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Choosing a Standard for Constructive Discharge in Title VII Litigation

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NOTES

CHOOSING A STANDARD FOR CONSTRUCTIVE DISCHARGE IN TITLE VII LITIGATION

INTRODUCTION

This Note examines the concept of constructive discharge in the context of litigation under Title VII of the Civil Rights Act of 1964.[1] This issue commonly arises in employment discrimination proceedings.[2] Typically, the former employee claims that his resignation was involuntary because it resulted from discriminatory[3] conditions imposed by the defendant employer.[4] All but one[5] of the

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1 Civil Rights Act of 1965, tit. vii, §§ 702-18, 42 U.S.C. §§ 2000e to 2000e-17 (1982) [hereinafter referred to as title VII].

2 The procedural processes and requirements applying to initiation of private suits under title VII are set forth in § 706 of the Act. 42 U.S.C. § 2000e-5. For a more detailed exposition, see generally B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 933-1337 (2d ed. 1983).

3 Section 703 of title VII provides:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1982).

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

5 The Seventh Circuit has not adopted either standard in the context of a title VII action. In a suit for damages under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), the Seventh Circuit utilized the reasonable employee standard in assessing plaintiff's claim that his constructive discharge from a position as a policeman deprived him of property without due process of law, thereby violating the fourteenth amendment. *See* Parrett v. City of Connersville, Ind., 737 F.2d 690, 694 (7th Cir. 1984) (court favorably cited two leading title VII cases applying reasonable employee standard), *cert. dismissed*, 105 S. Ct. 828 (1985). Within this same Seventh Circuit, however, district courts have used both the reasonable constructive discharge claims brought under title VII. *See*

circuit courts of appeals have adopted one of two standards for resolving claims of constructive discharge in the context of title VII litigation. The First,[6] Second,[7] Third,[8] Fifth,[9] Sixth,[10] Ninth,[11] Eleventh,[12] and District of Columbia[13] Circuit Courts of Appeals hold that a plaintiff has established a constructive discharge when he has shown that the conditions of employment were sufficiently intolerable that a reasonable employee would have resigned.[14] The Fourth,[15] Eighth,[16] and Tenth Circuit[17] Courts of Appeals hold that in addition to demonstrating intolerable conditions, a plaintiff must show that her employer had the specific intent of coercing her resignation.[18]

This Note first traces the development of the doctrine of con-

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Michaelis v. Polk Bros., Inc., 545 F. Supp. 109, 116-17 (N.D. Ill. 1982) (evidence insufficient to show defendant "imposed . . . conditions . . . for the purpose of forcing [employee] to resign"); Scott v. Océ Indus., Inc., 536 F. Supp. 141, 148 (N.D. Ill. 1982) (defendant made plaintiff's "working conditions so difficult and unpleasant that a reasonable person in her position would have felt compelled to resign"). The *Michaelis* court did not discuss the *Scott* decision.

6 Alicea Rosado v. Garcia Santiago, 562 F.2d 114 (1st Cir. 1977) (applying reasonable employee standard to find employee's transfer insufficient to constitute constructive discharge).

7 Pena v. Brattleboro Retreat, 702 F.2d 322 (2d Cir. 1983) (applying reasonable employee standard to find change in job responsibilities with no loss of pay or change of title insufficient to constitute constructive discharge).

8 Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888 (3d Cir. 1984) ("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.").

9 Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980). See *infra* notes 81-102 and accompanying text for an extended discussion of *Bourque*.

10 Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982) (applying reasonable employee standard to find "environment of sexual bias" sufficient to constitute constructive discharge).

11 Heagney v. University of Wash., 652 F.2d 1157 (9th Cir. 1981) (applying reasonable employee standard to find unequal pay alone insufficient to constitute constructive discharge).

12 Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (adopting reasonable employee standard and holding hostile and offensive working environment sufficient to constitute constructive discharge).

13 Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981). See *infra* note 109 for a discussion of *Clark*.

14 Courts frequently refer to this as the "objective standard." *See, e.g., Goss*, 747 F.2d at 887. This Note will refer to the objective standard as the "reasonable employee" standard.

15 EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983) (evidence demonstrating employer urged plaintiff not to resign proved employer did not constructively discharge plaintiff), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984).

16 Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981) (equally harsh treatment of all employees rebuts inference that employer intended to force plaintiff to resign).

17 Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975). For an extended discussion of *Muller*, see *infra* notes 32-45 and accompanying text.

18 Because this standard primarily examines an employer's intent, it is sometimes

structive discharge and sets forth the two standards that courts have used to decide this issue, identifying both their common point of origin and their subsequent divergence. This Note then critically examines which standard is more appropriate for use in title VII actions in light of the policies underlying title VII and the employer and employee interests at stake in constructive discharge cases. This Note concludes that the reasonable employee standard is more appropriate. Adoption of a uniform standard would reduce the potential for identical sets of facts producing different results. Finally, such a standard would help clarify the duties owed by both employer and employee in their employment relationship.

I
THE DOCTRINE OF CONSTRUCTIVE DISCHARGE

A. Constructive Discharge Under the NLRA

The immediate precursor of the doctrine of constructive discharge under title VII can be found in cases arising under the National Labor Relations Act (NLRA).[19] The NLRA expressly prohibits employers from engaging in certain unfair labor practices, such as interfering with employees' rights to form labor organizations and bargain collectively.[20] The NLRA includes discrimination as an unfair labor practice but does not prohibit all discrimination arising out of an employment relationship.[21] Instead, the Act proscribes employer discrimination "in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization."[22] Concomitantly, inquiry into the employer intent that led to the alleged discriminatory act is limited: "[I]n most

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referred to as the "subjective standard." This Note will refer to this standard as the "employer intent" standard.

19 National Labor Relations Act, 29 U.S.C. §§ 151-69 (1982).

20 *Id.* § 158(a)(1).

21 Radio Officers Union v. NLRB, 347 U.S. 17, 43 (1954) (§ 8(a)(3) does not outlaw all discrimination, only discrimination that encourages or discourages membership in labor organization).

Title VII and the NLRA differ in terms of the underlying policies and the footing of the parties, as the NLRA presupposes that the employee is a union member in most instances, whereas title VII does not. These differences weaken the argument that the National Labor Relations Board standard for assessing whether there has been a constructive discharge should be adopted wholesale into title VII. *See infra* note 58.

22 29 U.S.C. § 158(a)(3). For accounts of how the NLRA has interpreted the statutory language involving "discrimination," see Shieber, *Section 8(a)(3) of the National Labor Relations Act; A Rationale: Part I. Discrimination*, 29 LA. L. REV. 46 (1968) (discriminatory act must impinge on NLRA § 7 employee rights (29 U.S.C. § 157), although treatment need not differentiate among workers); Ward, *"Discrimination" Under the National Labor Relations Board*, 48 YALE L.J. 1152 (1939) (criticizing Board for reading NLRA protection of union activities too broadly, and maintaining that § 8(a)(3) protects employees only against employer's actions that discourage or encourage union membership).

cases, the employer's reason for discriminating will determine whether he has committed an unfair labor practice. If the discrimination is motivated by an anti-union purpose and has the foreseeable effect of either encouraging or discouraging union membership, it violates section 8(a)(3)."[23] Absent this showing, the employer may discharge an employee for any reason.[24]

Recognizing that an employer may effect a discharge without formally firing the employee, the National Labor Relations Board (NLRB) has long utilized the doctrine of constructive discharge. If employers were permitted to impose unpleasant working conditions to force union employees out, they could accomplish indirectly what the NLRA forbids them to do directly.

In *Crystal Princeton Refining Co.*[25] the Board articulated the constructive discharge standard as follows:

> There are two elements which must be proven to establish a "constructive discharge." First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.[26]

The second element requires a showing that the employer imposed the burdens because of the employee's union activities. This requirement recognizes that the NLRA only proscribes discrimination motivated by an anti-union animus.[27]

The first element of the NLRB's standard represents the basic concept underlying the constructive discharge doctrine, that the employee must demonstrate that an imposition of intolerable conditions prompted his resignation. This first element, however, encompasses *two* distinct ideas. First, the employer must impose the conditions with the requisite intent. Second, the conditions must be of a certain character. The standard does not indicate, however, from whose perspective one should gauge whether the conditions were intolerable. Thus, a court applying the first element of the NLRB standard to a claim of constructive discharge must answer two questions:

(1) whether, in order to have a constructive discharge, the em-

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23 1 THE DEVELOPING LABOR LAW 187 (C. Morris 2d ed. 1983).

24 *See* Midwest Regional Joint Bd., Amalgamated Clothing Workers v. NLRB, 564 F.2d 434, 440 (D.C. Cir. 1977) ("Absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws."). Other statutory provisions or contract rights, however, may circumscribe an employer's freedom to discharge an employee.

25 222 N.L.R.B. 1068 (1976).

26 *Id.* at 1069.

27 *See supra* note 23 and accompanying text.

> ployer's acts (or omissions) must have been taken with the express intention of forcing a resignation, and (2) what criterion should be used to determine whether the conditions actually prompting the resignation were . . . so intolerable as to justify deeming the resignation an involuntary one.[28]

Courts adopting the doctrine of constructive discharge for application in title VII cases have also faced these questions, as indicated by the following two cases.

B. Absorption into Title VII

Two of the earliest court of appeals cases[29] to apply the doctrine of constructive discharge in title VII litigation were *Muller v. United States Steel Corp.*[30] and *Young v. Southwestern Savings & Loan Association.*[31] Although the courts in these two cases appeared to formulate very similar standards for applying the doctrine, their use of these standards differed. In effect, the *Muller* and *Young* courts began to reach different answers concerning whether the employee must show that the employer intended to force the employee to resign. These different analyses foreshadowed the eventual split of authority on the appropriate standard for assessing a claim of constructive discharge.

1. Muller v. United States Steel Corp.

In *Muller,* the Spanish-American plaintiff alleged that he was a victim of national origin discrimination.[32] He claimed that the defendant corporation's selection process for supervisory positions in its pipe mill had a disparate impact[33] on him and other Spanish-

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28 Beye v. Bureau of Nat'l Affairs, 59 Md. App. 642, 651, 477 A.2d 1197, 1202 (Md. Ct. Spec. App., *cert. denied,* 301 Md. 639, 484 A.2d 274 (1984).

State court treatment of constructive discharge is beyond the scope of this Note.

29 The EEOC adopted the doctrine of constructive discharge before any courts of appeals had passed on the question. *See, e.g.,* EEOC Decision No. 72-2062, EEOC Dec. (CCH) ¶ 6366, at 4664, 4666 (June 22, 1972) ("Thus [the employee's] resignation was directly related to [the employer's] unlawful employment practices, and we conclude that . . . the resignation was a foreseeable consequence of these unlawful practices and constitutes a constructive discharge . . . .").

30 509 F.2d 923 (10th Cir.), *cert. denied,* 423 U.S. 825 (1975).

31 509 F.2d 140 (5th Cir. 1975).

32 509 F.2d at 926.

33 The Supreme Court explained the concept of disparate impact as follows:

> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.

International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977).

American employees.[34] During his employment as a production worker from 1968 to 1969, Muller twice filed charges with the state agency handling discrimination disputes,[35] contending that the corporation's failure to promote him to a position as a spell foreman was discriminatory. The state agency took no action on Muller's charges. Later in 1969 the mill closed, and Muller was reassigned as a laborer. Muller resigned his position in Augnst 1969 and brought suit under title VII.[36]

The district court determined "that the promotional system violated Title VII in that it lent itself to discrimination and was not shown to have been the product of business necessity."[37] The court also found that Muller had been constructively discharged because his "resignation was not a matter of free choice; . . . it resulted from discrimination."[38] In reaching its first conclusion, that the promotion system violated title VII, the court relied on statistics adduced by Muller. These statistics showed that although Spanish-Americans were not underrepresented in the defendant's work force, no Spanish-American had become a spell foreman since 1963.[39] The district court granted injunctive relief and awarded Muller back pay and attorney's fees.

The Court of Appeals for the Tenth Circuit affirmed the district court's findings that the corporation's promotion process had a disparate impact and that the corporation had not shown any business necessity sufficient to justify its practice.[40] The Tenth Circuit, however, reversed the district court's finding that the corporation had constructively discharged Muller.[41]

In so doing, however, the court ratified the use of constructive discharge in title VII actions.[42] The court's analysis indicated that

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34 509 F.2d at 927.

35 *Id.* at 925.

36 *Id.*

37 *Id.* The district court decision was unreported.

38 *Id.*

39 *Id.*

40 *See id.* at 926-28 (discussion of corporation's promotion practice that had disparate impact on Spanish-Americans); *id.* at 928-29 (analysis of whether business necessity justified use of employment practice having discriminatory impact).

41 *Id.* at 929. The exact grounds for reversal are unclear. The court stated that "there [was] a dearth of evidence to show a deliberate effort to make things difficult for the employee so as to bring about his separation." *Id.* The appeals court's statement suggests that the district court had used an erroneous standard for a showing of constructive discharge; alternatively, the statement may mean that the district court utilized the proper standard but the evidence was insufficient to support a finding of constructive discharge.

42 The ratification, however, hardly constituted a ringing endorsement. After noting the development of constructive discharge as a labor law doctrine, the most positive statement the court could make regarding its application in the instant case was, "We are not saying that this constructive discharge doctrine which developed in labor cases is

to prevail on a constructive discharge claim a plaintiff must show that the employer acted with the specific intent of forcing the employee to resign. The court found that the company's actions "were not designed to coerce [Muller's] resignation."[43] The court cited several NLRB constructive discharge cases to justify its determination that an employee must demonstrate the employer's specific intent to compel an involuntary resignation.[44] The Tenth Circuit noted that in each NLRB case "there was extrinsic evidence to establish that an effort had been made to render the job . . . unattractive and unpleasant."[45] Although the *Muller* court provided useful gnidance concerning the quantum of evidence necessary to show intent to force a resignation, it barely addressed the question of what measure should apply in assessing whether the conditions of employment were intolerable.

2. Young v. Southwestern Savings & Loan Association

Young began working as a teller at a branch office of the defendant employer's bank in February 1971.[46] Although she was aware when she accepted the position that Southwestern required its employees to attend monthly staff meetings, Young did not discover that the meetings began with a brief religious exercise, conducted by a Baptist minister, until she attended her first meeting.[47] Young, an atheist, attended the February and March meetings without complaint, but then decided not to attend any other meetings.

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inapplicable to civil rights cases." *Id.* Moreover, the appeals court's statement might be dictum because the relevant issue on appeal was "the holding that there was a constructive discharge." *Id.* at 926. Thus, the court may have decided that regardless of whether the invocation of the constructive discharge doctrine is proper in title VII cases, the facts of the case did not warrant a finding of constructive discharge. In any event, later Tenth Circuit decisions cite *Muller* for its articulation of the constructive discharge doctrine. *See* Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982); Coe v. Yellow Freight Sys., Inc., 646 F.2d 444, 454 (10th Cir. 1981).

43 509 F.2d at 929. The court's citation to Colorado Civil Rights Comm'n v. State, 30 Colo. App. 10, 488 P.2d 83 (1971), is significant because the Colorado court's discussion of constructive discharge appeared to adopt a standard that did not consider the employer's specific intent. "The fact of [constructive] discharge does not depend upon the use of formal works of firing. The test is whether sufficient words or actions by the employer 'would logically lead a prudent person to believe his tenure had been terminated.'" *Id.* at 16, 488 P.2d at 86 (quoting NLRB v. Trumbull Asphalt Co., 327 F.2d 841 (8th Cir. 1964)). Thus, the *Muller* court had before it an alternative "prudent person" standard when it adopted the "employer intent" standard for constructive discharge.

44 509 F.2d at 929. Specifically, the court cited NLRB v. Century Broadcasting Corp., 419 F.2d 771 (8th Cir. 1969); NLRB v. Tennessee Packers, Inc., Frosty Morn Div., 339 F.2d 203 (6th Cir. 1964); and Steel Indus., Inc. v. NLRB, 325 F.2d 173 (7th Cir. 1963).

45 509 F.2d at 929.

46 Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 141 (5th Cir. 1975).

47 *Id.* at 142.

In September 1971, when the manager of Young's branch office learned of her absences and asked her for an explanation, Young revealed her objection to the religious component of the meetings. The manager maintained that attendance was mandatory.[48] Although the manager had no authority to discharge Young,[49] she resigned later that day, explaining to her manager that she believed that he had fired her.[50]

Young brought suit against her employer in federal district court, alleging religious discrimination.[51] The district court found that Young had failed to show that her refusal to attend the monthly staff meetings had resulted in any discriminatory act by her employer and concluded that she had resigned voluntarily.[52] The Court of Appeals for the Fifth Circuit reversed this finding, holding "that the district court required too high a standard for a constructive discharge."[53] The correct standard, the Fifth Circuit announced, was "that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee."[54]

The *Young* court's formulation of the standard for constructive discharge differed little from the standard enunciated by the *Muller* court.[55] Despite the apparent similarity, however, each court's analysis concentrated on only one of the two elements involved in the doctrine of constructive discharge. The *Muller* court focused primarily on whether the employer intended to force the employee to resign.[56] In determining that Young's employer had constructively

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48 *Id.*

49 *Id.* at 144 n.7.

50 *Id.* at 142.

51 *Id.* at 143.

52 *Id.* The district court decision was unreported. Unlike Muller, Young was claiming that her employer had treated her disparately because of her lack of religious beliefs. The Supreme Court has explained the concept of disparate treatment as follows:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations he inferred from the mere fact of differences in treatment.

International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (citation omitted).

53 509 F.2d at 143-44.

54 *Id.* at 144.

55 *Id.* The *Young* court, like the court in *Muller,* relied exclusively on NLRB cases in formulating its constructive discharge standard. *See id.* and *Muller,* 509 F.2d at 929. See *supra* text accompanying notes 42-45 for the *Muller* court's standard.

56 *See supra* notes 43-45 and accompanying text.

discharged her, the *Young* court conceded "that the course of events leading to Mrs. Young's departure was rather too swift and spontaneous to admit any inference of an 'atmosphere of religious intimidation.' "[57] Instead, the court concentrated on Young's reasonable belief that she would eventually be discharged because of her refusal to attend the meetings and not on whether the employer possessed a specific intent to coerce her resignation. The Fifth Circuit acknowledged that Young's belief arose from her supervisor's statement that meetings were mandatory for all employees, but it did not discuss whether the statement indicated anything about the employer's state of mind.[58]

The differences between the *Muller* and *Young* analyses can be demonstrated by considering how each court would have decided the other circuit's case. The *Muller* court almost certainly would have decided in favor of Young's employer. The evidence did not

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57 509 F.2d at 143. The *Young* court did not identify the source of its quotation.

58 See Note, *Civil Rights—Religious Discrimination in Employment—Title VII Standards of "Reasonable Accommodation" and "Undue Hardship" Are Constitutional, But Recent Cases Illustrate Judicial Overzealousness in Enforcement,* 54 TEX. L. REV. 616 (1976), for a criticism of the *Young* court's finding constructive discharge without considering "whether the situation was deliberately created" by the employer. *Id.* at 638. The Note agrees with *Young*'s application of the constructive discharge doctrine to title VII because "Title VII, like the National Labor Relations Act, is designed to prevent discrimination in employment." *Id.* at 637-38 (footnote omitted). The Note concludes that "[a] watering down of the constructive discharge standard in the context of Title VII litigation serves only to infringe upon employer rights with no compensating benefit to employee[s]." *Id.* at 640.

This criticism of *Young*'s "watering down" of the constructive discharge standard by omitting the specific employer intent required in labor cases begs the question of whether the reasons for developing a two-pronged test for enforcing NLRA § 8(a)(3)'s proscriptions apply in the title VII context. Several factors suggest that the reasons for applying an employer intent standard in NLRB discrimination cases are less persuasive when discrimination is alleged under title VII.

First, in deciding whether an employer has constructively discharged an employee in violation of § 8(a)(3), the NLRB must determine whether the employer has committed an unfair labor practice and should therefore be held liable. In contrast, the issue in many title VII constructive discharge cases is the extent, rather than the existence, of the employer's liability; i.e., whether liability ends on the date the employee left work or whether it continues beyond that date because a constructive discharge is found. Thus, employers often do not stand on the same footing in NLRB and title VII constructive discharge cases.

Second, by its very nature the discrimination proscribed by the NLRA is more difficult to detect than the discrimination outlawed by title VII. Title VII primarily bans discrimination based on such immutable characteristics as race, color, sex, and national origin; the one exception is the proscription against religious discrimination. 42 U.S.C. § 2000e-2 (1982). Section 8(a)(3) is arguably narrower than title VII, in that it is concerned only with discrimination motivated by anti-union animus. Moreover, union membership is not an immutable characteristic. Thus, if one of the concerns favoring the employer intent standard is that employers should not be held liable for innocent actions, such a concern is not as compelling in title VII as it is in NLRB cases. In short, title VII constructive discharge cases are more likely to include indicia of invidious motivation than are NLRB constructive discharge cases.

suggest that the bank intended to force out nonbelievers by including in its business meetings a short religious program. The branch manager's reiteration of the policy probably would not have established the requisite specific intent.

A determination of how the *Young* court would have decided Muller's claim is less certain because the *Muller* opinion does not disclose how many times the company passed Muller over for a promotion.[59] It is unclear whether the *Young* court would have found Muller's beliefs about the cause of his failure to be promoted and prospects for future promotions to be reasonable. If Muller's company had repeatedly passed him over, the *Young* court might have decided that a reasonable belief prompted his action. On the other hand, if the company had only passed Muller over once, then the *Young* court might have agreed with the *Muller* court's result. Thus, the choice of approach, whether that of *Muller* or *Young*, might well determine the outcome of a constructive discharge claim.[60]

The next two sections of this Note examine the different standards implied by the *Young* and *Muller* approaches. The selection of a constructive discharge standard is important because if the standard is too stringent, some meritorious employee claims may be denied; if the standard is excessively permissive, employers will be exposed to liability that they would not otherwise face. Finally, the choice has implications for applicability of title VII prohibitions and sanctions in certain situations.

II
THE EMPLOYER INTENT STANDARD FOR CONSTRUCTIVE DISCHARGE CLAIMS

The employer intent standard enunciated in *Muller* is a two-pronged test. An employee must show both intolerable work conditions and the employer's specific intent to coerce the employee's resignation.[61] Unlike the analysis in *Young*, in which the tension between the doctrine enunciated and the approach the court actually

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59 The court stated that Muller was never chosen as a spell foreman in his 14 years of employment. 509 F.2d at 925. The court did not indicate, however, when Muller became qualified to perform in that capacity. Also, the court did not indicate whether Muller was aware that no Spanish-American had been appointed as spell foreman since 1965. Thus, it is unclear whether Muller thought he was facing a long-standing company practice as opposed to an isolated discriminatory act. *Id.* Finally, although the court cited statistics for 1968 and 1969 showing that all 20-25 employees selected as spell foremen were of "anglo origin," roughly 70% had more seniority than Muller; 20 other workers with more seniority than Muller also were not selected to be spell foremen. *Id.*

60 For an argument that the choice of standard will not affect the outcome in many cases, see *infra* note 139 and accompanying text.

61 See *infra* note 126 and accompanying text for a discussion of how Fifth Circuit

took prompted development of a standard focusing on the nature of the conditions imposed, the *Muller* employer intent standard was a fully developed analysis.[62] The other circuits that have adopted it have made few changes.[63] One post-*Muller* Tenth Circuit case, *Coe v. Yellow Freight System, Inc.*,[64] indicates what a plaintiff must show to establish the employer's intent. The Tenth Circuit, in affirming the district court's finding that the employer had not constructively discharged the plaintiff,[65] found "a dearth of evidence . . . tending to show that [the employer] deliberately engaged in a course of conduct designed to force plaintiff's working conditions to be so intolerable that he would be forced to quit."[66]

The Tenth Circuit's statement suggests that while a plaintiff must show both employer intent to terminate the employee and intolerable work conditions, the employee does not have to present evidence probative of the employer's intent *and* other evidence showing the intolerable conditions. The evidence that a plaintiff presents, however, must establish both the requisite employer intent and intolerable conditions. Courts rejecting the employer intent analysis in favor of a reasonable employee standard describe the *Muller* criteria as the more "stringent" of the two.[67] The stringency of the *Muller* employer intent standard is occasioned by its requirement that an employee prove an additional element with her evidence; it does not require the employee to present more evidence.

The *Muller* court was silent on why it opted for a more stringent standard. This stricter employer intent standard is more favorable to employers. Presumably, the Tenth Circuit was concerned that a permissive standard would encourage employee resignations and

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decisions have transformed the reasonable employee standard into a two-pronged test superficially resembling the *Muller* standard.

62 The *Muller* court did not address directly whether the employer-imposed conditions should be evaluated using the employee's subjective judgment or the objective judgment of a reasonable employee. Because the *Muller* court required the plaintiff to meet a more stringent standard, the objective analysis should govern. A subsequent Tenth Circuit case, Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982), confirms that even under a *Muller* employer intent standard, courts must measure the intolerability of working conditions from the viewpoint of the reasonable employee.

63 *See* EEOC v. Federal Reserve Bank, 698 F.2d 633, 672 (4th Cir. 1983) (" '[T]he employer's actions must be intended by the employer as an effort to force the employee to quit.' ") (quoting *Irving*, 689 F.2d at 172), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 104 S. Ct. 2794 (1984); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981) ("To constitute a constructive discharge, the employer's actions must have been taken with the intention of forcing the employee to quit.").

64 646 F.2d 444 (10th Cir. 1981).

65 *Id.* at 455. The district court's decision was unreported.

66 *Id.* at 454.

67 *See, e.g.*, Clark v. Marsh, 665 F.2d 1168, 1173 (D.C. Cir. 1981); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980).

possibly frivolous lawsuits. The Fifth Circuit's development of the reasonable employee standard also reflects these concerns.

III
THE DEVELOPMENT OF THE REASONABLE EMPLOYEE STANDARD FOR A CONSTRUCTIVE DISCHARGE

The *Young* court's analysis only suggested what a fully developed standard might be. This Note now examines the Fifth Circuit's evolving constructive discharge analysis, tracing this doctrine from its adoption in *Young* to its culmination as an explicit standard in *Bourque v. Powell Electrical Manufacturing Co.*[68] This section also reviews how other Fifth Circuit cases, decided after *Bourque*, have refined the *Bourque* reasonable employee standard, making more concrete what might otherwise be an amorphous standard. Although the Fifth Circuit has recognized that the proper resolution of constructive discharge claims depends largely on the facts of each case,[69] the court's treatment of certain issues arising under the reasonable employee standard indicates what a plaintiff should show to prevail on his claim. The post-*Bourque* cases indicate that the Fifth Circuit's standard, while not as stringent as the employer intent standard, is nonetheless a rigorous one.

A. The Transition from *Young* to *Bourque: Calcote*

The most important step in transforming the *Young* constructive discharge doctrine into the *Bourque* reasonable employee standard was resolving the issue of employer intent. The *Young* analysis left uncertain what the court meant by its use of "deliberately" in its enunciation of the doctrine of constructive discharge.

The Fifth Circuit addressed this question in *Calcote v. Texas Educational Foundation, Inc.*[70] *Calcote* reviewed a lower court finding[71] that an employer had discriminated against a white employee whose initial salary and subsequent pay increases were lower than those of blacks in comparable positions and who had been harassed by his black supervisor.[72] The lower court concluded that these conditions amounted to a constructive discharge.[73] Although agreeing with the district court that Calcote had been constructively discharged, the

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68 617 F.2d 61 (5th Cir. 1980).

69 *See, e.g.*, Hill v. K-Mart Corp., 699 F.2d 776, 779 (5th Cir. 1983) (court evaluated entire "employment milieu" in deciding constructive discharge claim).

70 578 F.2d 95 (5th Cir. 1978).

71 458 F. Supp. 231 (W.D. Tex. 1976).

72 578 F.2d at 96-97.

73 458 F. Supp. at 237.

court of appeals focused on the deliberate nature of the employer's actions.

In concluding that the actions that prompted Calcote's resignation were deliberate, the court was careful to show that one of the employer's departments or employees was directly responsible for those actions. The court noted that someone in the personnel office established both Calcote's starting salary and his job classification, and later gave Calcote a lower salary increase than was recommended.[74] Finally, the court found that Calcote's supervisor had harassed Calcote within the course of his duties as supervisor. The court held that the supervisor's acts were "deliberate" acts of the employer.[75] The court concluded, "We think the Conclusions of Law of the district court should be expanded to reflect . . . that the actions which caused Calcote's working conditions to be intolerable were deliberate."[76]

The *Calcote* court's analysis of the deliberateness of the employer's actions differed from that of the *Muller* court. In *Calcote* the court sought only to show that the defendant employer was responsible for the actions of its personnel and that these acts were not accidental. The court did not discuss the intentions of the personnel beyond noting the district court's conclusion that racial prejudice prompted the harassment of Calcote by his supervisor.[77] Significantly, the court did not discuss whether the supervisor's harassment was intended to force Calcote's resignation. *Calcote* thus requires that the plaintiff show that the employer intended its acts, but the decision does not require a showing that the acts were specifically intended to cause the employee's resignation.

The *Calcote* court's focus on the nature of the employer's behavior was prompted by the district court's failure to address the *Young* deliberateness requirement: "The district judge . . . did not use the word 'deliberately' or 'intentionally' in describing the constructive discharge doctrine, although the authorities he referred to contain that requirement."[78] One of the authorities the district court cited was *Muller*.[79] Although the *Calcote* court's analysis effectively repudiates *Muller,* the court did not explicitly reject it. Thus, the *Calcote* decision represents a transition to the express reasonable employee standard enunciated in *Bourque*.[80]

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74 578 F.2d at 98.

75 *Id.*

76 *Id.*

77 *Id.* at 97.

78 *Id.*

79 458 F. Supp. at 237.

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

B. *Bourque v. Powell Electrical Manufacturing Co.*

Bourque began work for the defendant employer in 1967 as a clerk and secretary in the purchasing department and later assumed supervisory responsibilities over other secretaries.[81] In February 1975, a position as a buyer in the department became available, and Bourque applied for it. The company's vice-president for personnel initially expressed reluctance to hire her but eventually accepted Bourque's application.[82] He informed Bourque, however, that she would not receive the $950 monthly salary paid the previous buyer. Instead, she was to continue at her current salary, $675 per month, with her position subject to a ninety day trial period. Bourque accepted the offer, insisting upon the trial period and a raise to $850 per month should she successfully complete the period.[83]

Bourque's supervisors deemed her trial period performance a success and granted her a salary increase. The increase, however, brought her monthly salary to only $719, $131 less than she had requested[84] and $213 less than the previous buyer had earned. She resigned shortly thereafter.[85]

In Bourque's subsequent title VII action, the district court found that she had suffered wage discrimination because of her sex.[86] The district court, however, relied on *Muller* in holding that Bourque had resigned voluntarily because "there [was] no evidence that anyone . . . deliberately attempted to render her working conditions so intolerable that she would be forced to quit."[87] The district court distinguished *Young* as involving a clear threat of discharge and the denial of the fundamental right to freedom of religion.[88] Both Bourque and her employer appealed from the district court's decision.

The Court of Appeals for the Fifth Circuit affirmed the trial court's determination that Bourque had resigned voluntarily,[89] but

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81 *Id.* at 63.

82 *Id.* In 1973 and 1974, Bourque had begun to perform some of the functions of the buyer and "expediters" in her department; she occasionally substituted for buyers who were on vacation.

83 *Id.* at 63-64.

84 *Id.* Bourque was insisting on a raise, relative to both her then current salary as a secretary and the amount she was to be paid at her new position, but one that would pay her $100 less than the previous male incumbent. *Id.*

85 *Id.* The Fifth Circuit's *Bourque* opinion does not indicate whether Bourque complained to anyone within the company about its failure to raise her salary to $850.

86 445 F. Supp. 125, 128-29 (S.D. Tex. 1977).

87 *Id.* at 129.

88 *Id.*

89 617 F.2d at 64. The Fifth Circuit stressed that Bourque had voluntarily accepted the position at a salary lower than the previous occupant received. *Id.* at 65. Her acceptance of a discriminatory condition in her employment is similar to another employee's action in a title VII case decided one month before *Bourque*. In Miller v. Texas State Bd.

rejected its reliance on *Muller*'s constructive discharge standard. The Fifth Circuit provided two reasons for its decision:

> Defendant urges, with some supporting authority, that in order to constitute a constructive discharge, the imposition of intolerable working conditions must be with the purpose of forcing the employee to resign . . . . Nevertheless, such a rule is inconsistent with authority in this Circuit and, we believe, with the realities of modern employment.[90]

The court's reference to the "realities of modern employment" is somewhat cryptic. A plausible interpretation, given that the *Bourque* court was rejecting the requirement that a plaintiff show that an employer had a specific intent to coerce her resignation, is that the court was concerned with a plaintiff's ability to adduce evidence of an employer's specific intent.[91]

In rejecting the *Muller* standard, the *Bourque* court explicitly articulated what had been implicit in both the *Young* and *Calcote* analyses: namely, that a court should evaluate a constructive discharge claim without reference to the "state of mind of the employer."[92] Instead, the analysis should concern itself with what the reasonable employee would have done: " '[T]he trier of fact must be satisfied that the . . . working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would

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of Barber Examiners, 615 F.2d 650 (5th Cir.), *cert. denied*, 449 U.S. 891 (1980), the plaintiff began work as an undercover investigator for a state licensing agency in 1965. For four years, Miller, a black, investigated both black- and white-owned shops. In 1969, Miller's supervisor asked bim to inspect only black-owned shops because of fear of interracial violence. Miller agreed to the change and received a promotion. The state agency was unhappy with the quality of Miller's inspections and attempted to transfer him to a different area, but he refused. After the agency fired him for refusing the transfer, Miller brought a title VII action, arguing that the disparate treatment he received prompted him to refuse the transfer and thus amounted to a constructive discharge. In affirming the district court's finding that Miller had not been constructively discharged, the Fifth Circuit pointed out that Miller had objected to inspecting black-owned shops only *after* his discharge.

The *Bourque* court also agreed with an earlier case, Cullori v. East-West Gateway Coordinating Counsel, 457 F. Supp. 335, 341 (E.D. Mo. 1978), in holding that "discrimination manifesting itself in the form of unequal pay cannot, alone, be sufficient to support a finding of constructive discharge." *Bourque*, 617 F.2d at 65. For a discussion of the relationship of a single "fact" of discrimination (generally insufficient to support finding of constructive discharge) and an "aggravated situation" (generally sufficient to support such finding under reasonable employee standard), see *infra* notes 107-16 and accompanying text.

90 617 F.2d at 65 (citations and footnote omitted).

91 The *Bourque* court might have felt that plaintiffs generally lack sufficient contact with the person making the discriminatory decisions to show specific intent. Alternately, the court may have assumed that a sophisticated employer might not reveal such an intent to the employee even if the two had sufficient contact.

92 617 F.2d at 65.

have felt compelled to resign."[93] The court, however, did not discuss what kind of showing would meet this standard; it was more concerned with demonstrating why Bourque's resignation was not a constructive discharge. Nevertheless, the *Bourque* court's discussion indicates, by negative inference, what a court using the reasonable employee standard should consider significant in deciding a claim of constructive discharge.

The Fifth Circuit, for example, found that the conditions that Bourque described "[did] not constitute . . . an aggravated situation."[94] Although the court stated that the occurrence of unlawful discrimination is relevant to a constructive discharge inquiry, discrimination, by itself, did not amount to a constructive discharge.[95] Indeed, the court concluded that the plaintiff will frequently have to combat the unlawful discrimination while still employed: "[W]e believe that society and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships."[96]

Although the court did not expressly identify those societal and title VII policies, the context of its statement is instructive. The

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93 *Id.* (quoting Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977)). Thus, *Bourque* was not the first case explicitly to adopt a reasonable employee standard in the context of employment relations.

The *Rosado* case involved a former civil servant's claim that his transfer to a new city was retaliation for his criticism of the administration of social welfare programs. *Rosado* was not a title VII case because Rosado's claim rested on first amendment grounds, Rosado maintaining that the transfer deprived him of his right to free speech. The First Circuit was concerned, however, that without a standard to assess when an employer has constructively discharged an employee there would be no effective check on public employee resignations in the face of grievances caused by an employer's action.

> Unless the [employer's action] is, in effect, a discharge, the employee has no right simply to walk out; he must accept the orders of his superior, even if felt to be unjust, until relieved of them by judicial or administrative action. Were this not so, a public employee would be encouraged to set himself up as the judge of every grievance; and the public taxpayer would end up paying for periods of idleness while the grievance was being adjudicated.

562 F.2d at 119.

94 617 F.2d at 66. The language of the opinion demonstrates that the court uses the phrase "aggravated situation" interchangeably with "intolerable conditions." Later court decisions utilizing the reasonable employee standard have refined the analysis by requiring the plaintiff to point to certain "aggravating factors" as prompting his resignation. *See infra* notes 103-112 and accompanying text (discussing Pittman v. Hattiesburg Mun. Separate School Dist., 644 F.2d 1071 (5th Cir. 1981)) and note 107 (discussing Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981)).

95 617 F.2d at 66. The court indicated that unequal pay alone does not sustain a showing of intolerable conditions so as to constitute a constructive discharge. For subsequent Fifth Circuit cases suggesting that certain forms of discrimination, by themselves, may be sufficient to constitute constructive discharge, see *infra* notes 117-38 and accompanying text.

96 617 F.2d at 66.

court was rejecting Bourque's contention that employees suffering illegal discrimination should be able to resign merely to pursue redress free from fear of employer retaliation.[97] The court apparently felt Bourque should have complained to the EEOC prior to resigning. Given that the EEOC usually attempts to mediate disputes between parties,[98] the title VII and, by extension, societal goal served is the nonlitigious resolution of employer-employee disputes within an ongoing employment relationship. In addition, the court stated that Bourque had the duty to mitigate damages by remaining on the job.[99] This requirement also fosters the nonlitigious resolution of disputes and would presumably extend to all those suffering discrimination not sufficiently egregious to justify resignation.

Taken together, the goal of resolving disputes without litigation and the duty to mitigate damages imply that in some circumstances an employee should have a duty to attempt to alleviate the intolerable conditions before he is justified in resigning. Where such an attempt is possible, the reasonable employee would adopt the less drastic alternative of complaining about the intolerable conditions rather than resigning; therefore, the employee who resigns is unreasonable. Voluntary acceptance without complaint[100] indicates that a reasonable employee would not find the conditions intolerable.

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97 *Id.* at 65-66. The Fifth Circuit offered another reason why employees should remain on the job when fighting discrimination: namely, the prohibition on employer retaliation against employees who have filed charges with the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-3(a) (1982).

98 Section 1601.20 of the EEOC Regulations indicates that the EEOC should try to encourage the parties to settle the dispute on mutually agreeable terms. The procedure for negotiation "clearly establishes the Commission's commitment to assisting charging parties and respondents in finding an early and reasonable resolution of charges whenever possible." EEOC COMPL. MAN. (BNA) § 15.1, at 15:0001 (May 1979) (*quoted in* B. SCHLEI & P. GROSSMAN, *supra* note 2, at 945). For a detailed presentation of the EEOC's administrative process, see B. SCHLEI & P. GROSSMAN, *supra* note 2, ch. 26.

99 617 F.2d at 66. The court's discussion of damages refers to situations in which parties in an employment discrimination action failed to resolve their dispute before a court settled it. The concern with limiting the extent of damages—both before and after litigation commences—is present in both instances.

100 The duty to mitigate by complaining or seeking redress, either inside or outside the company, would arise when the discrimination occurred after the beginning of the particular employment relationship. *Bourque* provides an example. No evidence suggests that Bourque was encountering discrimination as a secretarial supervisor. She voluntarily accepted the buyer's position, knowing that even if her employer agreed to her salary request, she would be paid less than her male predecessor. *See supra* notes 82-83 and accompanying text. Had the facts shown that Bourque accepted the position understanding that she would be paid the same as other buyers, but that her salary had lagged behind that of a comparable male buyer, then she would not have voluntarily accepted a discriminatory situation. Nevertheless, a reasonable employee would most probably complain about the unequal pay, hoping that a complaint would obviate the need for taking more drastic action.

The *Bourque* court applied this logic to hold that Bourque had resigned voluntarily:

> While we by no means discount the discrimination Ms. Bourque may have faced, we simply do not believe that working for unequal pay under the circumstances presented here constitutes a condition of employment so intolerable that an employee is forced into involuntary resignation. The very fact that Ms. Bourque accepted the position under the conditions imposed belies such a contention.[101]

The facts of the *Bourque* case, however, made it an inappropriate vehicle for a full discussion of the issues surrounding the duty to mitigate and the aggravated situation requirement. Bourque made no attempt to mitigate her damages prior to resigning. She did not complain about her unequal salary, seek internal redress, or inform the EEOC about her complaint until after she had resigned. Moreover, Bourque's only evidence of an aggravated work situation was her employer's salary discrimination. Some evidence indicated that Bourque's co-workers and supervisors were pleased with her work.[102] This evidence raises the question of whether employer suggestions that an employee remain with the company are relevant to determination of the aggravated situation issue. The *Bourque* decision, although not settling the issues that it raised, provided a framework for refinement of the reasonable employee standard. Three subsequent Fifth Circuit cases address, either explicitly or by implication, what constitutes an aggravated situation and what the duty to mitigate entails.

C. Post *Bourque* Decisions—*Pittman, Welch,* and *Meyer*: The Reasonable Employee Standard With a Bite

1. Pittman: *Development of the Aggravating Factors Analysis*

Under the reasonable employee standard a plaintiff need not show that the employer's purpose in creating the allegedly discriminatory conditions was to force an involuntary resignation. Considered by itself, the reasonable employee standard does not expressly articulate what the plaintiff must show to prove a constructive discharge. This lack of specificity should not burden a plaintiff preparing for trial because she will offer all evidence tending to show that employment conditions were onerous. It is more significant, however, to an aggrieved employee who, while remaining on the job, attempts to determine whether a court would find her resignation to be a constructive discharge. An aggrieved employee, aware that the

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101 617 F.2d at 65.

102 *See supra* note 84 and accompanying text.

law requires her to remain on the job unless employment conditions become "aggravated," does not know how intolerable conditions must become before she will be justified in resigning. In *Pittman v. Hattiesburg Municipal Separate School District,*[103] the Fifth Circuit refined the aggravated situation formulation in *Bourque.* The *Pittman* court also indicated that a court considering what a reasonable employee would have done should consider an employer's expressed desire that an employee not resign.

Pittman involved a claim of unequal pay due to racial discrimination. Pittman began working for the defendant school district as an assistant to the district's printer in June 1971. The printer resigned in Augnst 1972; his salary at that time was $6,900. The district hired Pittman for the vacant position on a trial basis at a salary of $5,000. Pittman did not have an assistant, as did his predecessor. Pittman's trial period ended in Augnst 1983, and the district formally promoted him to the position of printer.[104] After this promotion he was earning $900 less than his white predecessor. Several requests for parity in salary were ineffectual, and Pittman finally resigned on Augnst 14, 1974. One month later, the district rehired Pittman's predecessor, paying him $1,200 more than Pittman had received at the time of his resignation.[105] Pittman sued the school district, alleging racial discrimination, and the district court, adopting a United States magistrate's findings, entered judgment for the defendant.[106]

The Fifth Circuit reversed the judgment for the defendant but held that the school district had not constructively discharged Pittman.[107] In doing so, the Fifth Circuit reaffirmed the *Bourque* holding that inequality of pay, standing alone, cannot transform a resignation into an involuntary discharge.[108] The *Pittman* court echoed the "aggravated situation" language of *Bourque,* but spoke with greater specificity about the need to show "aggravating factors."[109] The

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103 644 F.2d 1071 (5th Cir. 1981).

104 *Id.* at 1073.

105 *Id.*

106 *Id.* at 1073-74. Both the magistrate's and the district court's decisions were unreported.

107 *Id.* at 1077.

108 *Id.*

109 *Id.* The *Pittman* aggravating factors analysis was applied in Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981). In *Clark,* the Court of Appeals for the District of Columbia affirmed the trial court's award of reinstatement and remanded for a determination of back pay for the period subsequent to the plaintiff's resignation because Clark had shown "a continuous pattern of discriminatory treatment encompassing deprivation of opportunities for promotion, lateral transfer, and increased educational training, existing over a period of several years." *Id.* at 1174, 1176. Moreover, the plaintiff in *Clark* had twice pursued internal administrative remedies without success. *Id.* at 1174. The court focused on the circumstances surrounding the last promotion denied the plaintiff.

Pittman decision suggests that to prove constructive discharge the plaintiff must be able to point to specific elements in the relationship, apart from the act giving rise to title VII liability, that made working conditions intolerable. Although an employer's discriminatory act is relevant to the constructive discharge inquiry, a plaintiff will not succeed with his constructive discharge claim by merely identifying the discriminatory act and alleging intolerable conditions in only generalized terms.

The *Pittman* court did not directly address the question of what constitutes an aggravating factor, but it listed several elements it would have considered significant had they been present in the case. The court noted that Pittman's employment relations were cordial.[110] The court also acknowledged that the district superintendent had urged Pittman to remain and that he had suffered no affront aside from the race-based wage discrimination.[111] If Pittman had demonstrated continuing affronts or hostile working conditions, the Fifth Circuit presumably would have found that the district had constructively discharged him.

Taken together, the aggravating factors that *Pittman* identified as necessary for a finding of constructive discharge indicate that the court requires a nexus between the title VII discriminatory act and the conditions prompting the employee's resignation.[112] The pres-

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Clark had been deputy director for three years and acting director for one. Despite favorable performance reviews, her superiors passed her over for promotion to permanent director in favor of "a recent law school graduate with no supervisory experience." *Id.* at 1174-75.

The *Clark* opinion catalogues the various concerns that courts using a reasonable employee standard have had in deciding constructive discharge cases. The *Clark* court was careful to enumerate the various forms of discrimination that Clark encountered. Unlike *Pittman* and *Bourque* where the discriminatory act was unequal pay, Clark's discrimination was manifested in different aspects such that the "[p]laintiff was . . . essentially locked into a position from which she could apparently obtain no relief." *Id.* at 1174. The court concluded that her repeated failure to obtain administrative relief was one factor justifying her belief that she had no recourse but to resigu. *Id.* at 1175-76. Unlike Bourque, Clark had first attempted to resolve her problem within the context of an ongoing employment relationship. Finally, the *Clark* court indicated that it shared the *Pittman* court's concern with work place conditions in its focus upon Clark's humiliation and loss of prestige after being passed over for a job that she had capably performed for a year.

110 644 F.2d at 1077.

111 *Id.*

112 Requiring demonstration of a nexus between the discriminatory act constituting the basis of title VII liability and the intolerable work conditions is significant in two ways. First, it limits title VII proscriptions to the behavior specified in the act. Second, the nexus requirement serves an evidentiary function. For example, an employer's continued use of racial epithets toward an employee who previously had been denied a promotion more readily supports a conclusion that the promotion decision was made on race-based criteria than when such abuse is absent. Similarly, a court applying the reasonable employee standard should find the constructive discharge determination easier because a reasonable employee would probably conclude that an attempt to mitigate or

ence of continuing affronts and noncordial working conditions suggests the intentional singling out of an employee because of her race. Of course, wage discrimination "singles out" an employee for different treatment. The Fifth Circuit, however, had already held that unequal pay, standing alone, did not constitute a constructive discharge. Presumably, the Fifth Circuit was concerned with overextending title VII coverage by making an employer liable for its imposition of conditions—apart from the wage discrimination—when it had imposed those conditions with an intent not proscribed by title VII. Thus, even under the *Bourque* reasonable employee standard, evidence of invidious intent is relevant in deciding constructive discharge claims.

The *Pittman* court also acknowledged the relevance of evidence showing that the employer wanted the employee to remain on the job.[113] By noting that Pittman's employer urged him to stay, the Fifth Circuit suggested that a reasonable employee would consider such manifestations of the employer's intent in determining whether resignation was the only available option. An employer's statements or remedial actions might suggest, for example, the possibility of improved conditions. Nevertheless, such manifestations cannot, by themselves, determine the constructive discharge issue. If a court treated them as dispositive of the issue of what a reasonable employee would do, such an analysis would effectively transform the reasonable employee standard into the employer intent standard.

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ameliorate probably would not succeed if an employer had demonstrated such a consistent pattern of animosity.

Subsequent Fifth Circuit cases display the court's concern that the conditions complained of relate to a title VII proscribed intent. *See* Hill v. K-Mart Corp., 699 F.2d 776, 779 (5th Cir. 1983) (no constructive discharge because "no showing . . . that this [transfer] was unusual or unreasonable or in any way motivated by race or sex"); Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650, 652 (5th Cir.) ("[Constructive discharge] recognizes a Title VII cause of action for wrongful discharge when an employer deliberately creates a discriminatory environment. . . ."), *cert. denied,* 449 U.S. 891 (1980).

Courts in other jurisdictions have expressed a similar nexus requirement and, implicitly, the same concern that liability be limited to what title VII proscribes. *See, e.g.,* EEOC v. Federal Reserve Bank, 698 F.2d 633, 672 (4th Cir. 1983), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984); EEOC v. Hay Assocs., 545 F. Supp. 1064, 1085 (E.D. Pa. 1982).

An employer facing a constructive discharge claim may argue that the intolerable conditions, while deliberately imposed, were motivated by animus not proscribed by title VII. Courts must carefully evaluate such a defense. An employer, for example, might not want a neo-fascist working in its organization but would prefer not to fire her directly. Title VII, because it does not proscribe discrimination based on an employee's political beliefs, would not prohibit the imposition of intolerable conditions calculated to effectuate the employee's departure. Courts should carefully scrutinize an employer's claim that his actions were politically motivated if the imposition of the conditions closely followed a promotion denial violating title VII.

113 644 F.2d at 1077.

The *Pittman* analysis suggests that the Fifth Circuit regards indications of the employer's benign intent as only one of several factors bearing on the tolerability of an employee's working conditions.

The *Pittman* court's refinement of *Bourque*'s "aggravated situation" analysis and its indication that an employer's intent is still relevant under the reasonable employee standard occurred in a factual context much like *Bourque*'s. Both were unequal pay cases in which the issue of liability was settled; in assessing the issue of constructive discharge, the Fifth Circuit's primary concern was fixing the *extent* of that liability. In *Welch v. University of Texas & Its Marine Science Institute*[114] and *Meyer v. Brown & Root Construction Co.*[115] the constructive discharge question arose in a different context. In these cases, the Fifth Circuit focused on whether an employer's behavior amounted to an employee discharge within the meaning of section 703(a)(1) of title VII.[116] Thus, the resolution of these constructive discharge claims determined *whether* the employer was liable under title VII.

2. Welch: *Showing Aggravating Conditions Is Not a Per Se Requirement*

Although the Fifth Circuit indicated that application of the reasonable employee standard was still appropriate, the resolution of the constructive discharge issue in *Welch* had a different implication than in either *Bourque* or *Pittman*. The *Welch* court's analysis implies that in certain instances a plaintiff can demonstrate intolerable conditions without proving aggravating factors. Hired as a research assistant at the marine biological institute where she did research toward a doctorate in education,[117] Welch was twice told by her supervisor that he did not want a woman in his employ. Welch resigned after a meeting in which her supervisor told her that having a doctorate made her overqualified for her job.[118] The district court concluded that the supervisor's comments amounted to a constructive discharge of Welch.[119]

The Fifth Circuit affirmed the trial court's determination that

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114 659 F.2d 531 (5th Cir. 1981).

115 661 F.2d 369 (5th Cir. 1981).

116 See *supra* note 3 for the statutory language of § 703(a)(1).

117 Welch v. University of Tex. & Its Marine Science Inst., 659 F.2d 531, 533 (5th Cir. 1981).

118 *Id.* The supervisor made the first statement before Welch received her doctoral degree. The second statement was made a year later, after Welch had earned her degree. *Id.* These statements, while expressing a prejudicial attitude, probably were not actionable under title VII because they did not amount to a pattern of offensive remarks. *Cf.* Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977) ("derogatory ethnic comments . . . were part of causal conversation and did not rise to the level necessary to constitute a violation of Title VII").

119 659 F.2d at 533. The district court opinion was unreported.

Welch had resigned involuntarily.[120] The court analyzed the facts of *Welch* under the *Bourque* reasonable employee standard.[121] The court did not, however, adopt the "aggravated situation" approach set forth in *Bourque* and refined in *Pittman*. Indeed, the supervisor's two statements, made a year apart, could scarcely constitute aggravating circumstances sufficient to justify a finding of constructive discharge.[122] The *Welch* court's approach to the constructive discharge issue implicitly acknowledges that, factually, this case is unlike either *Bourque* or *Pittman*.

Both *Pittman* and *Bourque* held that proof of discrimination alone was insufficient to constitute a constructive discharge.[123] Moreover, the *Pittman* court was concerned that the plaintiff show a nexus between the discriminatory act and the allegedly intolerable conditions.[124] Such a concern is inapposite in *Welch* because the constructive discharge was the act of discrimination. In this instance of alleged disparate treatment, Welch had to prove that her employer treated her differently because of her sex. Welch prevailed because the supervisor's statements plainly demonstrated his animus.[125]

Given the absence of the "aggravated situation" langnage in *Welch,* the most likely explanation for the court's result is that when an employer clearly expresses its desire that an employee resign, the

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120 *Id.* at 534 ("The findings of the district court that Welch's supervisor told her that as a woman doctor she would be unable to work for him and demanded to know, once she had received her Ed.D., when she would leave her employment are supported by the record and do not leave this court with the conviction that a mistake has been committed."). The Fifth Circuit's choice of language is explained by the context in which it appeared: the court was examining the trial court finding under the "clearly erroneous" standard of FED. R. CIV. P. 52(a). *Id.* at 533.

121 *Id.* at 534 ("A reasonable person would certainly resign employment after being ordered to leave."). The *Welch* outcome would probably be the same under a *Muller* standard because the employer manifested a desire that she leave.

122 The court implied, however, that the supervisor may have expressed his discriminatory attitude at other times: "In light of past dealings with this individual, Welch responded that since it was obvious he did not want a woman with a doctorate working for him, she would leave. . . ." *Id.* at 533. The facts do not reveal whether Welch's supervisor was hostile towards Welch in particular, or women in general. Although Welch was replaced by a woman with a bachelor's degree, the Fifth Circuit concluded that this replacement did not preclude Welch's sex discrimination suit in light of the difference in education levels. *Id.* & n.3. As noted before, the court rested its decision on the correctness of the trial court's findings concerning the two statements made by the supervisor. *See supra* note 120. The indication that the supervisor had previously expressed these attitudes is siguificant because such statements might well render Welch's working atmosphere hostile. The *Pittman* court suggested that a hostile working environment constitutes an aggravating factor as part of showing a constructive discharge. *See supra* notes 109-11 and accompanying text.

123 See *supra* notes 95-96 and accompanying text for the *Bourque* court's discussion, and note 108 and accompanying text for the *Pittman* reaffirmation of *Bourque*.

124 *See supra* note 112 and accompanying text.

125 *See supra* note 120.

employer has constructively discharged the employee regardless of the quality of working conditions. The result in *Welch* effectively transforms the *Bourque* reasonable employee standard into a two-pronged standard that is superficially like *Muller*'s.[126] Instead of requiring a plaintiff to show *both* an employer's intent to force resignation *and* intolerable conditions, however, an employee would succeed under the reasonable employee standard by showing either intolerable conditions *or* an unambiguous intent to coerce an employee's resignation motivated by a title VII proscribed bias. Courts would evaluate a plaintiff's claim under either prong using a reasonable employee analysis.

3. Meyer: *The Notion of Prospective Intolerable Conditions*

In *Meyer v. Brown & Root Construction Co.*[127] the Fifth Circuit, in applying a reasonable employee standard, returned to the aggravated situation analysis developed in *Bourque* and refined in *Pittman*. The court's treatment of Meyer's claim suggested a further expansion of the aggravated situation analysis. The defendant employer hired Meyer in 1976 as a warehouse office helper.[128] In September 1978 Meyer told her supervisor that she was pregnant; in turn her supervisor informed Meyer that the company would give her a leave of absence.[129] On January 8, 1979, Meyer was asked to train a replacement. The following day, Meyer arrived at work to find her replacement sitting at her desk. Meyer's supervisor told her that she would thereafter be working in the warehouse. Knowing that this position entailed heavy lifting, Meyer expressed apprehension about the adverse effects on her health and on that of her unborn child. In reply, Meyer's supervisor "snickered."[130] Further discussion revealed that the supervisor was unconcerned about the consequences of the transfer. The trial court concluded that the employer had

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126 *See supra* notes 32-45 and accompanying text.

127 661 F.2d 369 (5th Cir. 1981).

128 *Id.* at 370.

129 *Id.* at 371.

130 *Id.* The Fifth Circuit reproduced the conversation as follows:

> [W]hen Plaintiff questioned York [her supervisor] as to what she was going to do, he replied "you're going to work with Ed and Phil." Plaintiff replied that she could not do that without harming herself or her unborn baby, while York stood by snickering. Plaintiff remarked that she did not think York would do that, where upon York remarked "What?"
>
> Plaintiff then said "Jim, go home and sleep on it tonight and see if you wake up with a clear conscience."
>
> York said "I have."
>
> Plaintiff then said "What more do I say? I'm going . . . you know, fix up my papers because I'm going home."

Id. at 372 n.4 (quoting findings of fact in unreported district court decision).

constructively discharged Meyer.[131]

In affirming the trial court's determination that Meyer's resignation constituted a constructive discharge, the Court of Appeals for the Fifth Circuit followed *Welch* by using the *Bourque* reasonable employee standard to assess the constructive discharge issue. Unlike *Welch,* however, the court analyzed the facts in terms much like the "aggravated situation" formulation of *Bourque.* Discussing the conversation in which Meyer learned of her new assignment, the court remarked, "Certainly, a reasonable person would leave when presented with such a situation."[132] This discussion differed from *Bourque*'s analysis because *Bourque* implied that a constructive discharge requires a discriminatory act *and* aggravating circumstances. The discriminatory act alleged in *Meyer was* the constructive discharge. Indeed, Meyer could not have expected her supervisor's action because she apparently had no prior indication of his hostility towards her.[133] In effect, the *Meyer* court held that a reasonable employee could resign in the face of prospective intolerable conditions without having to show prior aggravating circumstances.

The court, however, indicated that to prove a constructive discharge a plaintiff would have to show that she knew what those conditions entailed. In response to the defendant employer's claim that a reasonable person would have questioned her supervisor concerning the nature of the assignment to the warehouse, the court found that Meyer had inquired about the nature of her new duties.[134] Although the court's discussion does not explicitly conclude that the plaintiff's inquiry satisfied her duty to mitigate damages, Meyer's inquiry apparently served to fulfill that duty. A hypothetical example, based on the facts of the *Meyer* case, demonstrates how an inquiry can fulfill the duty to mitigate damages. An employer could transfer a woman because she was pregnant[135] and incur liability for this disparate treatment without creating any intolerable condition. Failure to inquire about the assignment before resigning would not fulfill the employee's duty to mitigate damages. A complaint might have resulted in redress of the conditions. Thus, the goal of resolving

131 *Id.* at 371. The district court's decision was unreported.

132 *Id.* at 372.

133 "It is undisputed that Meyer had a good work record and good working relationship with her co-workers at all times during her tenure . . . ." *Id.* at 371. Whether the court considered Meyer's supervisor a "co-worker" is unclear. Moreover, the court does not discuss any evidence of unpleasant working conditions or prior hostility by Meyer's supervisor.

134 *Id.* at 372.

135 Section 701(k) of title VII states that sex-based discrimination proscribed by § 703(a)(1)-(2) includes discrimination because of a woman's pregnancy. "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy. . . ." 42 U.S.C. § 2000e(k) (1982).

disputes without litigation would also be frustrated by a failure to inquire.[136] In the *Welch* case the Fifth Circuit did not discuss the duty to mitigate damages.[137] This omission suggests that an employer's clearly evinced desire that an employee leave absolves the employee of the duty to mitigate damages by complaint or inquiry.[138]

IV
CHOOSING BETWEEN THE TWO STANDARDS

Should the courts adopt a uniform standard? The difference between the employer intent and reasonable employee standards for assessing a constructive discharge claim will not, in some instances, have any impact on the resolution of the issue. In many cases, proof of sufficiently egregious conditions alone will support an inference that an employer imposed them with the intent demanded by the more stringent *Muller* standard.[139] In addition, under a *Bourque* reasonable employee standard, an employee often will have to complain about the intolerable conditions to fulfill her duty to mitigate. These complaints would notify an employer of employee unhappiness and would probably amount to a constructive discharge under *Muller* if the employer failed to ameliorate those conditions or give the complaining employee a legitimate reason for them.

A court's use of one standard or the other, however, will deter-

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136 *See supra* notes 97-102 and accompanying text.

137 In another case a district court in the Fifth Circuit did not find a constructive discharge because "a reasonable person in plaintiff's shoes would [not] have found that the working conditions imposed by defendants compelled resignation. Plaintiff did not object to most of these conditions." Jones v. Birdson, 530 F. Supp. 221, 234 (N.D. Miss. 1980). An employee's protest of discriminatory conditions aids a court in determining whether the conditions forced the employee to resign involuntarily in several respects. A protest provides the courts with at least a subjective indication that the conditions were intolerable. An employee's protest also removes any doubt concerning the deliberateness of the employer's actions. Finally, given title VII's goal of promoting nonlitigious resolution of disputes, a protest might well result in the correction of the intolerable conditions.

138 Because courts decide each constructive discharge case on its facts, the judiciary should not make a duty to complain a per se requirement of a constructive discharge showing under the reasonable employee standard. For example, if the employer had an Equal Opportunity Employment Office and an employee failed to avail himself of it before resigning, the employee would have failed to fulfill the duty to mitigate. A showing that the employees who had complained to such an office were the objects of retaliatory actions by their supervisors, however, would indicate that an employee choosing not to complain should not be found to have failed the duty.

The *Welch* result indicates that in the Fifth Circuit a complaint to the EEOC after resignation and without an in-house complaint will not bar a plaintiff from prevailing on a claim of constructive discharge in all cases.

139 *See supra* note 61 and accompanying text.

mine the outcome in many cases. For example, in a case of sexual harassment, or when an employer has repeatedly denied an employee a promotion in violation of title VII but hopes that the employee will remain in his current position,[140] the employer is almost certainly imposing intolerable conditions. In these situations, the employer does not typically intend to coerce the employee's resignation. A plaintiff seeking redress in these situations would encounter substantial difficulty satisfying the *Muller* employer intent standard. Under the *Bourque* reasonable employee standard, however, a plaintiff would probably succeed with his constructive discharge claim.

Thus, courts utilizing different standards will reach different results in constructive discharge cases involving the same set of facts. The outcome of a suit should not be determined by the fortuity of which circuit the claim arises in. Moreover, title VII, a national anti-discrimination law, should be applied uniformly. Therefore, all the circuit courts should adopt one standard.

Although the Supreme Court has not addressed the question of which standard should apply, the Court in *Albemarle Paper Co. v. Moody,*[141] suggested some principles that should influence this determination. The Court held that in fashioning remedies[142] for title VII violations the two purposes underlying the statute must guide a trial court's discretion.[143] First, the Court noted that title VII was

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140 A slight modification of the facts of the *Bourque* case, *see supra* notes 81-85 and accompanying text, illustrates a situation in which an employer intentionally discriminates and intolerable conditions exist, but the employer did not intend to coerce a resignation.

Bourque was apparently performing well as head of the typing pool in the buying department. Bourque could have made out a case of constructive discharge if she could have proven that she had applied for a buyer's position several times, been denied the job because of her sex, and had her lateral transfers to other departments in the company blocked. Under the *Bourque* "aggravated situation" formulation, she could point to both discriminatory acts and an offensive working environment. Moreover, her attempt to transfer and avoid the unpleasantness of her situation might fulfill her duty to mitigate. *Cf.* Clark v. Marsh, 665 F.2d 1084 (D.C. Cir. 1981).

141 422 U.S. 405 (1975).

142 Section 706(g) details the options that a court has in fashioning remedies. 42 U.S.C. § 2000e-5(g) (1982) provides in part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to . . . back pay. . . . Back pay liability shall not accrue from a date more than two years prior to a filing of a charge with the [Equal Employment Opportunity] Commission. Interim earnings or amounts earnable with reasonable diligence by the person . . . discriminated against shall operate to reduce the back pay otherwise allowable.

143 422 U.S. at 417.

primarily designed as a prophylactic. The Court recognized how a back pay award can act as a deterrent: "Back pay has an obvious connection with this [prophylactic] purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality."[144]

Although the *Albemarle* Court was considering whether to award back pay, its discussion is apposite here. The prospect of liability for back pay[145] can have a powerful deterrent effect, even in non-class-action cases.[146] If an employer can escape or reduce its liability by concealing its intention to force an employee out, however, the deterrent effect of back pay liability will be considerably weakened. Under the more stringent employer intent standard, employers will sometimes escape liability because of the difficulties that the plaintiff will encounter in proving that the employer had the requisite intent. Even when an employer imposes intolerable conditions without intending to compel an employee's resignation, the possibility of monetary liability should cause employers to reexamine their practices. Thus, the Supreme Court's elucidation of the importance of back pay supports the use of a reasonable employee standard for assessing a claim of constructive discharge.

The second purpose of title VII identified by the Court in *Albemarle* is "to make persons whole for injuries suffered on account of unlawful employment discrimination."[147] Both the reasonable employee and employer intent standards further this purpose to some extent, because both recognize the applicability of the doctrine of constructive discharge to title VII litigation. The reasonable employee standard, however, will be more likely to provide relief that will fully compensate the employee. The following example illustrates the difference between the two standards: An employee suffers repeated discriminatory acts, including denials of promotion, transfer, and education, because he is black; nonetheless, his employer considers him a valuable employee in his present position. The employer attempts to answer the employee's protests that he is being discriminated against by explaining that blacks are simply not ready to assume higher positions in the company.

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144 *Id.*

145 Reinstatement is another remedy available in title VII cases. Courts sometimes award "front" pay in lieu of reinstatement. *See, e.g.*, Goss v. Exxon Office Sys. Co., 747 F.2d 885 (3d Cir. 1984). The *Goss* court defined this relief as "an award for a reasonable future period required for the victim to reestablish her rightful place in the job market." *Id.* at 889.

146 For example, the back pay award to the plaintiff in *Goss*, was for a two year period. It totaled $78,454.23; the court added prejudgment interest to the award at 12% per annum. *Id.* at 889.

147 422 U.S. at 418.

In this example, if the employee resigns and brings suit under title VII, he should prevail on his claim of disparate treatment because he could show intentional differential treatment motivated by an intent proscribed by title VII. Under the reasonable employee standard, the plaintiff would probably prevail on a constructive discharge claim. The employee could identify several different types of discrimination, attempts to mitigate by transfer requests and objections, and continued affronts to him because of his race. Under the employer intent standard, however, the employee would not be able to show that the employer possessed a specific intent to compel his resignation. If the employee lost on the issue of constructive discharge, a court would conclude that his departure was voluntary and award back pay only up to the date of his resignation.[148] Given such an outcome, the employee has not been made whole because he has not been placed in the situation he would have been in had he not been the victim of discrimination.

The make-whole policy of *Albemarle* is implicated in another context. Discriminatory acts may deprive the employee of a job benefit that is not easily measured in monetary terms, such as a cordial work environment. In these instances courts have provided injunctive relief.[149] These types of discrimination provide additional support for adoption of the reasonable employee standard. An individual resigning because of sexual harassment, for example, can only receive injunctive relief should she fail to prove a constructive discharge. Providing injunctive relief while denying such compensatory remedies as back pay or reinstatement does not serve the make-whole policy articulated in *Albemarle*.

The reasonable employee standard also represents a more equitable balancing of the employer and employee interests and title VII policies at stake in a constructive discharge claim than does the employer intent standard. Several different title VII policies are relevant in a constructive discharge case, including the basic goals of deterring discriminatory behavior and making victims whole,[150] the preference for nonlitigious resolution of disputes,[151] and the duty to mitigate damages.[152] Although an important concern, the policy of

148 *See, e.g.*, Muller v. United States Steel Corp., 509 F.2d 923, 930 (10th Cir. 1975) ("Unless [plaintiff] was constructively discharged, he would not be entitled to damages in the form of back pay . . . from the date of leaving the [defendant's] employ.").

149 *See, e.g.*, Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981) (imposing injunctive relief by requiring defendant employer to establish internal procedures for hearing, adjudicating, and remedying complaints of sexual barassment).

150 *See Albemarle*, 422 U.S. at 418, discussed *supra* notes 147-48 and accompanying text.

151 *See* Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980), discussed *supra* notes 97-99 and accompanying text.

152 *See supra* notes 99-100 and accompanying text.

nonlitigious dispute resolution is subordinate to both the deterrent and make-whole policies of title VII because the Act provides for a private right of action if Equal Employment Opportunity Commission mediation fails. This right of action does not depend on an employee continuing with his company. The *Pittman* case is an example of an employee recovering for discrimination even though he resigned voluntarily.[153]

The reasonable employee standard, as argned above, serves the deterrent and make-whole policies underlying title VII. The concern with adopting this less stringent standard is that it will undermine the policy of resolving employer-employee disputes without litigation by encouraging employees to leave.[154] Knowing that they will have an easier task of proving constructive discharge claims if they do not have to prove an employer's specific intent, employees may be more likely to resign. A person arguing for the employer intent standard might acknowledge that it will frustrate the deterrent and make-whole policies in a limited number of cases, but would maintain that this standard will foster nonlitigious resolution of disputes in all instances. She might also contend that the reasonable employee standard will encourage employee resignations, thereby disrupting employment relationships and triggering numerous lawsuits. Hence, the argument would conclude, the employer's interests in escaping liability and the title VII goal of maintaining the employment relationship are congruent in this respect.

The Fifth Circuit's development of the reasonable employee standard addresses these concerns. Both the "aggravating factors" analysis[155] and the requirement that there be a nexus between the discriminatory act[156] and those aggravating factors demonstrate that courts applying the reasonable employee standard still critically evaluate the facts of a case before finding that the employer has committed a constructive discharge. Moreover, the articulation of these concepts in connection with the reasonable employee standard adds a measure of predictability to court decisions under what otherwise might be an overly flexible standard. The reasonable employee standard will not encourage employee resiguation if the employee is required to mitigate damages. Adoption of this duty[157]

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153 The Fifth Circuit, in reversing the trial court's determination that Pittman had not suffered wage discrimination, remanded the case to the district court to assess damages. Pittman v. Hattiesburg Mun. Separate School Dist., 644 F.2d 1071, 1077 (5th Cir. 1981).

154 *See supra* note 67 and accompanying text.

155 *See supra* notes 109-12 and accompanying text.

156 *See supra* note 112 and accompanying text.

157 Both the concern about excessive employee resignation and the response that imposing a duty to mitigate will check this trend assume that employees know which

will encourage employees to complain about unpleasant conditions either through internal company procedures or by contacting the Equal Employment Opportunity Commission.

Finally, the less stringent reasonable employee standard serves employee interests by relieving an aggrieved employee of the need to show an employer's specific intent to compel his resignation. As the Fifth Circuit indicated in *Pittman,* manifestations of the employer's intent are relevant in evaluating the intolerability of work conditions. Of the two parties, the employer is in the better position to explain its actions. Moreover, an employee should not be required to remain in a job when, as measured by an objective standard, there is no reasonable hope of salvaging the employment relationship.

CONCLUSION

The split of authority among the current courts of appeals over the proper standard for assessing whether an employee has been constructively discharged should be resolved by the adoption of an objective standard. This analysis would recognize that an employee has been constructively discharged when a reasonable person in the employee's position would find conditions so intolerable that she would resign. This reasonable employee standard would permit flexibility and be responsive to the factual differences of each case. Moreover, the standard would be more compatible with Supreme Court pronouncements on related issues. The adoption of such a standard serves the policies underlying title VII while equitably balancing the interests of the employer and employee.

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standard courts will apply to their claims of constructive discharge. If employees who are subject to a discriminatory or simply unpleasant situation first resign and then seek legal redress, a court's choice of standard will have no impact upon employee resignation decisions. Employees will only become apprised of their rights and duties *after* they have left their positions. In companies that have litigated constructive discharge claims, knowledge of the cases' outcomes might inform employees about the standard. Where courts have denied claims of constructive discharge because of an employee's failure to mitigate damages by complaint to the employer or the EEOC, knowledge of these decisions within a company will inform other employees of this duty.

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