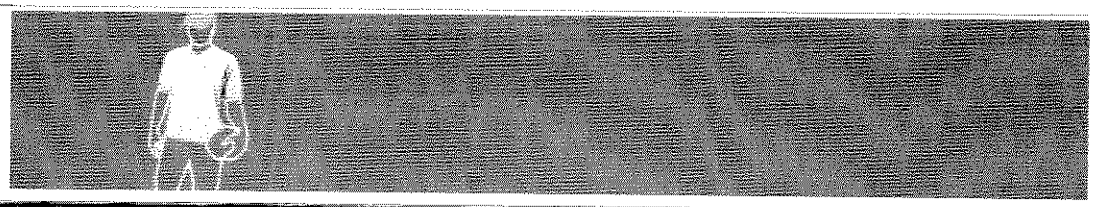

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Reconstructing Constructive Discharge in Second Circuit

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Ordinarily under Title VII of the Civil Rights Act of 1964, an employee experiencing discrimination or sexual harassment may not quit and then claim economic damages for the resulting lost wages. Only when the work conditions are so "intolerable" that a reasonable person would feel compelled to quit will the resignation be treated as a "constructive discharge," entitling the plaintiff to the same damages as if he or she were actually discharged.

In theory, the constructive discharge rule advances Title VII's goal "to encourage employees to stay in the employment relationship as long as possible and try to work out their discrimination claims within the work setting and through administrative processes."[1] In practice, the constructive discharge doctrine often leaves victims of discrimination or harassment with the Hobson's choice of continuing to work under all but intolerable conditions, or quitting and eviscerating their claim for damages.

Intent

The already-harsh constructive discharge doctrine is made harsher by the law of the U.S. Court of Appeals for the Second Circuit. In the words of the U.S. District Court for the Northern District of New York, "The law of constructive discharge in the Second Circuit is clearly unfavorable to the plaintiff."[2] The Second Circuit has held that for there to be a constructive discharge, it is not enough that the plaintiff resign under objectively intolerable circumstances, the employer must also intentionally create the unbearable work conditions.

In requiring a plaintiff to show employer intent in order to make out a constructive discharge claim, the Second Circuit has taken a position at odds with the majority of the circuit courts[3] and the Supreme Court.[4] Even more important, the Second Circuit has neither coherently defined employer intent nor given a rationale for requiring it as an element of constructive discharge.

The Second Circuit first recognized constructive discharge in the context of Title VII in 1983, in *Pena v. Brattleboro Retreat*. The court held, "A constructive discharge occurs when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation."[5] The Second Circuit's definition of constructive discharge, thus, has two parts: one, there exist intolerable working conditions that would compel a reasonable person to quit; and two, the employer acts intentionally or deliberately in creating the intolerable working conditions.

Until recently, the Second Circuit has required a plaintiff claiming a constructive discharge to prove not only that the employer intentionally created the intolerable conditions, but that it did so with the specific intent to force the employee to quit.[6] As reflected by *Whidbee v. Garzarelli Food Specialties Inc.*,[7] a 2000 decision, a plaintiff in this circuit who works under insufferable conditions quits at his or her legal peril because of the specific intent requirement.

The 'Whidbee' Case

In *Whidbee,* a white employee at a McDonalds store spewed racist epithets at two black co-employees for a period of months, and told them things such as that he kept a rope to hang another black employee at the store. When the two plaintiffs complained to their manager about the racist environment, the manager told them that they would have to handle the problem themselves. The plaintiffs then submitted letters of resignation, effective in two weeks. During those two weeks, the white employee persisted in making racist comments. When the plaintiffs again complained, the manager said that he "can't control [the white employee's] mouth," that "maybe [the plaintiffs] should approach him" themselves; and that if his or the plaintiffs' talking to the coworker did not solve the problem, the plaintiffs would "have to leave."

The manager, unwilling to confront the white employee, did issue him a written warning. The warning, however, went unheeded. In fact, after hearing a news story about a black man killed after being dragged from a pick up truck, the white employee announced that he "should go out and buy a truck and drag someone by the truck who is black." Only when the plaintiff's two-week notice period was nearly over did the manager, joined by his superior and the plaintiffs, tell the white employee that he would be fired if he continued making offensive comments. The plaintiffs left at the end of the two weeks.

Whidbee held that while a reasonable jury could find that the plaintiffs were subjected to a racially hostile work environment, their constructive discharge claim was properly dismissed. The appellate court did not consider whether the plaintiffs' working conditions were unbearable - the first prong of its constructive discharge test - but, instead, focused on the employer's intent.

With considerable understatement, the court observed that the manager's comments "might be seen as evincing a lack of concern about the plaintiffs' situation." Nonetheless, the Second Circuit held that the evidence did not support an inference that the employer intended to create intolerable working conditions, since the employer, even if belatedly, threatened to terminate the white coworker if he continued making racist remarks. Thus, although there certainly was sufficient evidence for a reasonable jury to find the store environment objectively intolerable for black employees, and although the employer refused to take corrective action until after the plaintiffs submitted their resignations, the plaintiffs lost their constructive discharge claim because they could not show the employer's specific intent to force them out.

Relaxing Employer Intent?

Since *Whidbee*, there are signs that the Second Circuit is relaxing the employer intent requirement. In *Terry v. Ashcroft*,[8] a 2003 decision, the Second Circuit gave short shrift to the employer intent requirement. The appellate court, in reversing summary judgment as to the plaintiff's constructive

discharge claim, considered only whether 1) the plaintiff's working conditions were intolerable, and 2) the constructive discharge occurred under circumstances giving rise to an inference of discrimination. The court treated facts suggesting that the employer wanted the plaintiff to resign (e.g., a supervisor telling the plaintiff that his "days were numbered") simply as factors supporting its finding of intolerable working conditions rather than as evidence of the employer's intent.

The following year, in *Petrosino v. Bell Atlantic*,[9] the Second Circuit did require the plaintiff to show employer intent, but indicated that it was prepared to scrap constructive discharge's specific intent requirement. The Second Circuit noted that "this court has not expressly insisted on proof of specific intent" and that it is sufficient for a plaintiff to show that the employer's conduct was "deliberate." As to a definition of "deliberate" conduct, *Petrosino* could do little better than say what was not deliberate conduct. The court stated that deliberate conduct must be more than mere "negligence" or 'ineffectiveness."[10]

The plaintiff in *Petrosino* worked in a sexually hostile environment for eight years. She transferred to another department after her supervisors told her that she stood a better chance of promotion there. Ms. Petrosino subsequently learned that, contrary to what her supervisors said, there were no possibilities of a promotion in the new department. She then quit, claiming constructive discharge. The Second Circuit had no trouble reversing the district court's summary dismissal of the plaintiff's hostile environment claim. However, it affirmed summary judgment as to the constructive discharge claim.

In determining whether Ms. Petrosino was constructively discharged, the Second Circuit considered whether the conduct precipitating her resignation, the supervisors' ill-advised transfer recommendation, was deliberate. The court found no evidence that the supervisors had deliberately misled the plaintiff into thinking that her chances for a promotion were better in the other department, much less that they misled her in order to put her in an unbearable situation and prompt her resignation. By indicating that the plaintiff could have met the employer intent requirement had she only shown that her supervisors deliberately misled her, for whatever reason, *Petrosino* signaled that any non-negligent, non-inadvertent act by the employer helping to create intolerable working conditions would suffice.

'Deliberate Conduct'

The Second Circuit's "deliberate conduct" requirement, in all of its variations, is a throwback to constructive discharge as originally conceived in the labor law context. In that context, the purpose of the constructive discharge doctrine was to prohibit employers from using indirect means to force out employees because of their union activities. As one court stated, "[a]n employer cannot do constructively what the act prohibits his doing directly."[11] Thus, for constructive discharge in the labor law area, there was a clear rationale for requiring specific intent.

The Second Circuit, however, has never offered a rationale for introducing "deliberate conduct," a watered-down version of the specific intent requirement, to constructive discharge in Title VII cases. The only arguable justification for requiring deliberate conduct, sans specific intent, is to safeguard an employer from liability for post-termination damages when it was not actively involved in the plaintiff's termination. However, this rationale conflicts with well-established Title VII law that, under some circumstances, liability may be imputed to an employer even for passive conduct. For example, it is clear that an employer may be held liable for its negligence or ineffectiveness in failing to stop or remedy coworker harassment.[12] If strictly applied, therefore, the deliberate conduct rule would arbitrarily deny the constructive discharge remedy to a whole category of Title VII plaintiffs, victims of coworker harassment.

Some lower courts are apparently aware that the strict enforcement of constructive discharge's deliberate

conduct requirement is untenable. In order to broaden the scope of constructive discharge without defying the deliberate conduct rule, district courts have recast classically negligent actions by an employer as deliberate conduct. Thus, in order to find a constructive discharge, courts have characterized an employer's failure to remedy harassment as "a deliberate refusal to address the problems," or "deliberate inaction."[13] That lower courts have had to resort to such tortured language in order to comply with the deliberate conduct requirement shows that the rule has outlived its usefulness.

Ultimately, under Title VII, courts need to protect employees from unlawful conditions so harsh that a reasonable person would feel compelled to quit.[14] As the Supreme Court stated when discussing how severe must be the sexual harassment in order to be actionable, "Title VII comes into play before the harassing conduct leads to a nervous breakdown."[15] By the same token, an employee should be able to leave a job before suffering a nervous breakdown without sacrificing essential statutory remedies. To hold otherwise would undermine one of the central purposes of Title VII, to make whole victims of discrimination.[16]

As in *Terry,* a court's exclusive focus should be on the harm suffered by the employee and whether the harm was caused by discrimination. The employer's specific intent to make the employee quit should be treated as evidence supporting the assertion of intolerable working conditions, and not as an additional element of a constructive discharge claim.

Incoherent and Outmoded

Clearly, the Second Circuit's constructive discharge doctrine is founded upon an employer intent standard that is incoherent and outmoded. Although *Pennsylvania State Police v. Suders,*[17] the Supreme Court's first decision on constructive discharge in the area of Title VII, did not address the issue of employer intent, its discussion of constructive discharge provides courts within this circuit needed guidance.

Suders answered a question left open by the Supreme Court's 1998 landmark sexual harassment rulings, *Burlington Indus. Inc. v. Ellerth* and *Faragher v. Boca Raton.*[18] In *Ellerth* and *Faragher,* the Court identified two types of sexual harassment. The first is where a supervisor's harassment culminates in a "tangible employment action," such as a discharge, demotion, or failure to promote. In such circumstances, the employer is strictly liable for the supervisor's conduct. In the second category, supervisory harassment does not result in a tangible employment action. The employer, in that case, has an affirmative defense if it can show that a) it exercised reasonable care to prevent and correct promptly the harassment; and b) the plaintiff unreasonably failed to avail herself of the employer's preventative and corrective policies.

Suders considered whether a constructive discharge is a tangible employment action. The Court, with Justice Ruth Bader Ginsburg writing for an eight-justice majority, held that a constructive discharge may be a tangible employment action, imposing strict liability on the employer, if the plaintiff quit in a reasonable response to an employer's official act that changed his or her employment status, such as a demotion or reduction in pay. In cases, however, where the plaintiff quit because of severe coworker or supervisory harassment, without having experienced a change in employment status, the employer may avoid liability by showing that the plaintiff unreasonably failed to use the employer's complaint procedures.

Suders' holding, that a constructive discharge may or may not be a tangible employment action depending on whether an official act was involved, was a logical extension of *Ellerth/Faragher.* More important for clarifying Second Circuit law was the Supreme Court's discussion of what constitutes a constructive discharge.

Suders stated that to establish a constructive discharge, an employee must "show that the abusive working environment became so intolerable that her resignation qualified as a fitting response." In determining a constructive discharge, "[t]he inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?"[19] The Court's focus was solely on the objective reasonableness of the employee's reaction to the working conditions; the employer's intent in creating the conditions was ignored. In the course of the opinion, the Court defined constructive discharge similarly four times, never once mentioning the necessity of showing the employer's subjective intent or deliberate conduct.[20] Justice Clarence Thomas, in his dissent, made clear that the majority's omission of employer intent from its definition of constructive discharge was not incidental, observing, "as it is currently conceived, a 'constructive' discharge does not . . . require that the act be undertaken with the same purpose as an actual discharge."[21]

The 'Suders' Decision

Suders arguably overruled the Second Circuit's employer intent requirement because it directs the inquiry toward the employee's reasonable response to intolerable working conditions, not the employer's state of mind. To date, however, courts within this circuit have either ignored *Suders'* formulation of constructive discharge[22] or, in the absence of a contrary Second Circuit ruling, held that the decision has no impact on the employer intent requirement.[23]

This is unfortunate since, as discussed, the Second Circuit's constructive discharge doctrine is ill-defined and at odds with Title VII's remedial purpose. With *Suders,* the Second Circuit has an opportunity, and perhaps a mandate, to formulate a coherent constructive discharge standard that jettisons the seriously flawed employer intent rule.

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1. *Morris v. Schroder Capital Mgmt. Int'l*, 445 F.3d 525, 531 (2d Cir. 2006).

2. *Bright v. Le Moyne College,* 306 F.Supp.2d 244, 256 (N.D.N.Y. 2004).

3. Compare *Poland v. Chertoff,* 494 F.3d 1174, 1185, n.7 (9th Cir. 2007) (not requiring proof that the employer created the intolerable conditions with the intent to cause the employee to resign); *Lindale v. Tokheim,* 145 F.3d 953, 955 (7th Cir. 1998) (same); *Ramos v. Davis & Geck Inc.,* 167 F.3d 727, 732-33 (1st Cir. 1999) (same); *Derr v. Gulf Oil Corp.,* 796 F.2d 340, 343-44 (10th Cir. 1986) (same); *Goss v. Exxon Office Sys. Co.,* 747 F.2d 885, 888 (3d Cir. 1984) (same); *Bourque v. Powell Elec. Mfg. Co.,* 617 F.2d 61, 65 (5th Cir. 1980) (specific intent requirement is "inconsistent with the . . . realities of the workplace") with *Elnashar v. Speedway SuperAmerica, LLC,* 484 F.3d 1046, 1058 (8th Cir. 2007) (requiring plaintiff to prove employer's intent); *Goldmeier v. Allstate Ins. Co.,* 337 F.3d 629, 635 (6th Cir. 2003) (same); and *Johnson v. Shalala,* 991 F.2d 126, 131 (4th Cir. 1993). Cases from the D.C. Circuit cases have reached conflicting conclusions. Compare *Clark v. Marsh,* 665 F.2d 1168, 1175, n.8 (D.C. Cir. 1981) (noting that employer's subjective intent is irrelevant) with *Mungin v. Katten Muchin & Zavis,* 116 F.3d 1549, 1558 (D.C. Cir. 1997). The Eighth and Sixth circuits, while requiring specific intent, have established a lower threshold to prove such intent. Thus, the Eight Circuit has ruled that evidence that a plaintiff's resignation was a "reasonably foreseeable consequence of [the] employer's discriminatory actions" is sufficient to show employer intent. *Hukkanen v. Int'l Union of Oper'g Eng'rs,* 3 F.3d 281, 284-85 (8th Cir. 1993); see also *Moore v. Kuka Welding Sys.,* 171 F.3d 1073, 1080 (6th Cir. 1999); Shuck, C., "That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine," 23 Berkeley J. Emp. & Lab. L. 401, 413-17 (2002).

4. *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

5. 702 F.2d 322, 325 (2d Cir. 1983) (internal quotations omitted).

6. See, e.g., *Kader v. Paper Software Inc.*, 111 F.3d 337, 339-40 (2d Cir. 1997); *Spence v. Maryland Casualty Co.*, 995 F.2d 1147, 1156 (2d Cir. 1993).

7. 223 F.3d 62 (2d Cir. 2000).

8. 336 F.3d 128 (2d Cir. 2003).

9. *Petrosino,* 385 F.3d 210 (2d Cir. 2004).

10. Id. at 229 (2d Cir. 2004) (citing *Whidbee,* 223 F.3d at 74).

11. *NLRB v. Holly Bra of California Inc.,* 405 F.2d 870, 872 (9th Cir. 1969) (citing *NLRB v. Vacuum Platers Inc.,* 374 F.2d 866 (7th Cir. 1967)).

12. *Fairbrother v. Morrison*, 412 F.3d 39, 48-49 (2d Cir. 2005) (abrogated on other grounds by *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53 (2006)); *Distasio v. Perkin Elmer Corp.,* 157 F.3d 55, 63-64 (2d Cir. 1998); *Torres v. Pisano*, 116 F.3d 625, 636-38 (2d Cir. 1997).

13. See *EEOC v. Grief Bros. Corp.,* No. 02-CV-468S, 2004 WL 2202641 *16 (W.D.N.Y. Sept. 20, 2004) (denying summary judgment as to constructive discharge, stating "[i]f the jury finds that Defendant had notice of the harassment and failed to adequately respond, it could reasonably find that Defendant's failure to remedy the harassment was deliberate"); *Rechichi v. Eastman Kodak Co.,* No. 02-CV-6249, 2004 WL 1698333 (W.D.N.Y. Jan. 21, 2004) (denying summary judgment where employer's refusal to address the problem and accusing plaintiff of harassing the men could be viewed as "a deliberate refusal to address the problem"); *Ross v. Mitsui Fudosan Inc.*, 2 F.Supp.2d 522, 530-31 (S.D.N.Y. 1998) (plaintiff made out a claim of constructive discharge where she alleged that employer knew of sexual harassment and did not investigate or take remedial action against the harassers); *Maturo v. National Graphics Inc.,* 722 F.Supp. 916, 923-24 (D. Conn.1989) (owner's and manager's "deliberate inaction" in ending sexual harassment constituted constructive discharge); cf. *Rutkowski v. Sears Roebuck Corp.,* 210 F.3d 355 (table decision), 2000 WL 354223 *4 (2d Cir. 2000) (no constructive discharge when plaintiff failed to show intolerable conditions through the employer's "deliberate action or deliberate inaction"); *De Chanval Pellier v. British Airways, PLC,* No. Civ.A. 02-CV-4195, 2006 WL 132073 *5 (E.D.N.Y. Jan. 17, 2006) (employer's investigations of sexual harassment and discrimination were not so deficient as to rise to the level of "deliberate inaction"); *Lupacchino v. ADP Inc.,* No. 3:02 CV 2281, 2005 WL 293508 (D. Conn. Jan. 21, 2005) ("Under some circumstances, an employer's failure to remedy sexual harassment can constitute sexual discharge.")

14. See *Ramos v. Davis & Geck Inc.,* 167 F.3d at 731.

15. *Harris v. Forklift Systems Inc.*, 510 U.S. 17, 22 (1993).

16. *Albemarle Paper Co. v. Moody*, 522 U.S. 405, 418 (1975); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976); *Saulpaugh v. Monroe Cmty. Hosp.*, 4 F.3d 134, 144-45 (2d Cir. 1993).

17. 542 U.S. 129 (2004).

18. *Ellerth*, 524 U.S. 742; *Faragher*, 524 U.S. 775.

19. 542 U.S. at 134, 141.

20. By contrast, *Suders* quoted *Sure-Tam Inc. v. NLRB*, 467 U.S. 883 (1984), which recognized constructive discharge claim in the labor-management context. There, the Court expressly required proof that the employer acted with the "purpose of discouraging union activity" in creating the intolerable working conditions. 542 U.S. at 142 (quoting *Sure-Tam Inc. v. NLRB*, 467 U.S. at 894 (1984)).

21. Id. at 154 (Thomas, J., dissenting).

22. See *Morris v. Schroder Capital Management Int'l*, 481 F.3d 86, 88 (2d Cir. 2007); *Ferraro v. Kellwood Co.*, 440 F.3d 96, 101 (2d Cir. 2006).

23. See *Roberti v. Schroeder Inv. Management No. America Inc.*, No. 04 Civ. 2404 *7, 2006 WL 647718 *7 (S.D.N.Y. March 14, 2006); *Grief Bros.*, 2004 WL 2202641 *15; *Thomas v. Bergdorf Goodman Inc.*, No. 03 Civ. 3066, 2004 WL 2979960 *9 n.5. (S.D.N.Y. Dec. 22, 2004).