No. 416A04 TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

WENDY WHITT, Plaintiff-appellee, v. HARRIS TEETER, INC., and RANDY SCHULTZ, Defendants-appellants.	))))))))	From Forsyth

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BRIEF OF AMICI CURIAE
NORTH CAROLINA ASSOCIATION OF WOMEN ATTORNEYS,
NORTH CAROLINA ACADEMY OF TRIAL LAWYERS,
SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION, INC.,
NORTH CAROLINA POLICE BENEVOLENT ASSOCIATION, INC., AND
NORTH CAROLINA ASSOCIATION OF EDUCATORS

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QUESTIONS PRESENTED

1. Does the cause of action for wrongful discharge in violation of public policy encompass a discharge that is constructive?

2. May a claim for constructive discharge in violation of public policy be based on a discriminatory hostile work environment?

3. To prove a claim for constructive discharge, must the employee show that the employer specifically intended to force the employee to quit?

ARGUMENT

I. THE CAUSE OF ACTION FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY ENCOMPASSES A DISCHARGE THAT IS CONSTRUCTIVE.

A. In Coman, the Court recognized a claim for constructive discharge in violation of public policy.

In Coman v. Thomas Mfg. Co., Inc., 325 N.C. 172, 381 S.E.2d 445 (1989), this Court considered for the first time whether North Carolina should adopt a public policy exception to the employment-at-will doctrine. The plaintiff in Coman was a long-distance truck driver employed by the defendant. The Court summarized the plaintiff's allegations:

> Defendant required plaintiff, and other drivers, to violate the [Department of Transportation's] regulations by driving for periods of time in excess of that allowed by the regulations. Plaintiff was also instructed by his employer that he would have to falsify the logs required by the regulations to show that defendant was in compliance with the regulations. Plaintiff was also informed that he would have to continue to drive for periods of time in violation of the regulations if he chose to retain his employment. Upon plaintiff's refusal to violate the regulations, he was told that his pay would be reduced at least fifty percent, such reduction being tantamount to a discharge of plaintiff.

325 N.C. at 173-74, 381 S.E.2d at 446 (emphasis added).

As the underlined language demonstrates, this Court clearly understood that the plaintiff in Coman was not actually fired by the defendant-employer, but instead was constructively discharged. Given the choice of violating federal regulations or taking a fifty percent cut in pay, the plaintiff resigned. The fact that the employer effected the termination by a forced resignation rather than an actual discharge was immaterial to the Court.

After summarizing the pertinent facts, the Coman Court approved and adopted the following language from the Court of Appeals' decision in Sides v. Duke University, 74 N.C. App. 331, 342, 328 S.E.2d 818, 826 (1985):

> "[W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent."

Coman, 325 N.C. at 175, 381 S.E.2d at 447 (quoting Sides). The Court found that the employer's alleged action – "tantamount to a discharge" – stated a cause of action for wrongful discharge in violation of public policy. Id.

Ten years later, in Garner v. Rentenbach Constructors, Inc., 350 N.C. 567, 515 S.E.2d 438 (1999), this Court reviewed the history of its wrongful discharge jurisprudence, beginning with Coman:

> This Court adopted a public-policy exception to employment-at-will in Coman v. Thomas Mfg. Co., 325 N.C. 172, 381 S.E. 445 (1989). In Coman, the plaintiff, a long-distance truck driver, alleged that his employer required him to drive in excess of the hours allowed by federal Department of Transportation regulations and ordered him to falsify his logs to show compliance with the regulations. The plaintiff refused to do so, and his pay was reduced by fifty percent, which amounted to a constructive discharge.

350 N.C. at 570, 515 S.E.2d at 440 (emphasis added). Although defendant cites Garner three times in its brief (Defendant's Brief at 16, 23, 32), it fails even to note the Court's characterization of the termination in Coman as a "constructive discharge" -- a reading of Coman that fatally undermines defendant's principal argument.

The message of Coman and Garner is unmistakable: since 1989, this Court has recognized that the tort of wrongful discharge encompasses a discharge that is constructive. No member of this Court has ever made any suggestion to the contrary.

To circumvent the plain language of Coman and Garner, defendant seeks to revise the facts in Coman to suit its theory. In its discussion of Coman, defendant avoids any mention of this Court's concise summary of the plaintiff's allegations in Coman. Instead, after disinterring the Coman record on appeal, defendant focuses on a single clause from the Coman complaint:

> 12. The plaintiff informed the defendant that he would refuse to drive except in compliance with the requirements of the Department of Transportation. Thereupon the defendant terminated the plaintiff's employment with the company or at least, forced the plaintiff to resign his employment.

Defendant' Brief at 22 (emphasis by defendant). Reading the underlined clause in isolation, defendant insists that "this Court was obligated to accept as true the allegation that the plaintiff was actually discharged." Id.

The belated "obligation" defendant seeks to impose on this Court -- sixteen years after the fact -- is a figment of its imagination. The final clause of the paragraph that defendant quotes ("or at least, forced the plaintiff to resign his employment") indicates that the plaintiff in Coman, like this Court, viewed the distinction between actual and constructive discharge as immaterial. The plaintiff clarified the sequence of events that resulted in his termination in the complaint's final paragraph, which defendant Harris Teeter studiously avoids mentioning in its brief:

> 15. The defendant's ultimatum to the plaintiff, compelling him to drive in violation of Department of Transportation regulations or otherwise suffer a reduction in pay of at least fifty (50) percent, was tantamount to a discharge for which he has suffered substantial damages in excess of $10,000.00.

Appendix to Defendant's Brief at A-3. Reading paragraphs 12 and 15 together, this Court reasonably interpreted the allegations to mean that the employer in Coman forced the plaintiff to resign his employment by imposing a pay reduction that was "tantamount to a discharge." Coman, 325 N.C. at 174, 381 S.E.2d at 446.

In the end, arguments about how the Coman complaint might have been construed are irrelevant. The law of wrongful discharge in North Carolina is based not on defendant's revisionist interpretation, but rather on the Coman Court's explicit statement of its understanding of the allegations, expressly and pointedly confirmed in Garner: the plaintiff in Coman was constructively discharged.

B. Barring all claims for constructive discharge would undermine North Carolina public policy.

Defendant invites this Court to narrow Coman by restricting the wrongful discharge tort to "actual" discharges. The employee's predicament in Coman illustrates the fallacy of defendant's position. One can easily imagine two ways in which the employer's actions could have resulted in Mr. Coman's termination. In Scenario A, the employer fires Mr. Coman after he announces that he will not violate the federal transportation regulations. In Scenario B, faced with the employer's ultimatum, Mr. Coman resigns rather than violate the federal law. In each scenario, the employer's intent to violate the law is identical,

as is the harm to the employee, as is the offense to public policy. Yet under defendant's theory, the terminated employee could bring a wrongful discharge claim in Scenario A, but not in Scenario B.[1]

Other wrongful discharge cases demonstrate the harmful and capricious effect of defendant's proposed rule. In Amos v. Oakdale Knitting Co., 331 N.C. 348, 416 S.E.2d 166 (1992), this Court held that firing an employee for refusing to work for less than the statutory minimum wage could constitute a wrongful discharge in violation of public policy. Suppose that the employer in Amos did not fire the employees, but instead slashed their wages in half, and waited for the inevitable resignations. If this Court were to adopt defendant's theory, the employees would be deprived of their common law remedy because they were "only" constructively discharged. Unprincipled employers would quickly learn that they could avoid liability simply by never uttering the words "you're fired."

Defendant's proposed distinction between actual and constructive discharges would "encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent." Coman, 325 N.C. at 175, 381 S.E.2d at 447 (quoting Sides, 74 N.C. at 342, 328 S.E.2d at 826). In recognizing a claim for constructive wrongful discharge in

[1] Defendant's theory would bar a wrongful discharge claim in even more extreme circumstances. Suppose the employer in Coman told the employee that he could continue to do his job, but that he would receive no pay unless he violated the federal regulations. Faced with the choice of driving without compensation or violating the law, the employee resigns. In defendant's view, the employee would have no wrongful discharge remedy because the employer never "actually" fired him.

violation of public policy, the Maryland Court of Special Appeals aptly described what is at stake in this appeal:

> If an employer directly discharges an at-will employee in such manner as to make the discharge an abusive one under Adler [Maryland's version of Coman], it would defy both reason and fairness to immunize him from liability simply because he has been clever enough to effect the abusive separation by forcing a resignation. That would, in effect, reward him for an extra measure of malefaction -- of not only acting in contravention of some clearly mandated public policy but of making things so intolerable that the employee is forced to initiate his own unlawful termination.

Beye v. Bureau of Nat'l Affairs, 59 Md. App. 642, 653, 477 A.2d 1197, 1203 (1984). As the Maryland court recognized, it would be perverse to reward the employer who deliberately orchestrates a forced resignation in violation of public policy.

C. Almost all other states that have considered the issue recognize claims for constructive wrongful discharge.

The majority below correctly noted that almost all other states that have considered the issue have held that a constructive wrongful discharge falls within the public policy exception to employment-at-will. The Court of Appeals listed ten states (Arkansas, California, Connecticut, Iowa, Maryland, Missouri, Oklahoma, Oregon, West Virginia, and Wisconsin) that recognize claims for constructive wrongful discharge and one state (Illinois) that does not. Whitt v. Harris Teeter, Inc., ___ N.C. App. ___, 598 S.E.2d 151, 157 (2004) (slip op. at 14-15).[2] The Court of Appeals' compilation understates the weight

[2] In identifying Illinois as the sole dissenting state, the Court of Appeals majority cited a decision by an Illinois intermediate appellate court that rejected a claim for constructive discharge. Whitt, 598 S.E.2d at 157 (citing Grey v. First National Bank, 169 Ill. App. 3d 936, 942-43, 523 N.E.2d 1138, 1143, appeal denied, 122 Ill. 2d 574, 530 N.E.2d 245 (1988). Decisions by the Illinois Supreme Court

of authority. New Hampshire and Washington should be added to the majority roster. Karch v. Baybank FSB, 147 N.H. 525, 536, 794 A.2d 763, 774 (2002) ("We hold that properly alleging constructive discharge satisfies the termination component of a wrongful discharge claim."); Snyder v. Medical Service Corp. of Eastern Washington, 145 Wash.2d 233, 238, 35 P.3d 1158, 1161 (2001) ("the law recognizes an action for wrongful discharge which may be either express or constructive"). The current tally of states (excluding North Carolina) is 12-1 in favor of including constructive discharges within the wrongful discharge cause of action.

The supreme courts of Iowa, Wisconsin and California succinctly explained the rationale for recognizing claims for constructive discharge:

> "In an attempt to avoid liability [for wrongfully discharging an employee], an employer may refrain from actually firing an employee, preferring instead to engage in conduct causing him or her to quit. The doctrine of constructive discharge addresses such employer-attempted 'end runs' around wrongful discharge and other claims requiring employer-initiated terminations of employment. . . . Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation."

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suggest that the state may not be firmly wedded to the minority position. See Hartlein v. Illinois Power Co., 151 Ill. 2d 142, 163, 601 N.E.2d 720, 730 (1992) ("we further decline to expand the tort of retaliatory discharge, on these facts, to encompass the concept of 'constructive discharge.'") (emphasis added); Hinthorn v. Roland's of Bloomington, Inc., 119 Ill.2d 526, 531, 519 N.E.2d 909, 912 (1988) ("We have no need to rule upon the viability of a constructive discharge theory at this time, because the plaintiff alleges that she was actually and not constructively discharged.").

Balmer v. Hawkeye Steel, 604 N.W.2d 639, 641 (Iowa 2000) (quoting Turner v. Anheuser-Busch, Inc., 7 Cal. 4th 1238, 1244-45, 872 P.2d 1022, 1025 (1994)); Strozinsky v. School Dist. of Brown Deer, 237 Wis. 2d 19, 57, 614 N.W.2d 443, 461 (2000) (quoting Balmer v. Hawkeye Steel).

In arguing that North Carolina should not recognize a claim for constructive discharge, defendant simply ignores the overwhelming weight of authority from other jurisdictions. See Defendant's Brief at 19-30. Defendant does not explain why this Court, unlike its sister courts in other states, should encourage "employers' 'end runs' around the law," Balmer v. Hawkeye Steel, 604 N.W.2d at 641, by barring claims for constructive discharge. Defendant's silence is understandable, given the lack of any principled reason to support a distinction between actual and constructive wrongful discharge.

II. A CLAIM FOR CONSTRUCTIVE DISCHARGE IN VIOLATION OF PUBLIC POLICY MAY BE BASED ON A DISCRIMINATORY HOSTILE WORK ENVIRONMENT.

As a fallback position, defendant argues that, even if a constructive discharge can support a claim for wrongful termination in violation of public policy, such claims are not actionable if based on a hostile work environment. Defendant's Brief at 30-36. Neither law nor equity support the exception that defendant proposes.

In Amos v. Oakdale Knitting Co., 331 N.C. at 348, 416 S.E.2d at 166, the defendants suggested that "in order to state a valid claim for wrongful discharge in violation of public policy an employee must either be required to engage in unlawful conduct or

the employer's conduct must threaten public safety." Id. at 352-53, 416 S.E.2d at 169. This Court responded:

> Defendants read Coman too narrowly. Although the definition of "public policy" approved by this Court does not include a laundry list of what is or is not "injurious to the public or against the public good," at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes.

Id. at 353, 416 S.E.2d at 169 (emphasis added).

In North Carolina employment law, the most important "express policy declaration contained in the North Carolina General Statutes" is the Equal Employment Practices Act (EEPA), which proclaims:

> It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.
>
> It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely affects the interests of employees, employers, and the public in general.

N.C.G.S. § 143-422.2.

The EEPA expressly condemns "discrimination . . . on account of . . . sex."[3] Id. The courts have repeatedly recognized that

[3] Of course, the EEPA expressly condemns other forms of discrimination, in addition to discrimination based on sex. The rule that defendant proposes would bar all wrongful discharge claims arising out of discriminatory hostile work environments -- including the most egregious racial harassment -- as long as the discharge was constructive. This brief focuses on sexual harassment because that is the type of discrimination at issue in this case, and the most frequently litigated form of workplace harassment. It is important

the EEPA's policy against sex discrimination includes sexual harassment in the workplace. See, e.g., Guthrie v. Conroy, 152 N.C. App. 15, 19-20, 567 S.E.2d 403, 407 (2002) ("the right to be free of sexual harassment in the workplace . . . is implicated in our State declaration of public policy, N.C.G.S. § 143-422.2"); Russell v. Buchanan, 129 N.C. App. 519, 522, 500 S.E.2d 728, 730 (1998) (referring to G.S. 143-422.2 as "North Carolina sexual harassment law"); McLean v. Patten Communities, Inc., 332 F.3d 714, 720 (4th Cir. 2003) (recognizing wrongful discharge claim in violation of public policy on the basis of sexual harassment); Phillips v. J.P. Stevens & Co., Inc., 827 F.Supp. 349, 352-53 (M.D.N.C. 1993) (same).

The North Carolina General Assembly has reinforced the EEPA's public policy declaration by enacting other statutes to protect employees from sexual harassment in the workplace. In 1998 the State Personnel Act was amended to provide that a State employee may bring a claim in the Office of Administrative Hearings for "[h]arassment in the workplace based upon . . . sex . . ., whether the harassment is based upon the creation of a hostile work environment or upon a quid pro quo." N.C.G.S. § 126-34.1(a)(10) (emphasis added). In 1999, the legislature enacted a statute barring retaliation against school employees for complaining of sexual harassment. N.C.G.S. § 115C-335.5(b).

Despite the General Assembly's clearly expressed declaration that sexual harassment violates North Carolina public policy,

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to remember, however, that the rule the Court adopts will govern claims arising out of all discriminatory hostile work environments, including harassment based on race, religion, national origin, age, and handicap.

defendant asks this Court to confer immunity on the employer who maintains a sexually hostile work environment. Defendant argues that liability for wrongful discharge should be limited to cases in which the employer terminates the employee 1) for refusing to perform an unlawful act, 2) in retaliation for exercising a public obligation, 3) in retaliation for asserting a legal right, or 4) in retaliation for whistleblowing. Defendant's Brief at 32. Contrary to defendant's suggestion, this Court has declined to adopt "a laundry list of what is or is not 'injurious to the public or against the public good.'" Amos, 331 N.C. at 353, 416 S.E.2d at 169. Instead, North Carolina anchors its wrongful discharge jurisprudence in legislative declarations of public policy, id., such as the anti-discrimination principles embodied in the EEPA. This Court explicitly recognizes that a wrongful discharge claim may be predicated on a violation of the public policy prohibiting "status-based discrimination." Kurtzman v. Applied Analytical Industries, Inc., 347 N.C. 329, 334, 493 S.E.2d 420, 423 (1997). The hostile work environment that defendant seeks to protect is precisely the kind of "status-based discrimination" that supports a claim for wrongful discharge in violation of public policy.

Federal law further supports the majority opinion below. In "establishing evidentiary standards and principles of law" in discrimination cases, this Court "look[s] to federal decisions for guidance." North Carolina Dept. of Correction v. Gibson, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983). "The ultimate purpose of . . . G.S. 143-422.2 and Title VII . . . is the same; that is,

the elimination of discriminatory practices in employment." Id. at 141, 301 S.E.2d at 85. Accordingly, the same "principles of law and . . . standards," id., should assist this Court in determining whether a claim for a constructive discharge in violation of public policy can be predicated on a sexually hostile work environment.

In Pennsylvania State Police v. Suders, ___ U.S. ___, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004), the United States Supreme Court considered a claim under Title VII for constructive discharge based on sexual harassment. The Court reaffirmed that to establish a hostile work environment, a plaintiff must show "harassing behavior 'sufficiently severe or pervasive to alter the conditions of [her] employment.'" 124 S.Ct. at 2347, 159 L.Ed.2d at 203 (citation omitted). The Court held that "to establish 'constructive discharge,' the plaintiff must make a further showing: she must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response." Id. The Court explained that "the inquiry is objective: did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" Id. at 2351, 159 L.Ed.2d at 216. The Court noted that the federal circuit courts have recognized constructive discharge claims in a wide range of Title VII cases, including, sexual harassment, race, pregnancy, national origin, sex and religion. Id. at 2351, 159 L.Ed.2d at 216-17. The Court concluded: "we agree with the lower courts and

the EEOC that Title VII encompasses employer liability for a constructive discharge." Id. at 2352, 159 L.Ed.2d at 217.

This Court should reach the same conclusion as the Supreme Court in Suders and every other federal circuit court: an employer may be liable for constructive discharge resulting from a discriminatory hostile work environment. See, e.g., Petrosino v. Bell Atlantic, 385 F.3d 210, 229 (2d Cir. 2004) (sex); Robinson v. Sappington, 351 F.3d 317, 336-37 (7th Cir. 2003) (sex); Delph v. Dr. Pepper Bottling Co., 130 F.3d 349 (8th Cir. 1997) (race); Amirmokri v. Baltimore Gas and Electric Co., 60 F.3d 1126, 1132-33 (4th Cir. 1995) (national origin); Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1353-54 (4th Cir. 1995) (sex).

III. TO PROVE A CLAIM FOR CONSTRUCTIVE DISCHARGE, THE EMPLOYEE IS NOT REQUIRED TO SHOW THAT THE EMPLOYER SPECIFICALLY INTENDED TO FORCE THE EMPLOYEE TO QUIT.

In Suders, the Supreme Court adopted a simple, straightforward test to determine whether the plaintiff-employee had stated a claim for constructive discharge: "the inquiry is objective: did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" 124 S.Ct. at 2351, 159 L.Ed.2d at 216. As this Court defines the elements of a claim for constructive discharge, it should follow the Supreme Court's guidance in Suders, a decision that embodies the recent collective wisdom[4] of

[4] Justice Ginsburg authored the majority opinion in Suders, joined by justices Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter and Breyer. Only Justice Thomas dissented.

the nation's highest court, based on decades of evolving law in the lower federal courts.

This Court should not adopt the test used by the Court of Appeals below, which is inconsistent with the clear weight of authority. Following prior decisions of the North Carolina Court of Appeals and the Fourth Circuit Court of Appeals, the majority and dissenting opinion below used a two-part test. A plaintiff alleging constructive discharge under the Court of Appeals' test must demonstrate (1) the objective intolerability of the working conditions, and (2) that the employer's actions were "'specifically intended to force [the employee] to quit.'" Whitt, 598 S.E.2d at 158 (quoting EEOC v. Clay Printing Co., 955 F.2d 936, 944 (4th Cir. 1992)) (emphasis in Clay Printing Co.); see id. ("'"Deliberateness exists only if the actions complained of were intended by the employer in an effort to force the employee to quit"'") (quoting Graham v. Hardee's Food Systems, Inc., 121 N.C. App. 382, 385, 365 S.E.2d 558, 560 (1996)); accord, Doyle v. Asheville Orthopaedic Assoc., PA, 148 N.C. App. 173, 177, 557 S.E.2d 577, 579 (2001); but see Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1355 (4th Cir. 1995) ("the employer must necessarily be held to intend the reasonably foreseeable consequences of its actions").

Using a variant of the Suders test, nine circuits do not require proof that the employer specifically intended to force the employee's resignation:

First Circuit

- Vega v. The San Juan Star, Inc., 377 F.3d 111, 117 (1st Cir. 2004) ("to prove constructive discharge, a plaintiff must usually 'show that her working conditions were so difficult or unpleasant that a reasonable person in [her] shoes would have felt compelled to resign.'").

Third Circuit

- Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888 (3rd Cir. 1984) ("we hold that no finding of a specific intent on the part of the employer to bring about a discharge is required for the application of the constructive discharge doctrine. 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.").

- Gray v. York Newspapers, Inc., 957 F.2d 1070, 1079 (3rd Cir. 1992) ("we employ an objective test in determining whether an employee was constructively discharged from employment: whether 'the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign.'").

Fifth Circuit

- Brown v. Kinney Shoe Corp., 237 F.3d 556, 566 (5th Cir. 2001) ("to prove a constructive discharge, a 'plaintiff must establish that working conditions were so intolerable that a reasonable employee would feel compelled to resign.'").

Seventh Circuit

- Tutman v. WBBM-TV, Inc., 209 F.2d 1044, 1050 (7th Cir. 2000) ("to establish a claim for constructive discharge under Title VII, a plaintiff must prove that his working conditions were so intolerable as a result of unlawful discrimination that a reasonable person would be forced into involuntary resignation.").

Eighth Circuit

- Hukkanen v. International Union of Operating Engineers, 3 F.3d 281, 284 (8th Cir. 1993) ("'a constructive discharge exists when an employer deliberately renders the employee's working conditions intolerable and thus forces [the employee] to quit. . .' Our language in [a prior decision] does not mean constructive discharge plaintiffs must prove their employers consciously meant to force them to quit. . .

When an employer denies a conscious effort to force an employee to resign, . . . the employer must necessarily be held to intend the reasonably foreseeable consequences of its actions.").

Ninth Circuit

- Lotson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987) ("a constructive discharge occurs when, looking at the totality of the circumstances, 'a reasonable person in [the employee's] position would have felt that he was forced to quit because of intolerable and discriminatory working conditions.' . . . This test establishes an objective standard; the plaintiff need not show that the employer subjectively intended to force the employee to resign.").

Tenth Circuit

- Sanchez v. Denver Public Schools, 164 F.3d 527, 534 (10th Cir. 1998) ("constructive discharge occurs when 'the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign'. . .' Essentially, a plaintiff must show that she had "no other choice but to quit."'").

Eleventh Circuit

- Poole v. Country Club of Columbus, Inc., 129 F.3d 551, 553 (11th Cir. 1997) ("to successfully claim constructive discharge, a plaintiff must demonstrate the working conditions were 'so intolerable that a reasonable person in her position would have been compelled to resign.'").

District of Columbia Circuit

- Katradis v. Dav-El, 846 F.2d 1482, 1485 (D.C. Cir. 1988) ("a constructive discharge occurs where the employer creates or 'tolerates discriminatory working conditions that would drive a reasonable person to resign.'").

- Clark v. Marsh, 665 F.2d 1168, 1175, n.8 (D.C. Cir. 1981) ("to the extent that [the employer] denies a conscious design to force [the employee] to resign, we note that an employer's subjective intent is irrelevant; [the employer] must be held to have intended those consequences it could reasonably have foreseen.").

Only the Fourth and Sixth circuits have imposed a specific intent requirement.[5] James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 378 (4th Cir. 2004) (evidence insufficient to show "'calculated effort to pressure [employee] into resignation'"); Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) ("Our decisions require proof of the employer's specific intent to force an employee to leave."); Logan v. Denny's, Inc., 259 F.3d 558, 568-69 (6th Cir. 2001) ("To demonstrate a constructive discharge, Plaintiff must adduce evidence to show that 1) 'the employer . . . deliberately created intolerable working conditions, as perceived by a reasonable person,' and 2) the employer did so with the intention of forcing the employee to quit . . . .'").

Other Fourth Circuit decisions adopt a more nuanced approach. In Martin v. Cavalier Hotel Corp., 48 F.3d 1343 (4th Cir. 1995), a female hotel employee quit her job rather than endure extreme sexual abuse by the hotel manager. The Martin court recognized that the Fourth Circuit adhered to the minority view, requiring the constructive discharge claimant to prove not only intolerable working conditions, but also the employer's

[5] The Second Circuit Court of Appeals has not yet decided whether to adopt a specific intent requirement. Noting that some district courts had concluded that specific intent is necessary to a constructive discharge claim, the Second Circuit recently cautioned that "this court has not expressly insisted on proof of specific intent." Petrosino v. Bell Atlantic, 385 F.3d 210, 229 (2d Cir. 2004). Absent proof of specific intent, the plaintiff alleging constructive discharge "must at least demonstrate that the employer's actions were 'deliberate' and not merely 'negligent or ineffective[].'" Id., (quoting Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 74 (2d Cir. 2000). See Stetson v. NYNEX Service Co., 995 F.2d 355, 360 (2d Cir. 1993) ("To establish a 'constructive discharge,' a plaintiff must show that the employer 'deliberately ma[de his] working conditions so intolerable that [he was] forced to quit.'").

intent. Id. at 1354. Focusing on the intent requirement, the defendant hotel corporation argued that the employee had failed to prove constructive discharge because "'[the hotel manager] would have preferred [the female employee] to remain at the hotel so he could continue to perpetrate and execute his lascivious acts' on her." Id. at 1355. The Fourth Circuit rejected the argument: "proof of an employer's intent 'does not mean constructive discharge plaintiffs must prove their employers consciously meant to force them to quit. When an employer denies a conscious effort to force an employee to resign. . . the employer must necessarily be held to intend the reasonably foreseeable consequences of its actions.'" Id. (quoting Hukkanen v. International Union of Operating Engineers, 3 F.3d at 284. The court observed that acceptance of the defendant's argument would undermine "the clear purpose of Title VII, effectively convert[ing] sexual harassment from a species of prohibited conduct to a viable defense. . . ." Id. at 1355 n.6. Finding that the employee's resignation was a "reasonably foreseeable consequence" of the employer's conduct, the court held that the plaintiff had demonstrated the requisite employer intent. Id. at 1355-56. See Amirmokri v. Baltimore Gas and Electric Co., 60 F.3d 1126, 1134 (4th Cir. 1995) (requisite intent inferred because employer's "response was not reasonably calculated to end [the employee's] intolerable working conditions").

The tension in the Fourth Circuit decisions illustrates the difficulty of a specific intent requirement and the wisdom of the test recently articulated in Suders, which now binds all federal

circuits. In seeking guidance from the federal courts, North Carolina courts owe the Fourth Circuit no special deference, especially where its minority view has been rendered obsolete by the United States Supreme Court. See State v. Lombardo, 306 N.C. 594, 602-04 (1982) (adopting a rule used by five of the six federal circuit courts that had faced the question, and declining to follow the Fourth Circuit's minority view). There is no reason for this Court to depart from the federal rule that proof of specific intent is not required in a constructive discharge case. The proper test is not whether the employer intended the employee to quit but rather whether the employer made the employee's working conditions intolerable.

This the ___ day of February, 2005.

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