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CONSTRUCTIVE DISCHARGE: WHAT IT IS, AND WHAT IT ISN'T, IN MISSISSIPPI EMPLOYMENT LAW

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When an irate employee threatens to "quit and sue," is she holding a gun to her employer's head, or to hers? Answering that question requires knowledge of the law of constructive discharge, the federal component of which is well-settled. Mississippi constructive discharge law is of relatively recent vintage. This article is offered to help the general practitioner determine whether Mississippi law will burden the employer or the employee with the consequences of her resignation.

I. THE CONCEPT OF CONSTRUCTIVE DISCHARGE

Employers today are burdened by a thick catalogue of rules limiting their right to end an unsatisfactory employment relationship. Employers are fairly charged with knowledge of many, such as express employment contracts and those implied from employment policies. And most employers have some knowledge of major federal anti-discrimination laws. But regardless of the source, or the employer's notice of a legal duty not to discharge an employee, courts permit an employee who has quit to state a discharge claim if she can prove that her resignation was a "constructive discharge."[1]

Constructive discharge is the legally-inferred equivalent of an express discharge. Rather like conspiracy, the term suffers from guilt by association. If an employer lawfully may discharge an employee expressly, it may constructively discharge her without liability.[2] Liability arises only when express discharge would have been forbidden.[3]

Courts weighing constructive discharge claims use a variant of the reasonable person standard.[4] Did the employer make the employee's working conditions so intolerable as to compel the resignation of any reasonable person? If so, the employer constructively discharged the employee. Formally, the question is objective.[5] That is, the employee need not prove that the employer intended to force her to quit, only that the employer intended to create the intolerable circumstances and that the employee's resulting resignation was the foreseeable act of a reasonable person.[6] Consequently, some have remarked that a constructive discharge claim may be premised on employer negligence.[7]

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*The author would like to thank Brendon T. McLeod who is currently working at Troutman Sanders in Atlanta, Ga.

1. *See* Cothern v. Vickers, Inc., 759 So.2d 1241, 1245-46 (Miss. 2000).
2. *See* Junior v. Texaco, 688 F.2d 377, 378 (5th Cir. 1982).
3. *See* Miller v. Texas State Bd. of Bar Examiners, 615 F.2d 650, 652 (5th Cir. 1980).
4. *See* Cothern, 759 So.2d at 1246.
5. *Id.*
6. *See* Bullock v. City of Pascagoula, 574 So.2d 637, 640 (Miss. 1990).
7. *See* Fowler v. Carrolton Public Library, 799 F.2d 976, 980 (5th Cir. 1986) (dicta). Your authors think this a legal fiction, but it is a logical extension of prior law and may determine insurance coverage, especially if the relevant law imposes liability for negligent violations and the relevant policy excludes liability for intentional acts.

As the reader suspects already, modifying holdings have developed into doctrines which push the result one way or the other in particular classes of cases. Let us hence.

II. MISSISSIPPI BORROWS FIFTH CIRCUIT LAW

The law which supplies the rule of decision for the discharge claim also supplies the rule for deciding whether the employee's resignation was a constructive discharge.[8] Fortunately for our litigants and litigators, the Mississippi Supreme Court has bought in bulk the constructive discharge law developed by the United States Fifth Circuit Court of Appeals under a broad range of federal employment and civil rights statutes.[9] This has so far produced uniform results regardless of the forum or law chosen by litigants.

Originally, the Fifth Circuit borrowed constructive discharge law developed by the National Labor Relations Board to determine whether an employer had craftily, or not so craftily, made work intolerable for a pro-union employee in order to stifle union organizing or to punish him for his union activities.[10] Like other Board discrimination cases, the question required evaluation of the employer's state of mind, most often inferred from circumstantial evidence.[11] Some Board opinions required proof that the employer intended to compel the employee to quit.[12] Other cases, with more or less clarity, required only that resignation have been a reasonably foreseeable result of the employer's badly motivated abuse.[13] Early Fifth Circuit cases treating constructive discharges under Title VII of the Civil Rights Act of 1964 did not remedy the confusion.[14] This permitted Title VII defendants to attack such claims as a matter of law when employees, reasonably and foreseeably compelled to quit, could produce no evidence that the employer specifically intended to force resignation.[15] Sustaining such defenses posed a practical problem in the days before the Civil Rights Act of 1991 permitted Title VII plaintiffs to recover legal damages. If no discharge, then no significant damages; if no significant damages, no incentive to sue. If constructive discharge turned on the employer's specific intent, few employees could or would make the claim. Consequently, a devious employer might evade

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8. *See* Guthrie v. Tifco Industries, Inc., 941 F.2d 374, 376-77 (5th Cir. 1991).

9. Bulloch v. City of Pascagoula, 574 So.2d 637, 640-41 (Miss. 1990); Hoerner Boxes v. Mississippi Employment Security Commission, 693 So.2d 1343, 1347 (Miss. 1997).

10. Young v. Southwestern Savings and Loan Association, 509 F.2d 140, 144 (5th Cir. 1975); Calcote v. Texas Educational Foundation, Inc., 578 F.2d 95, 97 (5th Cir. 1978).

11. Young, 509 F.2d at 144-45; Calcote, 578 F.2d at 97-98.

12. *See, e.g.*, Chem-Spray Filling Corp., 176 N.L.R.B. 754, 755 (1969) ("[The employer's conduct must be] of a kind calculated to force her to quit."), quoting Action Wholesale, Inc., 145 N.L.R.B. 627 (1963).

13. *See* Markus Hardware, Inc., 243 N.L.R.B. 903, 916 (1979) (citing objective standard as a means of judging the employer's intent); Borg Warner Corporation, 245 N.L.R.B. 513, 519 (1979) (distinguishing objective constructive discharge finding from "a constructive discharge in the traditional sense", which requires evidence that the employer created intolerable conditions "with the expectation or hope that he would voluntarily quit").

14. *See* Calcote v. Texas Educational Foundation, Inc., 578 F.2d at 98 (emphasizing that acts which forced resignation were "deliberate").

15. *See* Muller v. United States Steel Corp., 509 F.2d 923, 929-30 (10th Cir. 1975)(where there is a "dearth of evidence" to show a deliberate effort by employer to force employee's resignation, proof of constructive discharge fails).

Title VII scrutiny by making a complaining employee miserable, and if she quit, all the better.

No Fifth Circuit opinion explained the shift toward objectification in these terms, but the shift clearly occurred, and had the effect of defeating that employer tactic. By 1990, Fifth Circuit panels were consistently and clearly disavowing prior suggestions that a constructive discharge plaintiff must prove that her employer specifically intended to force her to quit.[16] But could a plaintiff with some evidence of race, sex, or age-based discrimination quit a genuinely stressful job and escape pre-trial dismissal of her constructive discharge claim? The Fifth Circuit would not take objectification this far.[17] The Fifth Circuit approach to constructive discharge takes account of the underlying statutory policy, and of opportunities for abuse, and so has led to predictable if different results in different classes of cases.

A state, county or municipal employee who has a legal right to be discharged only for some cause also has a Fourteenth Amendment "property interest" in her job, and so deserves a due process hearing of some sort before the governing body may deprive her of it.[18] This does not fit neatly with constructive discharge claims, since the constructive discharge plaintiff concedes that no formal action was taken to terminate her employment. The Fifth Circuit solution is that, "Constructive discharge in a procedural due process case constitutes a § 1983 claim only if it amounts to forced discharge to avoid affording pretermination hearing procedures."[19] This is a question of the employer's specific intent.[20]

Almost all employment discharge suits allege purposeful wrongs. It is practically, and therefore conceptually difficult, to separate objective constructive discharge analysis from the question of the employer's subjective motive. After all, there is no liability for a constructive discharge unless motivated by the prohibited state of mind. One solution — intended or not — is to raise the bar of objective intolerability. In *Landgraf v. USI Film Products*, 968 F.2d 427, 430 (5th Cir. 1992), *aff'd*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 119 (1994), the Court made express what had been implicit in Title VII sex harassment cases, "To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment."[21] The more relatively intolerable the circumstances, the better the bet that the employer created them for the prohibited purpose.[22]

The spectrum of employer intent which runs from reasonable foreseeability to specific intent is wide enough to avoid Hobson's choices. If pushed to either end, law focused upon the employer's state of mind might hold employers liable

16. *See* Jurgens v. EEOC, 903 F.2d 386, 390-92 (5th Cir. 1990); Boze v. Branstetter, 912 F.2d 801, 804-05 (5th Cir. 1990).

17. *See* Landgraf v. USI Film Products, 968 F.2d 427, 429-30 (5th Cir. 1992)(sexually harassed employee's constructive discharge claim dismissed as matter of law because reasonable employee would not have felt compelled to resign).

18. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985).

19. Fowler v. Carrolton Public Library, 799 F.2d 976, 981 (5th Cir. 1986).

20. *Id.* at 980.

21. *See also* Weller v. Citation Oil & Gas Corp., 84 F.3d 191, 195 n. 7 (5th Cir. 1996).

22. This is the author's hypothesis. The Fifth Circuit did not explain the quoted holding in this way.

to employees whose known hypersensitivity to minor slights prompted their resignations. It does not. There is no thin-skulled plaintiff rule. The employee's actual humiliation does not make a constructive discharge case. Rather, courts look to the character of the employer's intentional conduct, and the foreseeable effect of that conduct upon a hypothetical reasonable person.[23]

Similarly, plaintiffs lose when others who experienced the same working conditions tolerated them.[24]

Some resignations are disallowed as a matter of statutory policy. For example, courts presume almost conclusively that a hypothetical, reasonable pay discrimination plaintiff would contest the disparity while remaining on the job.[25]

Finally, there is the matter of timing. Suffering intolerable working conditions apparently aimed at you does not give you tenure. The evidence must permit a reasonable juror to infer that you quit because of those conditions.[26] That usually translates into the conditions prevailing when you quit. The longer you wait, the more tenuous that inference. Delays ranging from to four to thirteen months have been judged too long.[27] On the other hand, you are not entitled to presume the worst and jump ship upon slight or isolated provocation.[28]

III. THE EASY CASES

The proper result in some cases is clear because the dismissal is in no sense constructive. Most concern employees expressly forced to choose between resignation and discharge.[29] In other cases, employers have accepted resignations not tendered,[30] or have told the employee to use his short time remaining to find another job.[31] The same effect is achieved when an employer replaces the employee while offering only part time work in a demeaning capacity.[32] In all

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23. Jett v. Dallas Independent School District, 798 F.2d 748, 755 (5th Cir. 1986), *aff'd in part and remanded in part*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), *on remand*, 7 F.3d 1241 (5th Cir. 1993); Cothern v. Vickers, Inc., 759 So.2d 1241, 1245-47 (Miss. 2000).

24. Redd Pest Control Company, Inc. v. Foster, 761 So.2d 967, 971 (Miss. App. 2000); Benningfield v. City of Houston, 157 F.3d 369, 376-77 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1457 (1999); Jurgens v. EEOC, 903 F.2d 386, 391 n. 7 (5th Cir. 1990); Barrow v. New Orleans Steamship Association, 10 F.3d 292, 297-98 (5th Cir. 1994); Bodnar v. Synpol, Inc., 843 F.2d 190, 192 (5th Cir. 1988), cert. denied, 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 248 (1988); Kelleher v. Flawn, 761 F.2d 1079, 1086-87 (5th Cir. 1985); Junior v. Texaco, 688 F.2d 377, 380 (5th Cir. 1982).

25. Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 61 (5th Cir. 1980); Pittman v. Hattiesburg Municipal Separate School District, 644 F.2d 1071, 1076 (5th Cir. 1980).

26. *See* Stephens v. C.I.T. Group/Equipment Financing, Inc., 955 F.2d 1023, 1027 (5th Cir. 1992).

27. Vaughn v. Pool Offshore Co., 683 F.2d 922, 926 (5th Cir. 1982) (about four months after severe racial hazing aboard offshore rig); McKethan v. Texas Farm Bureau, 996 F.2d 734, 740-41 (5th Cir. 1993), *cert. denied*, 510 U.S. 1046, 114 S.Ct. 694, 126 L.Ed.2d 661 (1994) (thirteen months after humiliating speech).

28. Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239, 242-43 (5th Cir. 1993) (employee quit after supervisor called him a "wetback"); Ward v. Bechtel Corp., 102 F.3d 199, 202 (5th Cir. 1997) (manager quit promptly after company refused to fire subordinate who elbowed and threatened her); Webb v. Cardiothoracic Surgery Associates of North Texas, P.A., 139 F.3d 532, 535, 539-40 (5th Cir. 1998) (isolated outbursts and indignities).

29. *See* Bueno v. City of Donna, 714 F.2d 484 (5th Cir. 1983); Findeisen v. North East Independent School District, 749 F.2d 234 (5th Cir. 1984), *cert. denied*, ___ U.S. ____, 105 S.Ct. 2657, 86 L.Ed.2d 274 (1985).

30. *See* Brown v. East Mississippi Electric Power Association, 989 F.2d 858, 863 (5th Cir. 1993) (employee, given two weeks to choose demotion or resignation, received notice after one week that his resignation had been accepted)

31. *See* Faruki v. Parsons, S.I.P., Inc., 123 F.3d 315, 319 (5th Cir. 1997).

32. *See* Miller v. Butcher Distributors, 89 F.3d 265, 267 (5th Cir. 1996) ("It's either part time, or you're out of here.")

such cases, the employer expressly puts it to the employee that continued employment is not an option. If this evidence is believed, then the case should be classed as an express discharge. If litigated as a constructive discharge, the claimant normally wins despite the misnomer.[33]

IV. HARD CASES

In employment relationships, as in others, the parties sometimes draw opposing conclusions from ambiguous communications. The employee, believing that she has been fired, fails to return to work. The employer, knowing that the employee is displeased, interprets her departure as her resignation. The Mississippi Supreme Court tackled such a case in *Huckabee v. Mississippi Employment Security Commission*, 735 So.2d 390 (Miss. 1999). Ms. Huckabee complained to her supervisor that her convenience store job required the effort of two people.[34] The boss asked Ms. Huckabee if she were looking for another job.[35] Huckabee replied that she would look for another job while she continued working.[36] The boss said that she would have to replace Huckabee, and Huckabee promised to give two weeks notice when she found another job.[37] The conversation ended with the boss giggling as she said, "I'm hiring somebody else."[38] Huckabee took this to mean that she had been fired.[39] When she came back to get her final paycheck, her boss assumed that she had quit.[40]

The dispute was tried before an appeals referee of the Mississippi Employment Security Commission, in order to determine whether Ms. Huckabee had disqualified herself for unemployment compensation by leaving work voluntarily without good cause.[41] On this question, she bore the burden to prove by a preponderance of evidence that she had not.[42] The referee, then the full Commission Review Board, found her evidence wanting.[43] As they saw it, the employer reasonably believed that Ms. Huckabee had quit.[44] So did the Mississippi Supreme Court, originally.[45] The Court rejected Ms. Huckabee's constructive discharge analysis, since her boss had done nothing to make her working conditions intolerable.[46] Either this was an express discharge, or none.[47] If none, then Ms. Huckabee had the burden to prove a good cause for

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33. *See* Stephens, 955 F.2d at 1027 (employee was demoted, his salary cut, and employer badgered him to resign); Christopher v. Mobil Oil Corp., 950 F.2d 1209, 1214-15 (5th Cir. 1992)(employees offered choice between retirement or continued employment, both on unfavorable terms).

34. *Id.* at 392.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 392-93.

42. Miss. Code Ann. § 71-5-513(A)(1)(a), (c). Neither the original opinion nor the rehearing opinion discussed the parties' proof burden, apparently because the statute required the Court to defer to the MESC if its finding was supported by substantial evidence.

43. *See* Huckabee, 735 So.2d at 393.

44. *Id.*

45. *See* Huckabee v. Mississippi Employment Security Commission, 722 So.2d 590, 1998 WL 718357 (Miss. 1998) (withdrawn from bound volume).

46. *Id.* at 595-96.

47. *Id.* at 590-92.

leaving.[48] If so, the statute required the Court to defer to the Commission's finding if supported by substantial evidence.[49] Since there was contradicting evidence, the Court deferred to the Commission.[50]

On rehearing, the Court reversed itself, holding that the original opinion had asked and answered the wrong questions.[51] "The issue before this Court is whether an employee who abandons the workplace under the reasonable belief that she has been discharged should be classified as a 'discharged' employee and eligible for benefits or classified as a 'voluntary quit' employee and not eligible for benefits."[52] The Court viewed this by analogy to cases in which the employer fires the employee who announces an intent to resign at a future date.[53] In dissent, Justice Smith again argued that there was no proof of constructive discharge.[54] The majority agreed, holding that constructive discharge principles were "not germane."[55]

A similar problem of legal taxonomy arises when an employee quits under the reasonable belief that his employer has signaled its intent to fire him by circumstances which are not otherwise intolerable.[56] These cases have gone both ways, with the Fifth Circuit relying on a descriptive analysis with little predictive value.[57] The Fifth Circuit has treated the employee's resignation as a discharge when the adverse circumstances fairly may be called a "harbinger of dismissal."[58] Thus, in an age discrimination case, a 19% pay cut will support resignation if the employee also is forced to work for a less qualified junior, is forced to explain his demotion to his client, and is asked continually when he will quit.[59] But similar pay cuts without such extreme, aggravating factors do not send the same fatal signal.[60] In age discrimination cases, the Fifth Circuit has looked to this non- exclusive list of factors to answer this question.

> (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer

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48. *Id.* at 591.
49. *Id.* at 591-92.
50. *Id.* at 596.
51. *See* Huckabee, 735 So.2d at 392.
52. *Id.* at 394.
53. *Id.*
54. *Id.* at 397-98 (Smith, J., dissenting).
55. *Id.* at 396.
56. This is inferred from the Fifth Circuit's refusal to sustain claims based on seemingly less tolerable circumstances without proof that the employer intended thereby to send a message of impending termination to this particular employee. *See* Jurgens v. EEOC, 903 F.2d at 391 n. 7; Boze v. Branstetter, 912 F.2d at 804-05; Benningfield v. City of Houston, 157 F.3d at 376-77.
57. *See* Jurgens, 903 F.2d at 390-92 (employee who resigned after employer's discriminatory denial of promotion and non-discriminatory demotion not constructively discharged).
58. Stephens, 955 F.2d at 1028.
59. *Id.* at 1027.
60. McCann v. Litton Systems, Inc., 986 F.2d 946, 950-53 (5th Cir. 1993) (12% pay cut, forced to work for junior). *See also* Guthrie v. Tifco Industries, 941 F.2d 374, 377 (5th Cir. 1991), *cert. denied*, 503 U.S. 908, 112 S.Ct. 1267, 117 L.Ed.2d 495 (1992) (a 40% pay cut without extreme aggravating factors might send same message).

> calculated to encourage employee's resignation; or (7) offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not.[61]

It is not clear whose state of mind is being delved by this inquiry.

CONCLUSION

The Mississippi employee who threatens to quit and sue likely will win if she quits promptly and if the evidence shows that her employer, expressly or by clear implication, required her to choose resignation or dismissal. But clear proof of a specific employer intent to prompt her resignation is not absolutely necessary. Her claim may succeed if the evidence shows that her employer intentionally created such intolerable working conditions that he should have foreseen that any reasonable person in her position would quit, and if she indeed quit because of those conditions. But, her "constructive discharge" is actionable only if her express discharge would have been actionable.

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61. Barrow v. New Orleans Steamship Association, 10 F.3d 292, 297-98 (5th Cir. 1994).