc.: California Supreme Court Provides Employers With a More Favorable Constructive Discharge Standard

Joseph A. Meckes

NOTE

TURNER V. ANHEUSER-BUSCH, INC.: CALIFORNIA SUPREME COURT PROVIDES EMPLOYERS WITH A MORE FAVORABLE CONSTRUCTIVE DISCHARGE STANDARD

I. INTRODUCTION

In *Turner v. Anheuser Busch, Inc.*,[1] the California Supreme Court held that James Turner's claim for constructive wrongful discharge in violation of public policy failed as a matter of law.[2] The court held Turner could not show either objectively intolerable aggravated conditions on the job or that his employer violated public policy.[3] Because Turner did not state a cognizable claim, the court reinstated the trial court's grant of summary judgment in favor of Turner's employer Anheuser-Busch, Incorporated (hereinafter "ABI").[4] In reaching this conclusion, the court significantly modified the constructive discharge test by no longer allowing a plaintiff to use the employer's constructive knowledge of intolerable or aggravated working conditions as an element of a constructive discharge claim.[5] The court held that Turner could not prove a public policy violation in part because a significant amount of time

1. Turner v. Anheuser Busch, Inc., 876 P.2d 1022 (Cal. 1994). (per Lucas, C.J.; Arabian, Baxter, George, J.J., concurring; Mosk, J., concurring and dissenting; Kennard J. dissenting, joined by Woods, J. (Presiding Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Acting Chairperson of the Judicial Council).

2. *Id.*

3. *Id.*

4. *Id.* at 1035.

5. *Id.* at 1029.

had passed between Turner's whistle-blowing activities and his eventual resignation.[6] Moreover, the majority found Turner's claim that his supervisors had used fabricated performance appraisals to force his resignation untenable primarily because the appraisals appeared valid on their face.[7] Consequently, an employer may avoid a constructive discharge claim simply by either waiting some time before engaging in conduct designed to force an employer to resign, or by ensuring that any adverse treatment of employees is supported by negative performance appraisals.[8]

II. FACTS AND PROCEDURAL HISTORY

On January 3, 1989, James M. Turner tendered his resignation from ABI where he had worked in various capacities for approximately eleven years.[9] Until his voluntary resignation in 1981, Turner had worked as an industrial relations manager at ABI's Los Angeles brewery for approximately six years.[10] In January of 1984, Turner returned to ABI's wholesale operations division as "branch off-premises coordinator" in the sales department.[11]

While there, Turner complained about illegal conduct allegedly perpetrated by his supervisor William Schmitt.[12] Turner claimed that Schmitt had violated alcoholic beverage laws by giving gifts to liquor retailers[13] and by encouraging

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6. *Id.* at 1032-34.

7. *Turner,* 876 P.2d at 1032

8. *See infra* Section VI.

9. Turner v. Anheuser Busch, Inc., 876 P.2d 1022, 1025 (Cal. 1994).

10. *Id.* at 1024.

11. *Id.* The branch off-premises sales coordinator was responsible for coordinating sales activities with retailers who sold ABI products for consumption away from the retailer's premises. *Id.* Turner's immediate supervisor was William Schmitt. *Id.* Schmitt's supervisor was George Liakos. *Id.*

12. *Turner,* 876 P.2d at 1039 (Kennard, J., dissenting).

13. *Id.* Turner alleged that Schmitt gave liquor retailers Anheuser-Busch jackets and baseball tickets. *Id.*

Under the California Alcoholic Beverages Control Act, alcoholic beverage wholesalers may not "[f]urnish, give or lend any money or other thing of value . . . to . . . any person engaged in operating, owning or maintaining any off-sale licensed premises." CAL. BUS. & PROF. CODE, § 25502 (a)(2) (West 1985 & Supp.). Alcoholic beverage manufacturers may not "[g]ive or furnish, directly or indirectly, to any employee of any holder of a retail on-sale or off-sale license only

ABI employees to remove advertisements posted by ABI's competitors.[14]

In December 1984,[15] Schmitt gave Turner an overall rating of "needs improvement" on his annual performance appraisal.[16] The appraisal stated that Turner failed to timely and accurately complete important sales reports and to follow through on sales and marketing projects.[17] Schmitt's supervisor George Liakos contended that the appraisal was based solely on an objective review of Turner's performance during

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anything of value for the purpose or with the intent to solicit, acquire, or obtain the help or assistance of the employee to encourage or promote either the purchase or the sale of the alcoholic beverage sold or manufactured by the licensee giving or furnishing anything of value, and any employee who accepts or acquires anything of value contrary to the provisions of this subdivision is guilty of a misdemeanor." CAL. BUS. & PROF. CODE § 25503(d) (West 1985).

Turner claimed that Liakos directed Schmitt to "have the customers make payments for the material which was given in violation of the Alcohol and Beverage Commission regulations." *Turner,* 876 P.2d at 1039 (Kennard, J., dissenting). In his declaration, Liakos claimed he terminated the investigation when Schmitt told him that customer had paid for the jacket. *Id.* at n.4. Turner also claimed to have complained when he received information that Schmitt had directed a subordinate to give professional baseball tickets to another ABI customer. *Id.* at 1039. Turner stated that he passed this information along to Bill Richards, the operations manager for the wholesale operations division. *Id.*

14. *Id.* at 1039-40. The court noted that interfering with product display and advertising of competing sellers inside retail outlets might be construed as illegal "ribbonizing." *Id.* at 1034 n.12. While the court criticized Turner for failing to identify the proper statutory basis for his claim, the majority opinion itself cited inapplicable sections of the California Business and Professions Code for the proposition that ribbonizing is illegal; i.e., CAL. BUS. & PROF. CODE § 25502(b) (regulating the transfer of beer and wine wholesale licenses acquired before 1947) and CAL. BUS. & PROF. CODE § 25503.3 (allowing alcoholic beverage manufacturers to advertise in trade publications and to serve samples at trade shows). In fact, it is California Business and Professions Code § 25503.2(d) which prohibits so-called "ribbonizing." Section 25503.2(d) provides that alcoholic beverage wholesalers may rotate and manipulate only their own displays and products on the retailer's premises. CAL. BUS. & PROF. CODE § 25503.2(d). *See* Markstein Distributing Co. v. Rice, 135 Cal. Rptr. 255, 258 (Ct. App. 1976) (finding that liquor wholesaler's tampering with the products of another manufacturer is illegal ribbonizing).

15. *Turner,* 876 P.2d at 1039 (Kennard, J., dissenting). This was Turner's second performance appraisal since returning to ABI in January of 1984. *Id.* In his first performance appraisal in June 1984, Turner received an overall rating of "good," which the appraisal form defines as "consistently dependable and competent performance of the job." *Id.*

16. *Id.* The appraisal form defines the "needs improvement" rating as "performance which does not meet minimum level of acceptability, and is not good enough to warrant recognition or greater responsibility." *Id.* Schmitt performed the appraisals and Schmitt's supervisor George Liakos approved them. *Id.*

17. *Turner,* 876 P.2d at 1039 (Kennard, J., dissenting).

the appraisal period.[18] Believing he had performed competently, however, Turner claimed his supervisors gave him the adverse rating in retaliation for his complaints.[19]

In July 1985, Liakos transferred Turner from the sales department to the delivery department.[20] Although there was no change in salary, Turner believed the transfer was in retaliation for his complaints.[21] Liakos claimed, however, that he had transferred Turner because of his problems performing in the sales department and because his experience made him more suited to the delivery department.[22]

From December 1985 to November 1987, Turner received an overall rating of "good" in all performance appraisals.[23] However, in December 1988, Turner received a second overall evaluation of "needs improvement."[24] Liakos stated that Turner had recently become "an embittered and disgruntled employee" and that the performance appraisal reflected Turner's "uncooperative, confrontational" attitude toward management and his failure to timely complete assigned projects.[25]

Turner, however, believed that his superiors had rated him unfavorably in retaliation for his continuing opposition to other improper activities he had observed while at the delivery department.[26] Turner further believed that his superiors had

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18. *Id.*

19. *Id.*

20. *Id.* at 1040. In his new job, Turner's duties included supervising the day-to-day activities of delivery department employees. *Id.* Turner was supervised by Steve Garcia, the delivery manager. *Id.* Garcia reported to Bill Richards, the operations manager, who, in turn, reported to George Liakos. *Turner,* 876 P.2d at 1040 (Kennard, J., dissenting).

21. *Id.*

22. *Id.*

23. *Id.* at 1040. Bill Richards made all of Turner's evaluations at the delivery department from 1985 to 1987. *Id.* In 1988, however, Steve Garcia and Richards made Turner's appraisal. *Id.* All of Turner's appraisals were approved by George Liakos. *Turner,* 876 P.2d at 1040 (Kennard, J., dissenting).

24. *Id.* A comparison of the 15 individual rating categories from 1987 and 1988 revealed a dramatic change. *Id.* In his 1987 evaluation, Turner was rated "good" in eight categories, "very good" in six categories, and "excellent" in one category. *Id.* Turner did not receive a single "needs improvement" in any of the 15 rating categories. Id. In the 1988 evaluation, however, Turner was rated "needs improvement" in eight categories and "good" in the remaining seven. *Id.*

25. *Turner,* 876 P.2d at 1040 (Kennard, J., dissenting).

26. *Id.* at 1041. Turner specifically claimed that ABI was violating its union

used the evaluations to begin "setting him up" for termination.[27] Turner alleged that ABI managers had used similar methods in the past to force other ABI employees to leave the company.[28] As evidence of his superiors' intention to force him out, Turner cited his supervisors' failure to bring the incidents of poor performance to his attention when they occurred.[29]

Shortly after receiving the 1988 appraisal, Turner tendered his letter of resignation.[30] In his declaration, Turner stated that he had resigned because he believed his "chances would be better" in future litigation if he preempted his eventual termination.[31]

Shortly after his resignation, Turner filed suit against ABI and certain individuals alleging, *inter alia,* constructive wrongful discharge in violation of public policy and breach of contract.[32] The trial court granted ABI's motion for summary

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contract by subcontracting the washing of delivery trucks to a company owned by delivery manager Steve Garcia, Turner's immediate supervisor. *Id.* Turner complained to Garcia, Bill Richards and George Liakos. *Id.* In another incident, Turner said he informed Liakos that ABI could be "in jeopardy" for withholding benefits under a "health and welfare benefits" provision of a union contract. *Id.* Turner also believed ABI had violated the terms of some employment contracts that, in Turner's words, provided for the clerical staff to "be paid for 40 hours and work 37 and a half." *Id.* Turner claimed to have complained to Liakos about this violation. *Turner,* 876 P.2d at 1041 (Kennard, J., dissenting). Turner also claimed to have complained that the delivery department was not following organizational policies regarding temperature control to prevent the spoilage of beer. *Id.*

27. *Id.*

28. *Id.* Turner recounted the case of an ABI employee Van Hoy who had reported that some ABI employees had fabricated sales documents. *Id.* Although Van Hoy's report triggered an investigation, Van Hoy was subsequently given less responsibility and eventually left ABI. *Id.* at 1041 n.6 Turner also claimed that ABI had fabricated the performance appraisals of other ABI employees Bosman, Hocking, Dunez (or Dunaj) and Peterson in attempts to coerce them to leave. *Turner,* 876 P.2d at 1041 n.6.

29. *Id.* at 1040-41. Turner claimed that, contrary to normal employment policies, his supervisors had only informed him about the incidents of poor performance at the time of his performance review conference. *Id.* at 1042.

30. *Id.* at 1025.

31. *Id.* at 1032.

32. *Id.* at 1025. Turner also alleged causes of action for age discrimination, and both intentional and negligent infliction of emotional distress. *Turner,* 876 P.2d at 1025. ABI's motion for judgment on the pleadings resulted in the dismissal of Turner's emotional distress claim. *Id.* Turner voluntarily dismissed his claim for age discrimination. *Id.*

judgment on both the public policy and breach of contract claims.[33]

The Court of Appeal affirmed the trial court's grant of summary judgment as to the contract claim, but reversed on the public policy claim.[34] The court held that Turner's complaint adequately alleged the existence of constructive wrongful discharge in violation of public policy.[35] The court reasoned that a trier of fact could find that ABI deliberately created intolerable working conditions based on Turner's "long list" of alleged actions and conditions.[36]

On ABI's petition for review, the California Supreme Court reversed the Court of Appeal's judgment as to the public policy claim.[37] Because the court found that no issue of material fact existed, the court reinstated the trial court's grant of summary judgment.[38]

III. BACKGROUND

To maintain a claim for tortious constructive discharge, a plaintiff must prove: (1) an actual constructive discharge, and (2) an underlying tort claim against the employer.[39] A constructive discharge occurs when an employee is forced to resign by employer actions or working conditions that are so intolerable as to compel a reasonable employee to resign.[40] Since the typical employment relationship is considered "at-will," a constructively discharged employee is not entitled to damages unless he or she can prove an underlying claim in either breach of contract or a tortious violation of public policy.[41]

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33. *Id.*
34. Turner v. Anheuser-Busch, Inc., 12 Cal. Rptr. 2d 656, 659 (Ct. App. 1992).
35. *Id.* at 658.
36. *Id.*
37. *Turner,* 876 P.2d at 1024.
38. *Id.*
39. Turner v. Anheuser-Busch, Inc., 876 P.2d 1022,1030 (Cal. 1994).
40. *Id.* at 1025-27.
41. *Id.* at 1030. A wrongfully discharged employee may sue to recover damages only if the public policy violated by the employer is fundamental and delineated in a statutory or constitutional provision. *Id. See infra* note 46 for statutory support and a definition of "at-will." *See infra* notes 63 - 75 for further discussion of violations of public policy in the constructive discharge context. While an employee

A. CONSTRUCTIVE DISCHARGE

When an employee resigns because of an employer's deliberate attempt to make employment conditions intolerable, a constructive discharge is deemed to have occurred.[42] Since actual discharge carries significant legal consequences for employers,[43] employers may attempt to avoid liability for wrongful discharge by engaging in conduct to force the employee to resign.[44] While the employee is the one who actually

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claiming wrongful discharge may claim in either tort or breach of contract, the scope of this note is specifically limited to discussion of tortious wrongful discharge in violation of public policy.

42. 30 C. J. S. *Employer-Employee Relationship* § 53 (1992). Conditions must be so intolerable that a reasonable person under the same circumstances would also feel compelled to resign. *Id.*

43. Judicial holdings and legislative acts have given some discharged employees causes of action in either breach of contract or in tort or both. The California Supreme Court has recognized that employers may be liable if they discharge employees in violation of an implied contractual promise not to terminate without good cause or for breaching the parties' general duties of good faith and fair dealing. Foley v. Interactive Data, 765 P.2d 373, 385, 401 (Cal. 1988). State and federal statutes also impose liability upon employers for discharging employees under certain circumstances. For example, the California Fair Employment and Housing Act prohibits discharge because of race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, or sex. CAL. GOV'T CODE § 12921 (West Supp. 1996). Likewise, Title VII of the Civil Rights Act of 1964 and 1991 prohibits termination on the basis of race, color, religion, sex or national origin. 42 U.S.C.S. §§ 2000e-2, 2000e-3 (1989). Both California and federal laws prohibit the discharge of a female because of pregnancy, childbirth, and related medical conditions. CAL. GOV'T CODE § 12945.2(l)(1) (West Supp. 1996)); 42 U.S.C.S. § 2000e(k) (1989). California law also prohibits, for example, termination of employees for exercising their rights under the Workers' Compensation laws, CAL. LAB. CODE § 132a(1) (West Supp. 1996); because of absence while serving as an election officer on election day, CAL. ELEC. CODE § 1655 (West Supp. 1996); because an employee takes time off to serve as a juror or appear as a witness, CAL. LAB. CODE § 230 (West 1989); because an employee has joined a labor union, CAL. LAB. CODE § 923 (West 1989); because an employee takes time off for emergency duty as a volunteer firefighter, CAL. LAB. CODE § 230.3 (West Supp. 1996); or because an employee in the private sector has refused to submit to a polygraph test, CAL. LAB. CODE § 432.2 (West 1989). Furthermore, the California Supreme Court has recognized that a employer will be liable in tort if it discharges an employee in violation of public policy. See *infra* notes 63 - 75 and accompanying text for further discussion of tortious wrongful discharge in violation of public policy.

Federal statutes also prohibit termination for a variety of reasons. For example, an employer may not terminate an employee to avoid paying pension or welfare benefits, 29 U.S.C.S. § 1140 (1990); because an employee engages in union activity, 29 U.S.C.S. § 158(a)(1) (1988); or because an employee in the private sector refuses to submit to a polygraph test, 29 U.S.C.S. § 2002 (1990).

44. *Turner,* 876 P.2d at 1025.

says, "I quit," the employer is deemed to have actually severed the employment relationship.[45]

California law presumes an "at-will" relationship when the length of the employment relationship is not provided in the employment contract.[46] Thus, even when an employer forces an employee to resign, the employee will typically have no cause of action against the employer even though the discharge is legally regarded as a firing rather than a resignation.[47] To maintain an action in wrongful constructive discharge, therefore, an employee must show not only that he or she was forced to resign, but also that he or she is entitled to obtain damages for an underlying tort or for breach of contract.[48]

Although California has long recognized that a resignation coerced by the employer is equivalent to a discharge,[49] the California appellate courts did not define the elements of constructive discharge until 1987 in *Brady v. Elixir Industries.*[50] In *Brady*, the plaintiff-employee contended not only that her employer's repeated sexual harassment forced her to resign, but also that her employer's actions constituted a tortious constructive discharge in violation of public policy.[51] To establish constructive discharge, the *Brady* court held that an employee must show that actions of the employer or the conditions of employment were so intolerable or aggravated at the time of the employee's resignation that a reasonable person in

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45. *Id.*

46. CAL. LAB. CODE § 2922 (West 1989). The California Labor Code defines an "at-will" employment contract as "(a)n employment, having no specified term (that) may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month." *Id.*

47. *Turner,* 876 P.2d at 1030

48. *Id.*

49. Moreno v. Cairns, 127 P.2d 914, 916 (Cal. 1942).

> Whenever a person is severed from his employment by coercion, the severance is effected not by his own will but by the will of a superior. A person who is forced to resign is thus in the position of one who is discharged, not of one who exercises his own will to surrender his employment voluntarily.

Id. at 534-35.

50. 242 Cal. Rptr. 324 (Ct. App. 1987).

51. *Id.* at 325.

the employee's position would also have resigned.[52] Furthermore, the court also required that an employee bringing a constructive discharge claim prove that the employer had either actual or constructive knowledge that the employee found the conditions of his or her job intolerable.[53] The California Courts of Appeal subsequently expanded the test developed in *Brady* to encompass contract as well as tort claims.[54] Thus, a constructively discharged employee may sue for breach of both express employment contracts[55] and implied covenants not to discharge without good cause or not to discharge except in accordance with specified procedures.[56]

The *Brady* court discussed the constructive discharge standards of several jurisdictions, including the federal district and appellate courts, the California Fair Employment and Housing Commission and other states.[57] Although these cases uniformly required the circumstances of employment to be so aggravated or intolerable that a reasonable employee would feel compelled to resign, courts take divergent views on whether an employee must have proof that the employer actually intended that the adverse conditions cause the employee to resign.[58]

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52. *Id.* at 328.

53. *Brady,* 242 Cal. Rptr. at 328. The *Brady* court held that an employee need not prove the employer intentionally created intolerable working conditions specifically to cause the employee to resign. *Id.* The court found proving employer intent too stringent a standard. *Id.* Thus, the court adopted the requirement that the employer at least have either actual or constructive knowledge of the alleged intolerable circumstances. *Id.*

54. Zilmer v. Carnation, Co. 263 Cal. Rptr. 422 (Ct. App. 1989); Soules v. Cadam, Inc., 3 Cal. Rptr. 2d 6 (Ct. App. 1991).

55. *Zilmer,* 263 Cal. Rptr. at 426.

56. *Soules,* 3 Cal. Rptr. 2d at 11.

57. *Brady,* 242 Cal. Rptr. at 327.

58. *Id.* For cases not requiring proof of employer intent *see, e.g.*, Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 561-563 (1st Cir. 1986); Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888 (3d Cir. 1984); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980); Watson v. Nationwide Ins. Co., 823 F.2d 360, 361-362 (9th Cir. 1987); Nolan v. Cleland, 686 F.2d 806, 813 (9th Cir. 1982); Derr v. Gulf Oil Corp., 796 F.2d 340, 343-344 (10th Cir. 1986); Garner v. Wal-Mart Stores, Inc., 807 F.2d 1536, 1539 (11th Cir. 1987); Civil Rights Div., etc. v. Vernick, etc., 643 P.2d 1054, 1055 (Ariz. 1982); Lewis v. Oregon Beauty Supply Co., 714 P.2d 618, 621 (Ore. App. 1986); Atlantic Richfield v. D. of Columbia Com'n, 515 A.2d 1095, 1101 (D.C. App. 1986). For cases requiring some employer intent, *see e.g.,* Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985); Yates v. AVCO Corp., 819 F.2d 630, 637 (6th Cir. 1987); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981); First Judicial, etc. v. Iowa, etc., 315 N.W.2d 83, 87-89 (Iowa

Like the majority of jurisdictions, the *Brady* court found that requiring the employee to prove the employer had actual knowledge or intent was too stringent a standard.[59] Nevertheless, the *Brady* court determined that some proof of employer knowledge is necessary to insure the parties at least attempt a peaceful, on-the-job resolution of the problem.[60] Thus, the court adopted a middle-ground approach by requiring evidence that the employer had either actual *or* constructive knowledge[61] of the intolerable conditions.[62]

B. DISCHARGE IN VIOLATION OF PUBLIC POLICY

An employee suing for tortious constructive discharge must show not only intolerable conditions and employer knowledge, but must also show that the discharge in question violated a firmly established, fundamental and substantial public policy expressed in constitutional or statutory provisions.[63]

California's tortious discharge doctrine originated in *Petermann v. International Brotherhood of Teamsters*.[64] In *Petermann,* an employer discharged its business agent for refusing to perjure himself before a state legislative committee.[65] The court of appeal held that despite the employee's "at-will" status, allowing the union to discharge the employee for refusing to violate the law would be "obnoxious to the interests of the state and contrary to public policy and sound morality."[66] Similarly, in *Tameny v. Atlantic Richfield Co.*,[67] the California Supreme Court held that an employer violated pub-

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1982).

59. *Brady,* 242 Cal. Rptr. at 328.

60. *Id.*

61. The California Civil Code states that "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." CAL. CIVIL CODE § 19 (West 1982).

62. *Brady,* 242 Cal. Rptr. at 328.

63. Gantt v. Sentry Insurance, 824 P.2d 680, 687-88 (Cal. 1992).

64. 344 P.2d 25 (Cal. App. 1959).

65. *Id.*

66. *Id.* at 27.

67. 610 P.2d 1330 (Cal. 1980).

lic policy for firing an employee for refusing to participate in an illegal price fixing scheme.[68]

The California courts have reached a different conclusion when the discharge did not violate a policy inuring to the public at large but which, instead, served only the more limited interests of the employer itself.[69] In *Foley v. Interactive Data, Corp.*,[70] the employee claimed his employer violated public policy when it discharged him for informing his supervisor that a prospective managerial employee was under investigation for embezzlement.[71] Although the employee contended that he had a duty to report this information as the employer's agent, the court found that the employer violated no public policy since the agency relationship between the parties was of no interest to the public at large.[72]

The California Supreme Court further narrowed the kinds of actions that violate public policy in *Gantt v. Sentry Insurance*.[73] The court held that the employer's action must violate either a constitutional or statutory provision, reasoning that an employer ought to know when a public policy might be implicated.[74] Thus, a claim for tortious constructive discharge that does not implicate a fundamental public policy delineated in either a statutory or constitutional provision is subject to adjudication as a matter of law.[75]

IV. COURT'S ANALYSIS

In *Turner*,[76] the California Supreme Court reanalyzed the California constructive discharge standard.[77] Although the court confirmed that the employee's working conditions must

68. *Id.*
69. Foley v. Interactive Data Corp, 765 P.2d 373 (Cal. 1988).
70. *Id.*
71. *Id.* at 375.
72. *Id.* at 380.
73. *Gantt*, 824 P.2d at 683-89 (Cal. 1992).
74. *Id.* at 687.
75. *Turner*, 876 P.2d at 1033.
76. Turner v. Anheuser-Busch, Inc., 876 P.2d 1022 (Cal. 1994).
77. *Id.* at 1025-28.

be objectively intolerable, the court modified the *Brady*[78] test by ruling that an employer must have actual knowledge of the employee's intolerable circumstances to support a constructive discharge claim.[79] The *Turner* court also sought to clarify whether an employee could claim constructive discharge as a matter of law if the employee did not resign within a specified time period after the onset of the intolerable conditions.[80] Finally, the court analyzed Turner's claim and found that Turner's claim failed as a matter of law for two reasons.[81] The first "fatal flaw"[82] in Turner's claim was his inability to show that his working conditions were objectively intolerable.[83] The court also found Turner's claim was untenable as a matter of law because he could show no connection between public policy violations by ABI and his eventual resignation.[84]

A. THE CONSTRUCTIVE DISCHARGE TEST

Before reviewing the merits of Turner's claim, the court reviewed the evolution of California's constructive discharge doctrine.[85] The court attempted to clarify when circumstances would be so intolerable that they would compel an employee to resign.[86] The court then considered whether an employee must prove the employer had actual knowledge, rather than mere constructive knowledge, that the employee considered his or her working conditions intolerable.[87] In analyzing Turner's claim, the court considered and specifically disapproved case law that held an employee could not maintain a claim for constructive discharge if the employee failed to resign within a specific time period after the onset of the intolerable circumstances.[88]

78. 242 Cal. Rptr. 324 (Ct. App. 1987).
79. *Turner* at 1028-29.
80. *Id.* at 1031-32.
81. *Id.* at 1031.
82. *Id.*
83. *Id.* at 1031-32
84. *Id.* at 1032-35.
85. Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1025-29 (Cal. 1994).
86. *Id.* at 1027. *See infra* notes 89-94 and accompanying text.
87. *Turner*, 876 P.2d at 1027-29.
88. *Id.* at 1031.

1. Working conditions must be objectively "intolerable"

To maintain a constructive discharge action, the court reiterated that the employee must show working conditions so objectively intolerable that they would have compelled a reasonable employee under the same circumstances to resign.[89] The court noted, however, that all jobs have inherent frustrations, challenges and disappointments.[90] Therefore, an employee is protected only from unreasonably harsh conditions above and beyond those suffered by co-workers.[91] The court ruled that single, trivial or isolated acts of misconduct will not usually make job conditions sufficiently intolerable to force an employee to resign.[92] Instead, the proper focus is whether a reasonable person under the same circumstances would have had any reasonable alternative except to resign, not simply whether resignation was one reasonable option.[93] Thus, the primary question is whether the employer has coerced the employee's resignation by subjecting the employee to intolerable working conditions.[94]

In determining whether intolerable conditions had compelled Turner to resign, the court asked whether Turner's claim should be time-barred as a matter of law under the rule announced in *Panopulos v. Westinghouse Electric Corp.*[95] Un-

89. *Id.* at 1027. For this test, the court relied on *Slack v. Kanawha County Housing*, 423 S.E.2d 547 (W.Va. 1992). The *Slack* court collected and analyzed state and federal cases from several jurisdictions. *Id.* at 555-58. The court discovered general agreement that one essential element in any constructive discharge claim is proof that the employee's working conditions were so intolerable that any reasonable employee would resign rather than endure such conditions. *Id.* at 556.

90. *Turner*, 876 P.2d at 1026-27.

91. *Id.* at 1027.

92. *Id.* The court held that a "poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." *Id. See also* Valdez v. City of Los Angeles, 282 Cal. Rptr. 726, 723 (Ct. App. 1991) (holding that failure to promote an employee due to unlawful discrimination will not support a finding of constructive discharge); Soules v. Cadam, Inc., 3 Cal. Rptr. 2d 6, 12 (Ct. App. 1991) (Holding that a demotion accompanied by reduction in pay and negative performance evaluations does not constitute constructive discharge).

93. *Turner*, 876 P.2d at 1026. *See also* Rochlis v. Walt Disney Co., 23 Cal. Rptr. 2d 793, 798 (Ct. App. 1993) (Holding that an employee who contended he was underpaid for a difficult executive position could not assert constructive discharge claim).

94. *Turner*, 876 P.2d at 1026-27.

95. 264 Cal. Rptr. 810 (Ct. App. 1989). In *Panopulos*, the plaintiff filed suit for

der *Panopulos,* a limitations period begins to run at the time the intolerable actions or conditions that caused the resignation become known to the employee.[96] This time period tracks the statute of limitations for whatever cause of action the employee might have as a result of the intolerable circumstances. Under this rule, the employee claiming constructive discharge must have resigned within this time period, or his or her constructive discharge claim will fail as a matter of law.[97]

The *Turner,* court rejected *Panopulos* finding that any reliance on the applicable limitations period to determine whether employment conditions were indeed intolerable would be unduly arbitrary.[98] The court explained that although the length of time an employee remains on the job after the onset of intolerable circumstances may be a factor in determining whether working conditions were actually intolerable, an employee's failure to resign within this period does not prove the employee's resignation was unreasonable as a matter of law.[99] The *Turner* majority agreed with the *Panopulos* decision, however, to the extent that an "outer limit" exists after the onset of intolerable conditions beyond which an employee may not remain on the job and still claim constructive discharge.[100]

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constructive discharge after resigning his job in 1983. *Id.* at 813. The plaintiff alleged that intolerable working conditions from 1978 until the time he resigned in 1983 injured his psyche and his back. *Id.* The court held that too much time had passed between the onset of the intolerable circumstances and the employee's resignation. *Id.* at 817. The court wrote: "[T]he applicable limitations period must constitute an outer limit beyond which an employee may not, as a matter of law, remain employed after the onset of allegedly intolerable conditions and thereafter maintain a claim for wrongful constructive discharge." *Id.* The court reasoned that "sound policy requires that there be a limit beyond which claims such as that of plaintiff here may not be asserted." *Id* at 816. The court held his suit time-barred since the longest applicable limitations period was four years and the plaintiff's transfer had occurred more than four years before his resignation. 264 Cal. Rptr. at 816.

96. *Id.* at 817.

97. *Id.*

98. *Turner*, 876 P.2d at 1031.

99. *Id.* The *Turner* court only disapproved *Panopulos* to the extent that it prescribed the statute of limitations as a time limit on an employee's decision to "weather the storm." *Id.*

100. *Id.*

2. Employer must have actual knowledge of the employee's intolerable working conditions

The *Turner* Court significantly modified the *Brady* test byallowing employees to proceed on a constructive discharge claim only if the employer has actual knowledge of the alleged intolerable working conditions.[101] While the *Brady* line of cases allowed a constructive discharge claim to proceed on an allegation the employer had actual *or* constructive knowledge of the employee's intolerable conditions, the *Turner* court ruled that the employee must prove that the employer either intentionally created or knowingly permitted the intolerable working conditions to continue.[102] The *Turner* majority found that this actual knowledge requirement better served the goal articulated in *Brady* of insuring the parties attempt to resolve the conflict before a lawsuit is required.[103]

In *Brady,*[104] the court had required that the employer have *either* actual or constructive knowledge to ensure that the employer and an employee attempt a peaceful on-the-job resolution of any workplace conflicts.[105] The *Turner* court, however, stated that requiring the plaintiff to show that the employer had actual notice of the intolerable conditions was a more appropriate standard if the courts wished the parties to work out their differences prior to the onset of a lawsuit.[106] The court reasoned that requiring employees to notify a person in authority about the intolerable situation would give employers, unaware of any problems, an opportunity to correct any objectionable conditions or circumstances the employee finds objectionable prior to legal action by the employee.[107] Furthermore, the court determined that the actual knowledge requirement would prevent employers from shielding themselves from

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101. *Id.* at 1028. For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees. *Id.* at 1029.

102. *Turner,* 876 P.2d at 1029.

103. *Id.* at 1028.

104. *Id.* at 1029; Brady v. Elixer Indus., 242 Cal. Rptr. 324 (Ct. App. 1987).

105. *Turner,* 876 P.2d at 1029 (*citing Brady*, 242 Cal. Rptr. at 328).

106. *Turner,* 876 P.2d at 1029.

107. *Id.*

constructive discharge lawsuits by deliberately ignoring a situation that has become intolerable to a reasonable employee.[108] Thus, the court concluded that the actual knowledge requirement would more effectively serve the favorable policies set forth in *Brady*.[109]

The *Turner* court based its modification of the knowledge requirement on the idea that constructive discharge is ultimately a coerced resignation.[110] While noting that proof that the employer intended to create intolerable working conditions would be evidence that the employer coerced the employee's resignation,[111] the court declined to require proof that the employer expressly intended to cause the resignation.[112] The court reasoned that requiring employees to produce evidence that the employer intended to constructively discharge them would preclude some meritorious claims since an employer is unlikely to announce a constructive discharge strategy "from the rooftops."[113] On the other hand, the court reasoned an employer's actual knowledge of the existence of intolerable conditions and its failure to address them would be strong circumstantial evidence that the employee's resignation was, in fact, employer-coerced.[114]

B. TURNER'S CLAIM FOR CONSTRUCTIVE WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY IS FATALLY FLAWED

The court found two "fatal flaws" in Turner's claim for constructive wrongful discharge in violation of public policy.[115] First, Turner presented insufficient evidence that his working conditions were so intolerable that they would have compelled a reasonable person under the same circumstances

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108. *Id.*
109. *Id.*
110. *Id.* at 1027-28.
111. *Id.* at 1028.
112. *Id.* Although many federal and state courts do, in fact, require express proof that the employer intended to cause the employee's resignation. *See supra* notes 57 - 62 and accompanying text for further discussion of employer intent in this context.
113. *Turner,* 876 P.2d at 1028.
114. *Id.*
115. Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1031 (Cal. 1994).

to resign.[116] Second, even assuming Turner could have shown intolerable working conditions, he could not show any relationship between his whistle-blowing activities and his resignation and thus could not show ABI violated any public policy.[117] Standing alone, either of these flaws would have entitled ABI to summary judgment.[118]

1. Conditions of Turner's job were not aggravated or intolerable

The *Turner* majority held that none of the following three conditions taken alone or together constituted sufficiently under constructive discharge: (1) the illegal acts of Turner's fellow employees which he allegedly witnessed and reported in 1984; (2) his 1985 reassignment; or (3) his low performance rating in 1988.[119] Since none of these issues contained a triable issue of material fact, the court found no merit in Turner's constructive discharge action.[120]

The court ruled that, without more, a reasonable employee should not be so offended by the "mere existence" of illegal conduct in the workplace that he or she would reasonably feel compelled to resign.[121] According to the majority, a reasonable person in Turner's circumstances would not have felt compelled to resign since Turner's supervisors had never required, or even requested, that he take part in any illegal activity.[122] Furthermore, violations of state law regulating the economic and contractual relationships between an alcoholic beverage manufacturer and its customers and competitors was not the kind of obnoxious or aggravated activity that might cause a reasonable employee to feel compelled to resign.[123]

The fact that approximately three years had passed be-

116. *Id.* at 1031-32.
117. *Id.* at 1032-34.
118. *Id.* at 1031.
119. *Id.* at 1031-32.
120. *Id.*
121. *Turner*, 876 P.2d at 1032.
122. *Id.*
123. *Id.* The court noted that ABI had, in fact, taken action on some of Turner's complaints. *Id.*

tween Turner's reassignment to the delivery department (allegedly in retaliation for his complaints about illegal activities) and his eventual resignation was found to be strong evidence indicating that neither Turner nor the hypothetical reasonable person would have regarded the working conditions at ABI as intolerable.[124]

The court also rejected Turner's claim that his 1988 performance evaluation formed a basis for his constructive discharge claim.[125] Since a properly managed business must occasionally review, criticize, demote, transfer, and discipline its employees,[126] a single, negative performance rating should not create circumstances so intolerable that a reasonable employee would be forced to resign.[127] Thus, Turner could not claim that ABI managers had used negative performance appraisals to force him from the company.[128]

Finally, the court determined that even considering all of the miscellaneous charges of misconduct together, no pattern of continuous harassment existed sufficient to maintain a claim for constructive discharge.[129] For more than three years after he had complained of illegal activity, Turner received good performance reviews and increases in compensation.[130] Moreover, the court noted, Turner had admitted resigning because he had thought ABI was "setting him up" for termination and he had believed he would fare better in future litigation if he were to preempt his discharge.[131] Thus, the court concluded that Turner had resigned voluntarily since his work-

124. *Id. See also* Vaughn v. Pool Offshore Co., 683 F.2d 922, 926 (5th Cir. 1982) (holding that no constructive discharge occurs when alleged misconduct occurred several months prior to resignation); Wagner v. Sanders Assoc., Inc., 638 F. Supp. 742 (C.D. Cal. 1986) (holding that passage of time between allegedly intolerable condition and resignation "goes a long way toward destroying" assertion that conditions were intolerable).

125. *Turner,* 876 P.2d at 1032.

126. *Id.*

127. *Id. See also Soules*, 3 Cal. Rptr. 2d 6, 12 (Ct. App. 1991) (holding that an employee claiming constructive discharge must show aggravating factors such as a continuous pattern of discrimination since, generally, a single, isolated incident of sexual harassment will not create sufficiently intolerable circumstances).

128. *Turner,* 876 P.2d at 1032.

129. *Id.*

130. *Id.*

131. *Id.*

ing conditions could not have compelled him to resign if his resignation was strategic and not coerced.[132] Thus, the court found Turner's failure to produce any evidence to show intolerable circumstances alone sufficient to defeat his constructive discharge claim.[133]

2. ABI did not violate public policy

Even if Turner could have shown intolerable circumstances, the court ruled that summary judgment was proper since Turner had not shown that ABI had tortiously violated public policy.[134] To prove that a discharge violates public policy, the majority reiterated that an employee must show that the dismissal contravened a policy that is (1) fundamental,[135] (2) beneficial to the public at large,[136] and (3) embodied in a statute or constitutional provision.[137] Tort claims of this type typically arise when an employer discharges an employee for refusing to violate a statute at the employer's request, for exercising a statutory right or privilege, or for performing a legal duty.[138]

The court found that even if Turner could show that supervisors had discharged him in retaliation for his complaints about ABI's internal practices or ABI's violations of its collective bargaining agreements, this did not amount to a violation of fundamental public policy since the benefit of these policies served only ABI or its employee unions and not the public at large.[139] The tort of wrongful discharge, the court stated, is not a tool for the enforcement of the employer's contracts or

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132. *Id.*

133. *Id.*

134. *Turner,* 876 P.2d at 1032-33.

135. *Id.*

136. Id. at 1032-33. The interest advanced by the policy must inure to the benefit of the public at large, rather than simply to the individual employer or employee. *Id. See also* Foley v. Interactive Data Corp., 765 P.2d 373, 379-80 (Cal. 1988) (holding that an employee discharged for complying with the fiduciary duty owed by an agent to his principle does not implicate public policy since the agency relationship does not benefit the public at large).

137. *Turner,* 876 P.2d at 1033; *see also* Gantt v. Sentry Insurance, 824 P.2d 680, 687-88 (Cal. 1992).

138. *Turner,* 876 P.2d at 1033.

139. *Id.*

internal policies.[140] Therefore, because none of these activities involved a fundamental public policy, Turner's claim for constructive discharge based on these allegedly improper activities failed.[141]

Turner's allegation that his superiors violated the California Alcohol Beverage Control Act (hereinafter "ABC Act")[142] was likewise found insufficient to support his claim for constructive discharge.[143] The court first ruled Turner's implication of the ABC Act was insufficient to create a triable issue of material fact since he failed to provide citations to the specific statutory or constitutional authority giving rise to his public policy claim.[144] While the court found that retaliation for reporting violations of the ABC Act might involve a fundamental public policy,[145] Turner's action still failed because he demon-

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140. *Id.*

141. *Id.*

142. The California Alcohol Beverage Control Act is codified in CAL. BUS. & PROF. CODE § 23000 et seq (West 1985).

143. *Turner,* 876 P.2d at 1034. Turner complained that ABI personnel had violated the ABC Act by removing competitors' advertisements and by giving gifts to retailers. *Id.*

144. *Id.* at 1033. Turner alleged that by giving gifts to retailers, ABI had violated "Alcohol, Tobacco and Firearms laws." *Id.* Turner also alleged that ABI violated "ABC Act § 25503" by instructing its sales personnel to remove or tear down its competitors' products and advertising and making consignment sales of alcohol. *Id.* Although criticizing Turner for failing to cite specific statutes violated by ABI or citing incorrect statutory authority given the facts of this case, the court itself also cited incorrect statutory authority for the alleged violations. *See supra* note 13 for further discussion of possible statutory provision allegedly violated by ABI.

145. Although Turner simply claimed ABI violated "Alcohol, Tobacco and Firearm laws," *Turner,* 876 P.2d at 1033, the California Alcoholic Beverage Control Act does prohibit wholesalers from giving gifts to liquor retailers. Bus. & Prof. Code, §§ 25502(a)(2) (West Supp. 1996), 25503(d) (West 1985). Interfering with a competitor's advertising display could be considered illegal ribbonizing under CAL. BUS. & PROF. CODE § 25502.3 as construed in Markstein Distributing v. Rice, 135 Cal. Rptr. 255, 258 (Ct. App. 1976).

In its declaration of purpose, the Alcohol Beverage Control Act states:

> This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people. All provisions of this division shall be

strated no connection between his complaints and the negative performance appraisal that allegedly caused him to resign.[146] The court noted that no evidence indicated that management had regarded him as a disloyal employee or a troublemaker despite his reporting activity during the three-year period between Turner's transfer and his resignation.[147] Also important to the *Turner* majority was the fact that ABI had not simply dismissed Turner's complaints out-of-hand.[148] Instead, ABI had investigated Turner's complaints and had made its own determinations that no illegal activity had taken place.[149] The court concluded that because no apparent connection was shown between the alleged ABC Act violations and Turner's 1988 performance appraisal, the only reasonable inference was that Turner's negative appraisal simply reflected a bona fide assessment of his job performance and did not implicate a fundamental public policy.[150]

V. DISSENTING OPINION

In *Turner,* Justice Kennard dissented from both the majority's decision to require an employer's actual knowledge in a constructive discharge claim,[151] and the majority's rein-

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liberally construed for the accomplishment of these purposes.

CAL. BUS. & PROF. CODE, § 23001 (West 1985).

146. *Turner,* 876 P.2d at 1034.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1034-35.

151. Turner v. Anheuser Busch, Inc. 876 P.2d 1022, 1035-43 (Cal. 1994). (per Kennard, J., dissenting, joined by Woods J. and joined in part by Mosk, J.)

Justice Mosk, joining Justice Kennard's dissent, criticized the court for abandoning the constructive knowledge component of the constructive discharge test. *Id.* at 1035. Mosk also stated that he was in accord with Justice Kennard on the question of whether ABI's illegal marketing practices in 1984 contributed to cause Turner's resignation in 1988. *Id.*

Justice Mosk, however, concurred with the majority's decision because he believed Turner did not suffer objectively intolerable conditions of employment as a matter of law. *Id.* Mosk reasoned that Turner's single "needs improvement" performance appraisal after four years of good evaluations did warrant his belief that he would subsequently receive a series of poor performance appraisals that would blot his employment record. *Id.* Furthermore, Mosk believed Turner's "damaging" admission that he had resigned for strategic reasons was further evidence that his working conditions were not "intolerable." Id. at 1035.

statement of the trial court's grant of summary judgment.[152] Instead, she argued that the courts should hold an employer responsible when proof is offered that the employer had constructive as well as actual knowledge of intolerable working conditions.[153] Furthermore, she argued summary judgment was improper since Turner had presented sufficient evidence for a jury to conclude that an orchestrated campaign to force him from his job made his work conditions objectively intolerable.[154] Finally, despite the majority's finding to the contrary, the dissent argued that Turner had indeed presented sufficient evidence to prove a causal relationship between ABI's alleged violations of the ABC Act in 1984 and Turner's 1989 resignation.[155]

A. CONSTRUCTIVE KNOWLEDGE STANDARD SUPPORTED IN LAW AND REASON

Justice Kennard disagreed with the majority's decision to require actual employer knowledge as an element of a constructive discharge claim for two reasons.[156] First, employer knowledge was not at issue in *Turner* since Turner had alleged his employers actually intended to drive him from the company.[157] Second, the actual knowledge requirement adopted in *Turner* erroneously departed from the test uniformly applied by the California appellate courts and supported by jurisprudence on both the state and federal levels.[158]

The dissent first contended that this case was an improper vehicle for modifying the standard of employer knowledge since the issue of whether ABI had constructive or actual knowledge

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152. *Turner,* 876 P.2d at 1038-43 (Kennard, J., dissenting).

153. *Id.* at 1036-38.

154. *Id.* at 1041-42.

155. *Id.* at 1042-43.

156. Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1036-38 (Cal. 1994) (Kennard, J., dissenting).

157. *Id.* at 1036.

158. *Id.* Prior to *Turner* the following California opinions had adopted the test for constructive discharge developed in Brady v. Elixer Indus., 242 Cal. Rptr. 328 (Ct. App. 1987): Rochlis v. Walt Disney Co. 23 Cal. Rptr. 2d 793, 798 (Ct. App. 1993), Soules v. Cadam, Inc. 3 Cal. Rptr. 2d 6, 10 (Ct. App. 1991), Valdez v. City of Los Angeles, 282 Cal. Rptr. 726, 735-36 (Ct. App. 1991), Zilmer v. Carnation Co., 263 Cal. Rptr. 422, 425-26 (Ct. App. 1989)

was not at issue.[159] Because Turner alleged that his supervisors had intended their actions to lead to his eventual termination, the dissent reasoned that Turner had alleged ABI had actual knowledge.[160] The issue of an employer's constructive knowledge should arise only in cases where the employee's allegedly intolerable working conditions were unknown to the employing company's management or the employee's supervisors.[161]

The dissent next contended that proof of constructive knowledge is appropriate where an employer is responsible for an employee's resignation. Kennard reasoned that if an employer is *responsible* for working conditions so intolerable they force an employee to resign, the employer has sufficient notice to be liable in a constructive discharge claim.[162] For authority, Justice Kennard cited the constructive discharge standard applied by federal courts in sexual harassment claims brought under Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII").[163] Under what Kennard characterized as the "majority rule" in Title VII cases, an employee is constructively discharged when intolerable working conditions *"for which the employer is responsible"* cause the employee to resign.[164]

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159. *Turner,* 876 P.2d at 1036 (Kennard, J., dissenting).

160. *Id.*

161. *Id.*

162. *Id.* at 1036-37.

163. *Id.* at 1036-37. Title VII of the Civil Rights Act of 1964 is codified in 42 U.S.C.S. § 2000e et seq. (1989).

164. *Turner,* 876 P.2d at 1036 (Kennard, J., dissenting; emphasis by Justice Kennard). Kennard attributes her assertion that employer "responsibility" is an element of the constructive discharge tests employed by a majority of the federal circuits to BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 260 (1992). Lindemann and Kadue cite several sexual harassment cases as authority for the proposition that employer responsibility for the intolerable conditions will support a constructive discharge claim under federal civil rights laws. *Id.* Whether the employer had any knowledge, actual or constructive, was not central to Lindemann and Kadue's analysis, however. Instead, the question explored by Lindemann and Kadue is whether an employee must necessarily prove the employer's intent to cause the employee's resignation. *Id.*

Only one case cited by Lindemann and Kadue accorded with Justice Kennard's views on employer responsibility. In Derr v. Gulf Oil Corp., the court held that employment conditions that were foreseeably intolerable to the employer would support employer responsibility for an employee's resignation. 796 F.2d 340, 344 (10th Cir. 1986). Lindemann and Kadue also cite Goss v. Exxon Office Sys., 747 F.2d 885, 887 (3d Cir. 1984), for the proposition that employer intent is not required in finding a constructive discharge. LINDEMANN & KADUE, *supra* at 260

Kennard looked to the Equal Employment Opportunity Commission's (hereinafter "EEOC") guidelines implementing Title VII for an explanation of when an employer is *responsible* for an employee's resignation.[165] The EEOC guidelines provide that an employer is responsible for sexual or racial harassment any time the employer (or its agents or supervisory employees) knew or should have known of harassment in the workplace, unless the employer can prove that it took appropriate immediate corrective action.[166] Kennard asserted that every federal appellate court that has considered this issue has found that, absent prompt remedial action, an employer with only constructive knowledge is responsible for abusive workplace conditions.[167] Furthermore, the California Fair Employment and Housing Act (hereinafter "FEHA")[168] also imposes liability on an employer who fails to take corrective action when it has actual or constructive knowledge of racial, sexual and other forms of harassment by co-workers.[169] Thus,

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n.41. The *Goss* court, however, implied that the employer's *actual* knowledge of the employee's intolerable circumstances was a prerequisite in proving constructive discharge. "The court need merely find that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." *Goss,* 747 F.2d at 888. Thus, the "element" of employer responsibility encompassing both constructive and actual knowledge cited by Kennard is not supported by Lindemann and Kadue's analysis. *See* LINDEMANN & KADUE, *supra* at 260.

165. 29 C.F.R. § 1604.1 et seq. (1993).

166. *Turner,* 876 P.2d at 1037 (Kennard, J., dissenting). 29 C.F.R. §§ 1604.11(d) (delineating employer liability for sexual harassment), 1606.8(d) (delineating employer liability for harassment because of national origin) (1993).

167. *Turner,* 876 P.2d at 1037 (Kennard, J., dissenting). The federal courts have held employers responsible for workplace harassment when the employer knew or should have known about abusive workplace conditions involving harassment based on race or sex. *See, e.g.,* Lipsett v. University of Puerto Rico, 864 F.2d 881, 900-01 (1st Cir. 1988); Kotcher v. Rosa and Sullivan Appliance Ctr, Inc. 957 F.2d 59, 63 (2d Cir. 1992); Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir. 1990); Nash v. Electrospace System, Inc., 9 F.3d 401, 403 (5th Cir. 1993); Kauffman v. Allied Signal, Inc., Autolite Div., 970 F.2d 178, 183 (6th Cir. 1992); Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317, 320 (7th Cir. 1992); Hall v. Gus Const. Co., 842 F.2d 1010, 1015 (8th Cir. 1988); Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991); Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572, 577 (10th Cir. 1990); Steele v. Offshore Shipbuilding, Inc. 867 F.2d 1311, n. 1 (11th Cir. 1989).

168. CAL. GOV'T CODE § 12900 et seq. (West 1989).

169. *Turner,* 876 P.2d at 1037 (Kennard, J., dissenting). The California Government Code provides: "[h]arassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immedi-

the dissent concluded that the constructive knowledge component of the *Brady* test for constructive discharge is supported by analogous authority under Title VII and FEHA.[170]

The dissent argued that maintaining the constructive knowledge standard was appropriate because circumstances may exist where an employer should be liable despite having only constructive knowledge. Kennard reasoned that when the hostile work environment is created by the complaining employee's co-workers or subordinates, an employer will often have only constructive knowledge.[171] Furthermore, an employer has constructive knowledge if it does not give the employee any means to complain, discourages complaints or fails to read or take employee complaints.[172] When these conditions are so obvious and pervasive that they should draw the attention of a reasonably attentive employer, then the employer has constructive knowledge.[173] Thus, Kennard argued that sound public policy and analogous legal authority support maintaining the *Brady* standard of employer knowledge.[174]

B. SUMMARY JUDGMENT IMPROPER

Justice Kennard disagreed with the majority's conclusion that Turner could not show objectively intolerable working conditions or that a nexus existed between ABI's public policy violations and Turner's resignation.[175] While Justice Kennard conceded that the evidence of Turner's intolerable working conditions was not overwhelming, summary judgment was improper since sufficient triable issues of material fact remained.[176] Specifically, the dissent contended that Turner's supervisors may still have regarded him as a disloyal employee despite the fact that a significant amount of time had passed

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ate and appropriate corrective action." CAL. GOV'T CODE § 12940(h)(1) (West Supp. 1996).

170. *Turner*, 876 P.2d at 1038 (Kennard, J., dissenting).

171. *Id.* at 1037-38.

172. *Id.* at 1038.

173. *Id.*

174. *Id.*

175. Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1038 (Cal. 1994) (Kennard, J., dissenting).

176. Id. at 1042.

between Turner complaints about statutory violations.[177] Thus, Kennard contended that the majority erred in finding that Turner's claim did not implicate public policy because he could not establish any link between his resignation and ABI's statutory violations.[178]

1. Intolerable conditions

The dissent argued that a reasonable employee might have found his employer's efforts to force him from his job or set him up for termination might be so intolerable as to compel him to resign.[179] Although Justice Kennard agreed with the majority that negative performance appraisals do not independently create the type of conditions necessary to support a constructive discharge claim, she argued that a campaign to drive an employee from employment could well meet this standard.[180]

Kennard found that Turner had presented sufficient tangible evidence to support his claim that he was driven to resign.[181] For instance, Turner had offered uncontradicted evidence that his supervisors never mentioned any of the incidents of poor performance described in Turner's 1988 performance appraisal at the time that they had allegedly occurred.[182] Since this was contrary to normal and sound personnel practices, the dissent gave credence to Turner's claim that he was being "set up" for termination.[183] Furthermore, Turner had produced evidence that ABI had used similar methods to force resignations on other occasions.[184] Kennard also found it inexplicable that Turner had suddenly become an unsatisfactory employee after four years of receiving uniformly good performance evaluations.[185]

177. *Id.* at 1043.
178. *Id.*
179. *Id.* at 1042.
180. *Id.*
181. *Turner,* 876 P.2d at 1041-42 (Kennard, J., dissenting).
182. *Id.* at 1042.
183. *Id.*
184. *Id.*
185. *Id.*

The dissent found this evidence sufficient for a trier of fact to find that ABI had, indeed, used a systematic campaign to drive Turner from his job.[186] A reasonable employee, knowing the poor evaluations would continue, eventually lead to discharge, and also might lead to reduced employment prospects in the future, might very well find the situation so intolerable as to warrant resignation, the dissent argued.[187]

2. Nexus between Turner's 1989 resignation and ABI's 1984 statutory violations

Justice Kennard contended that Turner had produced sufficient triable evidence that ABI may have forced his 1989 resignation at least partially in retaliation for his 1984 whistle-blowing activities.[188] ABI manager George Liakos may have tolerated or encouraged the illegal conduct alleged by Turner because it may have increased company sales.[189] Thus, the dissent argued, a reasonable jury could infer that Turner's supervisor's ordered his 1985 transfer to prevent him from observing any further illegal or improper activities.[190] The dissent also maintained that a jury could trace a causal sequence from Turner's initial complaints, through his continued agitation while assigned to the delivery department, and finally to the negative performance appraisal which he claimed had caused him to resign.[191] Thus, the dissent found Turner's evidence sufficient to avoid summary judgment on the issue of whether his supervisors had endeavored either to "set him up" for termination or to force him to resign.[192]

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186. *Id.*

187. *Turner,* 876 P.2d at 1042 (Kennard, J., dissenting).

188. *Id.* at 1042-43. The majority held that one reason Turner's constructive discharge claim failed was that he could not establish a nexus between his complaints about illegal activities in 1984 and his resignation in 1989. *Id.* at 1032. The court ruled that any connection between the events of 1984 and Turner's resignation was obliterated by the good performance appraisals Turner received during the interim. *Id.* Moreover, the majority found Turner's statement that he resigned because he thought he would fare better in litigation a strong indication that no connection existed. *Id.*

189. *Id.* at 1042-43.

190. *Turner,* 876 P.2d at 1042 (Kennard, J., dissenting).

191. *Id.* at 1043.

192. *Id.*

Justice Kennard, found the four-year interval between Turner's initial complaints and his eventual resignation not so temporally distant as to summarally eliminate a causal inference.[193] Whether Turner's complaints regarding the 1984 statutory violations had "marked" him as a disloyal employee was a question properly left for the jury.[194] The dissent found it entirely plausible that a legally sophisticated employer might allow some time to pass before reinstigating a campaign to force an employee to resign or be fired.[195]

Although retaliation for Turner's complaints regarding violations of union contracts and internal company policies would not have violated public policy,[196] the dissent contended that Turner's complaints may have given his superiors continuing grounds to regard him as a disloyal employee and troublemaker.[197] Thus, Turner's belief that his supervisors were attempting to force him from the company through adverse performance appraisals was amply supported by the evidence.[198]

To demonstrate the required "nexus," Kennard argued, Turner need only prove that his December 1988 performance appraisal was given partially in retaliation for his opposition to statutory violations in 1984.[199] However, if the 1988 performance appraisal was given solely in retaliation for improper practices that did not involve statutory violations, Kennard would agree with the majority that Turner's constructive discharge did not violate a public policy.[200] In Kennard's view, however, the potentially mixed motives of Turner's supervisors

193. *Id.* at 1043. The majority opinion did not dispute that giving gifts to retailers and encouraging employees to remove competitors' advertisements violated the Alcohol Beverage Control Act. *Id.* at 1042. The majority also did not dispute that discharging an employee in retaliation for opposition to such activities would have violated public policy. *Id.*

194. *Turner,* 876 P.2d at 1043 (Kennard, J., dissenting).

195. *Id.*

196. *Id.* at 1042, n. 7. Justice Kennard agreed with the majority's conclusion that violations of collective bargaining agreements and internal company policies did not violate fundamental public policy. *Id.*

197. *Id.* at 1043

198. *Id.*

199. *Turner,* 876 P.2d at 1042-43 (Kennard, J., dissenting).

200. *Id.*

presented an issue of material fact properly left to the trier of fact.[201]

VI. CRITIQUE

The *Turner* court erred in reinstating the trial court's summary judgment order in favor of ABI because the majority incorrectly decided or refused to resolve three triable issues of material fact.[202] First, the court incorrectly decided as a matter of law that Turner's supervisors did not engage in a campaign to force him from his job even though Turner had produced sufficient evidence to warrant a trial on the issue of his supervisor's motives.[203] Second, the court never reached the issue of whether such a campaign might have created intolerable circumstances since the court incorrectly found that Turner's supervisors did not attempt to coerce or harass him to resign.[204] Finally, the court improperly decided as a matter of law that ABI did not give Turner unfavorable performance appraisals in retaliation for his complaints about violations of the ABC Act in 1984 and thus did not implicate fundamental public policy.[205]

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201. *Id.* at 1043.

202. Turner v. Anheuser-Busch, Inc., 876 P.2d 1022 (Cal. 1994). The California Code of Civil Procedure provides:

> The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

Cal. Code Civ. Proc. § 437c(c) (West 1995). Thus, a defendant moving for summary judgment must show facts negating all causes of action on all theories contained in the complaint. Miles Laboratories, Inc. v. Superior Court, 184 Cal. Rptr. 98, 102 (1982). Because summary judgment is seen as a drastic remedy, the court should resolve doubts about the propriety of granting the motion in favor of the party opposing the motion. Rowland v. Christian, 443 P.2d 561, 563 (Cal. 1968).

203. *See infra* Section IV.A. for further discussion.

204. *See infra* Section IV.B. for further discussion.

205. *See infra* Section IV.C. for further discussion.

These errors are significant because they demonstrate the *Turner* majority's failure to recognize that an employer might use fabricated performance appraisals to force an employee to resign, or, alternatively, to justify a wrongful discharge. Furthermore, courts will now likely find that a whistle-blowing employee's constructive discharge was unrelated to the employee's complaints if sufficient time has passed between the complaints and the forced resignation. Thus, employees facing a similar situation are likely doomed to adverse judgment as a matter of law since they will be unable to prove the required "nexus"[206] between their complaints and their forced resignation.

A. SUMMARY JUDGMENT WAS IMPROPER BECAUSE A TRIABLE ISSUE OF MATERIAL FACT REMAINED AS TO WHETHER ABI MANAGERS USED FABRICATED PERFORMANCE APPRAISALS TO FORCE TURNER'S RESIGNATION

With very little discussion, the *Turner* majority dismissed Turner's claim that his 1988 performance appraisal had been part of a concerted effort to orchestrate his discharge or resignation.[207] The court stated that Turner's claim amounted to nothing more than an attempt to "weave unrelated and disjointed events together into an insidious pattern" which quickly unraveled under the circumstances.[208] Furthermore, the court found that Turner had presented insufficient evidence to prove that any ABI managers had regarded Turner as a disloyal employee.[209] The court also noted that the ABI managers responsible for Turner's earlier negative evaluations were no longer on the scene.[210] Moreover, the prompt investigation of Turner's complaints undertaken by ABI further dispelled any notion there was a concerted effort to harass Turner.[211] The court also found that Turner had resigned voluntarily for strategic reasons and thus could not show that his supervisors had coerced or compelled him to leave ABI.[212] The court found the

206. *Turner,* 876 P.2d at 1032.
207. Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1032 (Cal. 1994).
208. *Id.*
209. *Id.* at 1034.
210. *Id.*
211. Id. at 1034.
212. *Turner,* P.2d at 1032. Turner admitted resigning when he did because he

favorable performance ratings Turner had received during the period of more than three years between the events of 1984 and his 1988 negative performance appraisal strong evidence that no mischief was afoot.[213] The court concluded that Turner's 1988 negative evaluation could reflect only a bona fide assessment of Turner's job performance and could not have constituted an attempt at reprisal.[214]

The majority's examination of the facts, however, failed to sufficiently address the contradictory evidence offered by Turner to show a genuine issue as to whether Turner's negative appraisals objectively evaluated Turner's performance or whether ABI managers had used them to "set up" Turner for discharge.[215] In contrast, Justice Kennard's dissent correctly concluded that Turner had produced sufficient evidence to create a triable issue of material fact and thus avoid summary judgment.[216] Based on the evidence presented by Turner, a jury could have found that ABI had engaged in conduct designed to force to Turner to resign or to "set him up" for discharge.[217]

In support of his claim, Turner presented evidence that the unfavorable performance appraisals in both 1984 and 1988 came on the heels of his complaints about improper practices at ABI.[218] Turner claimed that he did not deserve the unfavorable ratings since his performance at ABI had been of consistently high quality.[219] Moreover, Turner argued that his supervisors' failure to discuss instances of poor performance with him when they occurred was further proof that his super-

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thought his "chances would be better" in future litigation if he preempted his discharge. *Id.*

213. *Id.*

214. *Id.* at 1034-35.

215. *Id.* at 1041-42 (Kennard, J., dissenting). Justice Kennard argued that Turner had produced sufficient evidence to show that his supervisors had engaged in a campaign to force him from his job. *Turner,* 876 P.2d at 1041-42 (Kennard, J., dissenting). Any evidence supplied by the defendants, Kennard asserted, simply established the existence of a triable issue of fact. *Id.*

216. *See id.* In reviewing a grant of summary judgment, the court must consider the evidence in the light most favorable to the party opposing summary judgment. *Molko v. Holy Spirit Ass'n,* 762 P.2d 46, 63 (Cal. 1988).

217. *See supra* note 218.

218. *Turner,* 876 P.2d at 1042 (Kennard, J., dissenting).

219. *Id.*

visors had been intent on forcing his departure from ABI since such conduct was not in line with normal personnel practices.[220] Turner also recounted how ABI had retaliated against another employee (Van Hoy) for complaining about improper activities on the job.[221] Thus, a trier of fact could have inferred that ABI had given Turner the negative performance appraisals to further some illegitimate goal and not objectively assess his job performance.[222]

Furthermore, Turner produced anecdotal evidence that ABI had used negative performance appraisals in the past to force other employees to resign their positions.[223] Turner described three instances where ABI used fabricated performance appraisals to encourage specific employees to resign.[224] Thus, Turner presented at least some evidence that ABI supervisors were inclined to use fabricated performance appraisals to force employees to resign.

Even though different managers had appraised Turner in 1984 and 1988, this fact should not have undercut Turner's claim because each manager reported to the same individual general manager.[225] While different individuals supervised Turner at each department, each supervisor, in turn, reported to George Liakos, the general manager.[226] Liakos was not only in Turner's direct chain of command, but was also involved in all of Turner's appraisals and was responsible for Turner's 1985 transfer.[227]

As Justice Kennard correctly maintained, a jury could have concluded that Liakos transferred Turner to the delivery department in 1985 so that Turner would not continue to draw attention to profitable but illegal activities occurring in the

220. *Id.*
221. *Id.* at 1041 n. 6.
222. *See id.* at 1042. Justice Kennard found sufficient evidence for a trier of fact to determine that Liakos, Schmitt and Garcia had conspired to terminate Turner to prevent him from continuing his complaints regarding violations of the ABC Act and ABI's internal policies. *Id.*
223. *Turner*, 876 P.2d at 1041 n.6 (Kennard, J., dissenting).
224. *Id.*
225. *Id.* at 1034.
226. Id. at 1040.
227. *Id.* at 1039-40.

sales department.[228] The jury could further infer that Turner's continued complaints while assigned to the delivery department led Turner's supervisors to embark on a campaign to force him to resign.[229] Moreover, the assertion that ABI managers were likely to use performance appraisals to harass employees had sufficient evidentiary support since Turner alleged that ABI had taken similar action in the past.[230]

Turner had also produced sufficient evidence to create a triable issue of fact as to whether his supervisors at ABI used his performance appraisals to force him to resign. By overlooking evidence produced by the Turner, the *Turner* majority incorrectly found Turner's appraisals to be objective performance evaluations.[231] However, even if Turner could have shown that his supervisors gave him the performance appraisals in retaliation for his complaints, Turner's supervisors' conduct would only have amounted to a constructive discharge if his working conditions had become so intolerable that he would have felt compelled or coerced to resign.[232]

B. SUMMARY JUDGMENT WAS INCORRECT BECAUSE ABI'S EFFORT TO FORCE TURNER TO RESIGN MAY HAVE BEEN INTOLERABLE

Since the *Turner* court concluded that no ABI supervisors had tried to force Turner's resignation, the majority never reached the issue of whether such a situation would be sufficiently intolerable to compel a reasonable person to resign.[233] By focusing only on minor parts of Turner's overall claim, the court incorrectly concluded that Turner's resignation was unjustified because his employment conditions were not intolera-

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228. *Id* at 1042.

229. *Turner,* 876 P.2d at 1042 (Kennard, J., dissenting).

230. *See supra* notes 224 - 227 and accompanying text for further discussion.

231. *See Turner*, 876 P.2d at 1034. The fact that Turner's performance appraisals appeared objective "on their face" and the fact that three years had passed between Turner's complaints about illegal activities and the time he received the negative performance appraisal in 1988 was sufficient for the *Turner* majority to determine that Turner's negative performance appraisal was simply a bona fide assessment of his job performance. *Id.*

232. *Id.* at 1026-27.

233. Turner v. Anheuser-Busch, Inc., 876 P.2d 1022 (Cal. 1994).

ble as a matter of law.[234] By taking this myopic view, the majority failed to consider whether an employee is justified to resign when faced with virtually certain termination in the near future.[235]

In contrast, other courts considering constructive discharge claims have found that imminent termination creates working conditions sufficiently intolerable that a reasonable person would feel compelled to resign. For example, in *Lopez v. S.B. Thomas, Inc.*,[236] an employee claimed that his employer constructively discharged him when his supervisor told him that he would be discharged in 90 days. The court held that such a statement by an employer alone suffices to present a triable issue as to whether a constructive discharge had occurred.[237] Likewise, in *Welch v. University of Texas & Its Marine Science Institute*,[238] a professor told his graduate research assistant that she would have to resign after being awarded her doctorate since the professor believed a female with an advanced degree was inappropriate for the position. The court held that the trial court had not erred in finding constructive discharge since "a reasonable person would certainly resign employment after being ordered to leave."[239]

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234. *Id.* at 1032 (concluding that Turner's resignation was voluntary and strategic, not coerced or compelled).

235. *See id.* at 1042 (Kennard, J., dissenting). Justice Kennard argued that a trier of fact could find a campaign to force an employee to resign would be objectively intolerable and could compel a reasonable employee to resign. *Id.* The majority, however, reviewed only parts of the alleged "campaign" with regard to their intolerability. *C.f.* Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 562-63, 564 (1st Cir. 1986). In *Calhoun*, the court held that the courts should focus on the overall circumstances in determining whether employment conditions are intolerable. *Id.* The court chastised the court below for applying a "divide and conquer" approach to determining intolerability. *Id.* Likewise, in *Turner*, the court divided Turner's claim of intolerable working conditions into its most tolerable elements. The court found that, alone, neither observing illegal acts, *Turner*, 876 P.2d at 1034, observing violations of ABI's internal procedures, *id.* at 1033, nor being subjected to unfavorable performance appraisals, *id.* at 1032, were sufficiently egregious to amount to intolerable circumstances. As noted by Justice Kennard in her dissent, however, Turner's claim was that these elements simply went toward proving that Turner's supervisors had engaged in a campaign to force him from his job. *Id.* at 1041-42. Thus, like the court below in *Calhoun*, the Turner court divided Turner's claim into subparts that are much easier to swallow.

236. 831 F.2d 1184, 1188 (2d Cir. 1987).

237. *Id.*

238. 659 F.2d 531, 534 (5th Cir. 1981).

239. *Id.*

Similarly, Justice Kennard's dissent recognized that the proper issue was whether an attempt to coerce an employee to resign by using deliberately fabricated performance appraisals would amount to objectively intolerable circumstances.[240] Since the degree of intolerability is measured by an reasonable-person standard, courts have recognized that the issue of whether an action or condition of employment is intolerable is normally a question of fact best left for the jury.[241] Courts have also recognized, however, that situations may exist where an employee's decision to resign is unreasonable as a matter of law.[242]

The *Turner* court held that Turner's case fell among the latter since his working conditions were not intolerable as a matter of law.[243] First, the court concluded that Turner's exposure to illegal and improper activities at the workplace was not intolerable since the nature of the conduct was not obnoxious or aggravated enough to cause a reasonable employee to resign.[244] Furthermore, the court found that Turner could not claim the illegal acts he observed in 1984 created intolerable circumstances in 1989 when Turner resigned.[245] Rather than asking whether a reasonable person would feel compelled to resign if faced with imminent dismissal, the court instead mistakenly focused on whether the illegal acts Turner witnessed or whether Turner's adverse performance appraisals *standing alone* created intolerable working conditions.[246] Al-

240. Kennard wrote:

> The question, then, is not whether one, or even two, adverse performance reviews justify an employee's decision to resign. Rather, the issue is whether a reasonable employee would find working conditions intolerable, and feel compelled to resign, when the employee's supervisors had launched a campaign to drive the employee out of the company by means of adverse performance evaluations, based on charges deliberately fabricated.

Turner, 876 P.2d at 1042 (Kennard, J., dissenting).

241. *See, e.g.*, Thomas v. Douglas, 877 F.2d 1428, 1434 (9th Cir. 1989), Soules v. Cadam, 3 Cal. Rptr. 2d 6, 11 (Ct. App. 1991), Valdez v. City of Los Angeles, 282 Cal. Rptr. 726, 733 (Ct. App. 1991).

242. *See, e.g., Soules*, 3 Cal. Rptr. at 11; *Valdez*, 282 Cal. Rptr. at 733.

243. *Turner*, 876 P.2d at 1032.

244. *Id.*

245. *Id.*

246. *See id.* (holding that Turner could not show intolerable circumstances from the evidence produced).

though the *Turner* court correctly decided that Turner's negative performance appraisals independently did not create an objectively intolerable situation,[247] the court failed to consider whether employers might use fabricated appraisals as a message to employees that they have no future with the company and thereby creating intolerable working conditions for the employee.[248]

The *Turner* court relied on *Soules v. Cadam, Inc.*[249] as support for the proposition that an employer must, from time to time, evaluate and criticize its employees if it wishes to function as an efficient business enterprise.[250] In *Soules*, the employee claimed she was constructively discharged because she was given a negative performance appraisal accompanied by a demotion.[251] *Soules* is distinguishable, however, because the Soules' employer had not intended the negative appraisal to cause Soules to resign.[252] Unlike the plaintiff in *Soules,* Turner alleged that his supervisors had intended to use the appraisal to force him from the company and not as part of a remedial company policy designed to promote workplace efficiency.[253] Thus, the court failed to address the central issue framed by Turner: whether imminent discharge is sufficiently intolerable to cause a reasonable employee to resign.

Although the majority opinion is unclear as to whether a constructive discharge of an employee through the use of fabricated performance appraisals is possible,[254] the *Turner* decision provides unscrupulous employers legal ammunition to use performance appraisals in a similar manner. Under the *Turner* decision, employers may be able to avoid litigating the merits

247. *Id* at 1032. The *Turner* majority noted that "every employer must on occasion [use performance appraisals to] review, criticize, demote, transfer, and discipline employees" in order to properly manage its business. *Id* (citations omitted).

248. *See Turner,* 876 P.2d at 1042. (Kennard, J. dissenting). Kennard contended that Turner produced sufficient evidence that his supervisors engaged in such underhanded tactics to force him from his job. *Id.*

249. 3 Cal. Rptr. 2d 6 (1991).

250. *Turner,* 876 P.2d at 1032; *Soules,* 3 Cal. Rptr. 2d at 12.

251. *Id.* at 9.

252. *Id.* In fact, after the employee had resigned, the employer informed her by mail that she was "absolutely welcome" to return to her job. *Id.*

253. *See Turner,* 876 P.2d at 1041 (Kennard, J., dissenting).

254. *See id.* at 1036 (Mosk J., concurring and dissenting).

of constructive discharge claims where an employee claims the employer has fabricated performance appraisals to force a resignation if the appraisals themselves appear facially valid.[255]

C. SUMMARY JUDGMENT WAS IMPROPER BECAUSE ABI VIOLATED PUBLIC POLICY BY DISCHARGING TURNER IN RETALIATION FOR HIS COMPLAINTS

The majority incorrectly found that Turner had not presented sufficient evidence to create a triable issue of fact concerning whether his supervisors constructively discharged him in retaliation for his complaints about illegal activity he observed in 1984.[256] However, assuming Turner's discharge was in retaliation for his complaints, the question then becomes whether such a retaliatory discharge would have violated fundamental public policy.[257]

1. The *Turner* court incorrectly decided that ABI did not discharge Turner in retaliation for his complaints in 1984

Turner claimed that his supervisors deliberately fabricated his performance appraisals in retaliation for his history of complaints about allegedly improper and illegal activities he witnessed while employed at ABI.[258] The court, however, ruled that Turner's allegation of retaliation fails because Turner did not resign until approximately five years after the occurrence of the only illegal activities that may have implicated public policy.[259] The dissent correctly noted that the passage of time between Turner's original reporting activities and his eventual resignation should not have been sufficient to elimi-

255. *See id.* at 1034-35 (majority op.) Because Turner's 1988 performance appraisal appeared valid on its face and because it was given nearly three years after Turner's complaints about illegal activities, the court found that it reflected a bona fide assessment of Turner's performance on the job. *Id.*

256. *See* Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1041-42 (Cal. 1994) (Kennard, J., dissenting).

257. *See id.* at 1043.

258. *Id.* at 1041-42.

259. *Id.* at 1034.

nate any causal relationship as a matter of law.[260] Turner produced evidence of a causal sequence beginning with his reporting of illegal activities in 1984, leading to his transfer to the delivery department in 1985, his continuing reporting activities while at the delivery department, and finally culminating in the final fabricated performance appraisal in late 1988.[261] Thus, although the statutory violations giving rise to the public policy element of Turner's constructive discharge claim were somewhat removed in time from Turner's eventual resignation, a jury could have decided as fact that a causal relationship did indeed exist.[262]

2. ABI violated public policy by retaliating against Turner

Even if Turner had created a triable issue of fact as to whether his supervisors used fabricated performance appraisals to drive him from his job, summary judgment would still have been proper if Turner could not show that his discharge violated some fundamental public policy.[263] An employee has a cause of action for tortious wrongful discharge if the employee is fired for performing an act that public policy would encourage, or for refusing to do something that public policy would condemn.[264] However, difficulties arise in determining whether a claim genuinely involves public policy or a lesser controversy.[265] Accordingly, the policy in question must not only affect society at large, but must also be delineated in constitutional or statutory provisions.[266] Thus, to avoid summary judgment, Turner was required to show, at a minimum, that his discharge violated some public policy set out in a statute or constitution.[267]

As noted by both the majority *and* the dissent, the only

260. *See id* at 1043.
261. *Id.*
262. *See Turner,* 876 P.2d at 1043 (Kennard, J., dissenting).
263. *See supra* notes 63 - 75 for further discussion of public policy in the constructive discharge context.
264. Gantt v. Sentry Insurance, 824 P.2d 680, 684 (Cal. 1992); Foley v. Interactive Data Corp., 765 P.2d 373, 379 (Cal. 1988).
265. *Gantt,* 824 P.2d at 687.
266. *Id.* at 684, 687.
267. *Turner,* 876 P.2d at 1032-33.

potential public policy element of Turner's claim arises out of his complaints regarding allegedly illegal activities observed at ABI in 1984.[268] The majority chastised Turner for failing to identify violations of specific statutory or constitutional provisions that might have implicated fundamental public policy.[269] The majority maintained that Turner's reference to only one provision of the ABC Act[270] put both ABI and the court "in the position of having to guess at the nature of the public policies involved, if any."[271] Thus, the court found Turner's claim "plainly insufficient" to create an issue of fact as to whether public policy had been violated.[272]

The majority further ruled that even if Turner had had statutory support, merely witnessing violations of the ABC Act did not implicate public policy.[273] The court found Turner's claim rested on an allegation of whistle-blower harassment since Turner could not show his supervisor's discharged him for refusing to participate in any illegal act.[274] However, the court also found that Turner could not show his employers forced his resignation in retaliation for his complaints because his resignation in 1988 was too far removed from the allegedly illegal acts of 1984.[275]

In so holding, the majority did not consider whether ABI may have violated public policy by constructively discharging Turner in retaliation for his complaints about the alleged ABC Act violations.[276] The majority opinion did not discuss whether a retaliatory discharge for complaints to one's *own* employer regarding illegal acts would violate public policy. Although the

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268. *Id.* at 1033-34 (majority op.), 1042 (Kennard, J., dissenting).

269. *Id.* at 1033 (majority op.).

270. *See supra* notes 13, 14 and 144 for complete discussion of the statutory violations alleged by Turner and those considered by the majority.

271. *Turner,* 876 P.2d at 1033.

272. *Id.*

273. *Id.* at 1034.

274. *Id.*

275. *Id.*

276. *See id.* Because the *Turner* majority found Turner's resignation too far removed from any alleged violations of public policy to justify a trial on the merits, *Turner,* 876 P.2d at 1034, the court never reached the issue of whether an orchestrated campaign to force an employee to resign, such as alleged by Turner, would have violated public policy.

majority agreed that violations of the ABC Act might implicate a fundamental public policy,[277] the court rejected Turner's public policy claim in the "classic *Tameny*[278] sense" because ABI never asked Turner to participate in any illegal activity and did not harass him for fulfilling any legal duty or for exerting any statutory prerogative.[279] Therefore, the court held Turner's only potential claim was that he was discharged in retaliation for reporting an alleged statutory violation.[280] The court's finding that insufficient evidence existed to show a nexus between the statutory violations of the 1984 and Turner's eventual resignation necessarily precluded any discussion of whether retaliation for Turner's complaints might have violated public policy.[281]

In a similar situation, the Court of Appeal in *Blom v. N.G.K. Spark Plugs (U.S.A.), Inc.,*[282] considered whether discharging an employee in retaliation for his attempts to rectify his employer's violations of the law violated public policy.[283] In *Blom,* N.G.K. Spark Plugs had hired Blom as personnel manager and had given him instructions to "Americanize" the corporation's disproportionately Japanese staff.[284] However, when Blom attempted to comply with FEHA[285] and Title VII,[286] N.G.K. Spark Plugs terminated Blom in retaliation for his efforts.[287] The court held that the legislative purpose underlying FEHA and Title VII would be undermined if employers were allowed to terminate employees for "protesting working conditions which they reasonably believe constitute a hazard to their own health or safety, or the health or safety of others."[288] The court ruled that achieving the statutory objective

277. *Id.*
278. Tameny v. Atlantic Richfield Co. 610 P.2d 1330 (Cal. 1980) (holding that an employer who discharges an employee who refuses to participate in an illegal price fixing scheme is liable in tort).
279. *Turner,* 876 P.2d at 1033-34.
280. *Id.*
281. *See id.*
282. 4 Cal. Rptr. 2d 139 (Ct. App. 1992).
283. *Id.* at 143.
284. *Id.* at 140.
285. CAL. GOV'T CODE § 12900 et seq. (West 1989).
286. 42 U.S.C.S. § 2000e et seq. (1989).
287. *Blom,* 4 Cal. Rptr. 2d at 140.
288. *Id.* at 143.

of a safe and healthy work environment for all employees requires that employees be free to call their employer's attention to illegal practices within the employee's knowledge.[289] Making the employer aware of illegal activities and giving the employer the opportunity to take corrective action, the court held, is important to effectuating the statutory intent.[290] Thus, a common law action in tort arises when an employer discharges an employee in retaliation for resisting employer violations of the law that secure fundamental public policies.[291]

Likewise, Turner's discharge in retaliation for his complaints to his supervisors about the illegal activity he observed in 1984 also violated public policy.[292] In enacting the ABC Act, the California Legislature declared that the subject matter of the Act "involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people."[293] Therefore, the termination of an employee for attempting to effect the purposes of the ABC Act must also implicate a fundamental public policy.[294] Thus, because Turner presented sufficient evidence that ABI discharged him in retaliation for his complaints about illegal conduct he observed in 1984, Turner's discharge must also have violated public policy.

VII. CONCLUSION

In *Turner v. Anheuser-Busch, Inc.*, the California Supreme Court held that Turner, an executive employee, could not maintain his claim for constructive wrongful discharge as a matter of law.[295] The *Turner* court's finding that the mere passage of time had dispelled any causal relationship between Turner's reporting activities in 1984 and his resignation in 1989 bodes ill for employees working for legally savvy employers. As Justice Kennard noted in her dissent, a legally sophisti-

289. *Id.*
290. *Id.*
291. *Id.*
292. *See id.* at 1042-43 (Kennard, J., dissenting).
293. CAL. BUS. & PROF. CODE § 23001(West 1985), *see supra* note 145 for the legislature's declaration of purpose included in the ABC Act.
294. *See Turner*, 876 P.2d at 1042-43 (Kennard, J., dissenting).
295. Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1024 (Cal. 1994).

cated employer might elect to allow some interval of time to pass before taking illicit action against an employee it regards as disloyal.[296] Thus, in a claim for whistle-blower harassment similar to Turner's, an employer might choose to allow some time to pass before engaging in any activity designed to constructively discharge the employee. While a court might recognize that the employer would have violated fundamental public policy had the discharge taken place earlier, the court would feel constrained by *Turner* to grant a motion for summary judgment if there were any question whether the employee can prove a nexus between the reporting activity and the discharge.

This note has argued that the California Supreme Court's reinstatement of the trial court's summary judgment order was flawed since it failed to recognize three material issues of fact presented by Turner.[297] First, Turner produced evidence that his supervisors engaged in a campaign to use fabricated performance appraisals to force Turner to resign or to "set him up" for eventual discharge. Second, since the court found Turner's employer did not try to force Turner's resignation, the court failed to reach the issue of whether such action would constitute intolerable circumstances. Finally, the court held that Turner's claim failed to state a public policy claim since it incorrectly found his resignation was too remote in time for him to show any connection between his whistle-blowing activity and his eventual discharge. As a result of the *Turner* decision, an unscrupulous employer may use fabricated performance appraisals to force the resignation of an employee with near impunity. After *Turner*, an employer need only allow a significant amount of time to pass between an incident implicating public policy and the termination of an employee to avoid incurring liability for a constructive wrongful discharge.

Joseph A. Meckes[*]

296. *Turner*, 876 P.2d at 1043 (Kennard, J., dissenting).

297. *See supra* notes 202 - 295 and accompanying text.

* Golden Gate University School of Law, Class of 1997. Thanks to Wendy Wilbanks for her tireless and admirable dedication.