North Dakota Law Review

Volume 71 | Number 4 Article 5

1995

Civil Rights - The Constructive Discharge Doctrine and Its Applicability to Sexual Harassment Cases: Does It Matter What the Employer Intended Anymore

Stacey Elizabeth Tjon Aasland

CIVIL RIGHTS—THE CONSTRUCTIVE DISCHARGE DOCTRINE AND ITS APPLICABILITY TO SEXUAL HARASSMENT CASES: DOES IT MATTER WHAT THE EMPLOYER INTENDED ANYMORE?

Hukkanen v. International Union of Operating Engineers, 3 F.3d 281 (8th Cir. 1993)

I. FACTS

In 1978, Ms. Nancy J. Hukkanen [hereinafter Hukkanen] began working for the International Union of Operating Engineers, Hoisting and Portable Local No. 101 [hereinafter the Union], as a general office worker and was later promoted to a secretarial position.[1] In 1980, Mr. Sam F. Long [hereinafter Long] became the chief executive officer of the Union[2] and asked Hukkanen to be his personal secretary.[3] In June of 1981, Long began sexually harassing Hukkanen.[4] On October 29, 1984, Hukkanen resigned from her position with the Union because Long's repeated harassment created intolerable working conditions.[5]

After her resignation, Hukkanen sued Long and the Union alleging that Long's sexual harassment[6] constituted sex discrimination under Title VII[7] and, as a result, Hukkanen had been constructively dis-

---

1. Hukkanen v. International Union of Operating Eng'rs, 3 F.3d 281, 284 (8th Cir. 1993).

2. *Id.* Long and the Union were both defendants in the instant case. *Id.*

3. *Id.* During her first two years with the Union, Hukkanen had little contact with Long. *Id.*

4. *Hukkanen*, 3 F.3d at 284. The district court found that Long's conduct toward Hukkanen was unsolicited and offensive and occurred regularly between June of 1981 and August of 1984. *Id.* at 285. Long's conduct included propositioning Hukkanen to have sex with him, attempting "to engage her in offensive conversations about sex, touch[ing] her breasts, and paw[ing] between her legs." *Id.* On one occasion in his office, Long brandished a gun and threatened to rape Hukkanen. *Id.*

5. *Hukkanen*, 3 F.3d at 285. At the time of Hukkanen's resignation, neither the Union nor Long intended to fire her. *Id.* In fact, Long even asked Hukkanen if she would reconsider her decision to resign as his personal secretary. *Id.* Just over a month after her resignation, on December 1, 1984, Hukkanen began working for a different employer at a lower wage. *Id.*

6. Courts have recognized two types of sexual harassment claims under Title VII: quid pro quo and hostile environment. Jones v. Wesco Inv., Inc., 846 F.2d 1154, 1156 (8th Cir. 1988). Quid pro quo sexual harassment "occurs when submission to sexual conduct is made a condition of concrete employment benefits." *Id.* (citing Hall v. Gus Constr. Co., 842 F.2d 1010, 1013 (8th Cir. 1988) (quoting Hicks v. Gates Rubber Co., 833 F.2d 1406, 1413 (10th Cir. 1987))). Hostile environment sexual harassment is defined as "conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 563-64 (8th Cir. 1992) (citing 29 C.F.R. § 1604.11(a)(3) (1988)).

7. Title VII of the 1964 Civil Rights Act is federal statutory law which bars discrimination by employers against employees because of race, color, religion, sex, or national origin. Title VII of the Civil Rights Act of 1964 § 703, *as amended* 42 U.S.C. § 2000e-2(a)(1) (1989). The purpose of Title VII is to end discrimination and allow protected groups to compete for employment on the basis of their qualifications and not be hindered by their membership in a protected class. 42 U.S.C. §§ 2000e to 2000e-17 (1988). Section 703(a)(1) is the applicable statutory provision of Title VII in the instant case because it explicitly prohibits sex discrimination by employers with respect to conditions of employment. *Id.* Section 703(a)(1) provides:

(a) It shall be an unlawful employment practice for an employer—

charged.[8] The district court found that Long's ongoing sexual harassment of Hukkanen was both offensive and unwelcome.[9] The district court further found that the cumulative effect of Long's conduct created intolerable working conditions and that a reasonable person in Hukkanen's position would have felt forced to resign.[10] Therefore, the district court concluded that Long's treatment of Hukkanen constituted sexual harassment,[11] that the harassment created continuing violations of

---

> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a)(1) (1989) (codifying § 703 of the 1964 Civil Rights Act).

8. *Hukkanen*, 3 F.3d at 284. The Equal Employment Opportunity Commission [hereinafter EEOC] exists to prevent "any person from engaging in any unlawful employment practice," and provides specific guidelines for a Title VII plaintiff to follow when making a claim of discrimination. 42 U.S.C. § 2000e-5(a) (1989) (codifying § 706). Section 706(e)(1) of the 1964 Civil Rights Act is one of many provisions provided by the EEOC which sets forth the appropriate statute of limitations period in a Title VII case. *Id.* § 2000e-5(e)(1). Section 706(e)(1) provides that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred." *Id.*

9. *See Hukkanen*, 3 F.3d at 284. In sexual harassment cases, courts require plaintiffs to show that a defendant's sexual advances are unwelcome. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986). In determining whether conduct by a defendant is unwelcome, the trier of fact must look at the totality of the circumstances to make that determination. *Burns*, 955 F.2d at 564. A trier of fact considers conduct to be unwelcome if the plaintiff considers it to be offensive or undesirable, and if he or she did not solicit or encourage it. *Id.* at 565 (citing *Hall*, 842 F.2d at 1014). In *Burns*, the Eighth Circuit determined that when the district court found that the defendant's advances were unwelcome, the court also necessarily found that defendant's behavior was offensive. *Id.*

10. *Hukkanen*, 3 F.3d at 285. The district court applied the standard for constructive discharge the Eighth Circuit previously set forth in Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981). *Id.* The *Bunny Bread* standard requires a plaintiff to show that "a reasonable person [in the employee's situation] would find [working] conditions intolerable" and that the employer's deliberate actions were taken with the intention of forcing the employee to resign. *Id.*

11. *See* discussion *supra* at note 6 (stating the difference between quid pro quo sexual harassment and hostile environment sexual harassment).

Title VII as sex discrimination,[12] and that Long and the Union constructively discharged Hukkanen as a result of those violations.[13] Accordingly, the district court awarded Hukkanen back pay,[14] front

12. *See supra* note 7 (discussing the purpose of Title VII in seeking to end discrimination in employment and its applicability to individuals who are members of a protected class). Because Title VII forbids discrimination on the basis of sex, sexual behavior directed at a woman raises the inference that the harassment is based on her sex, and is therefore considered sex discrimination for purposes of Title VII. *See, e.g.*, Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 905 (11th Cir. 1988) (stating that a plaintiff can establish a prima facie case of sex discrimination by showing a pattern of sexual harassment that subjects the employee to disparate treatment discrimination with respect to a term, condition, or privilege of employment).

13. *Hukkanen*, 3 F.3d at 284. In the instant case, the Union and Long contended that Hukkanen's Title VII claim was time barred because she failed to file a claim with the EEOC within the one hundred and eighty day period. *Id.* at 285. The Union and Long argued that Hukkanen knew or should of known she had a claim no later than July 1983 but did not file with the EEOC until March of 1985. *Id.* The Union and Long asserted that she was therefore barred by the statute of limitations from bringing an action. *Id.* The Eighth Circuit disagreed, however, reasoning that when a plaintiff "prove[s] a pattern of sexual harassment that culminate[s] in [a] constructive discharge[,]" the violations are continuing in nature and therefore the limitations period does not begin to run until the last occurrence of the discrimination. *Hukkanen*, 3 F.3d at 285 (citing Gardner v. Morris, 752 F.2d 1271, 1279 (8th Cir. 1985)). In *Hukkanen*, the Eighth Circuit concluded that the last occurrence of discrimination was her constructive discharge on October 29, 1984. *Id.* at 285. Therefore, the Eighth Circuit found that Hukkanen's claim fell well within the statute of limitations period set forth in section 706(e)(1). *Id. See* 42 U.S.C. § 2000e-5(e)(1) (1989).

14. *Hukkanen*, 3 F.3d at 284. The purpose of Title VII is to achieve equality in employment and to make persons whole for injuries suffered on account of unlawful employment discrimination. *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 413-14 (1975) (stating that validation studies of employment tests are impermissible unless shown to be significantly correlated to important elements of work and are relevant to the job for which the candidate is being measured). A back pay award is a form of relief which a court may award when a plaintiff shows that he or she has sustained an economic loss as a result of an employer's discrimination. Taylor v. Phillips Indus., Inc., 593 F.2d 783, 787 (7th Cir. 1979). In the instant case, the Union and Long contended that Hukkanen was not entitled to a back pay award because she would have been terminated for non-discriminatory reasons if she had not resigned. *Hukkanen*, 3 F.3d at 285. The district court rejected this argument and the Eighth Circuit agreed that there was no evidence that the Union intended to fire Hukkanen any time before her resignation. *Id.* The Union and Long also argued that the district court's back pay award was excessive because Hukkanen failed to mitigate her damages. *Id.* at 286. The Eighth Circuit again disagreed with the Union and Long, reasoning that Hukkanen made the requisite reasonable efforts to mitigate her damages when she secured a new job within one month of her resignation, and persistently tried to obtain a higher paying job. *Id.*

pay,[15] pension benefits,[16] and attorney's fees.[17] The Union and Hukkanen both appealed.[18]

The central issue on appeal to the Eighth Circuit Court of Appeals was whether Hukkanen proved that she had been constructively discharged despite the fact that Long's actions were not taken with the intent of forcing her to resign.[19] The Eighth Circuit affirmed the district court's ruling, *holding* that in order to prove constructive discharge, Huk-

---

15. *Hukkanen*, 3 F.3d at 284. Front pay is a type of damages award where a court orders the employer to pay the employee prospective pay. *See* MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1060 (8th Cir. 1988) (stating that an illegally discharged employee who presumptively would have continued working until the age of retirement, is entitled to a front pay award). To determine a front pay award, courts presume that an illegally discharged employee would have continued working for the employer until retirement. *Id.* A front pay award is a matter of equitable relief that lies within the discretion of the district court. *Id.*

16. *Hukkanen*, 3 F.3d at 284. The Union argued that Hukkanen should not receive her pension benefits until she retires. *Id.* at 286. However, the Eighth Circuit disagreed stating that "[w]hen a successful constructive discharge plaintiff is not reinstated . . . the district court may award the present value of the plaintiff's interest in [her] pension plan as of the date of settlement." *Id.* (citing Loeb v. Textron, Inc., 600 F.2d 1003, 1021 (1st Cir. 1979)).

17. *Hukkanen*, 3 F.3d at 286. In *Kamberos v. GTE Automatic Electronics, Inc.*, the court stated that the proper method for determining a prevailing party's award of attorney's fees is to multiply the number of hours worked with the elements set forth in the Code of Professional Responsibility as adopted by the American Bar Association. Kamberos v. GTE Automatic Elec. Inc., 603 F.2d 598, 603-04 (7th Cir. 1979). The Code of Professional Responsibility suggests:

> Factors to be considered as guides in determining the reasonableness of a fee include the following:
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
> (3) The fee customarily charged in the locality for similar legal services.
> (4) The amount involved and the results obtained.
> (5) The time limitations imposed by the client or by the circumstances.
> (6) The nature and length of the professional relationship with the client.
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
> (8) Whether the fee is fixed or contingent.

Id. at 604 n. 9 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-106).

The Union and Long also challenged the district court's use of the attorney fee multiplier. *Hukkanen*, 3 F.3d at 287. The Eighth Circuit reversed the district court's award which gave Hukkanen triple "the lodestar amount to reflect the risk of loss a lawyer faces in taking a sexual harassment case against a high profile defendant on a contingent fee basis." *Id.* After the district court decided the *Hukkanen* case, the United States Supreme Court handed down an opinion which disallowed the enhancement of an attorney fee award "beyond the lodestar amount to reflect that a party's attorneys were retained on a contingency basis." *Id.* (citing City of Burlington v. Dague, 112 S. Ct. 2638, 2641-44 (1992)). Therefore, regardless of the risk of loss an attorney incurs when suing a high profile defendant on a contingent fee basis, the court may not allow enhancement of a fee award beyond the lodestar amount. *Id.*

18. *Hukkanen*, 3 F.3d at 284. The district court declined to award Hukkanen an enhanced monetary award to compensate her for increased income tax liability. *Id.* Hukkanen appealed only this part of the decision by the district court. *Id.* at 287.

19. *Id.* Before *Hukkanen*, the Eighth Circuit required that an employee show that the employer engaged in conduct with the intention of forcing the employee to resign. Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981); *see supra* note 10 (explaining the Eighth Circuit's former standard for constructive discharge under Title VII).

kanen did not have to show that Long's actions were taken with the intention of forcing her to resign, rather Hukkanen only had to prove that her resignation was a reasonably foreseeable consequence of Long's harassment.

II. LEGAL BACKGROUND

Title VII of the 1964 Civil Rights Act is federal statutory law which bars discrimination by employers against employees based on race, color, religion, sex, and national origin.[20] Congress adopted Title VII of the 1964 Civil Rights Act[21] "to assure equality of employment opportunities and to eliminate those discriminatory practices" directed at members of a protected class.[22] Section 703(a)(1) of the Act, which is the substantive provision of Title VII provides in pertinent part that:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[23]

Title VII[24] provides relief for individuals who are victims of unlawful employment discrimination.[25] Individuals may experience discrimi-

---

20. 42 U.S.C. § 2000e-2(a)(1) (1989) (codifying § 703 of the Civil Rights Act of 1964).

21. *Id.* §§ 2000e to 2000e-17.

22. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (citing Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971)). In its enactment, Title VII required "the removal of artificial, arbitrary, and unnecessary barriers to employment when th[ose] barriers operate invidiously to discriminate on the basis of . . . [an] impermissible classification." *Griggs*, 401 U.S. at 430-31. The Court in *Griggs* dealt with the issue of standardized testing which, neutral on its face, operated invidiously to exclude many blacks who were capable of performing the job effectively. *Id.* at 430. Congress intended the language of Title VII to be read broadly in order to "eliminate the inconvenience, unfairness, and humiliation of . . . discrimination." Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971). In *Rogers*, the Fifth Circuit explained that:

> Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.

Id.

23. 42 U.S.C. § 2000e-2(a)(1) (1989) (codifying § 703). Under Title VII, "the term 'employer' means a person engaged in an industry affecting commerce . . . and any agent of such person." *Id.* § 2000e(b) (codifying § 701). An "employee" is any "individual employed by an employer." *Id.* § 2000e(f).

24. *Id.* §§ 2000e to 2000e-17.

25. *Id.* § 2000e-5(g)(1) (codifying § 706). It provides that:

> If the court finds that the [employer] has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the [employer] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without back pay (payable by the employer

nation in a number of ways, including being forced to resign on the basis of the individual's race, color, religion, sex, or national origin.[26] The constructive discharge doctrine provides redress for the employee who is forced to resign as a result of unlawful employment discrimination.[27] For purposes of analysis, it is important to distinguish a constructive discharge from an actual discharge. Actual discharge occurs when the employer directly terminates the employment relationship.[28] Constructive discharge is a court-created concept "that permits an employee's resignation to be treated as a firing when certain circumstances are present."[29]

The constructive discharge doctrine first appeared as a labor law concept under the National Labor Relations Act [hereinafter NLRA], in cases involving anti-discrimination provisions of the Act.[30] According to

---

> . . . responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person . . . discriminated against shall operate to reduce the back pay otherwise allowable.

Id.

26. An individual may be discriminated against on the basis of a protected trait in many, if not all phases of the employment relationship, including but not limited to: hiring, promotions, transfers, and benefits. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) (reasoning that defendant's refusal to transfer workers over a particular age was age discrimination in violation of Title VII).

27. *See* Easter v. Jeep Corp., 750 F.2d 520, 521 (6th Cir. 1984) (applying constructive discharge doctrine in a sexual harassment case); Goss v. Exxon Office Sys. Co., 747 F.2d 885, 887-88 (3d Cir. 1984) (applying the constructive discharge doctrine in a pregnancy discrimination case); Pena v. Brattleboro Retreat, 702 F.2d 322, 325-26 (2d Cir. 1983) (applying the constructive discharge doctrine in an age discrimination case).

28. Frazer v. KFC Nat'l Management Co., 491 F. Supp. 1099, 1105 (M.D. Ga. 1980), *aff'd without opinion*, 636 F.2d 313 (5th Cir. 1981).

29. Mark A. Kelley, *Constructive Discharge: A Suggested Standard For West Virginia and Other Jurisdictions*, 93 W. VA. L. REV. 1047, 1049 (1991). Constructive discharge has been defined as:

> a discharge implied by the courts. No express or actual discharge occurs; rather, the courts examine the circumstances surrounding the employee's decision to quit or resign. If the decision was forced on the employee, the courts will deem it a constructive discharge and will treat the employee as if he or she has been explicitly and directly discharged.

Id. (citing Baxter & Farrell, *Constructive Discharge —When Quitting Means Getting Fired*, 7 EMPLOYMENT REL. L.J. 346, 347 (1981) (emphasis omitted)).

30. 29 U.S.C. § 158(a)(3) (1988). The NLRA prohibits an employer from discriminating against an employee on the basis of union membership. *Id.* § 158(b)(2). The National Labor Relations Board adopted the constructive discharge doctrine because it recognized that an employer might attempt to indirectly discriminate against union members by making their working conditions so intolerable that an employee would be forced to resign. Martin W. O'Toole, Note, *Choosing a Standard for Constructive Discharge in Title VII Litigation*, 71 CORNELL L. REV. 587, 589-91 (1986). Section 158(a)(3) provides that:

> (a) It shall be an unfair labor practice for an employer—
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a labor organization
>
> . . . .

National Labor Relations Act, § 8(a)(3) *as amended*, 29 U.S.C. § 158(a)(3) (1988).

the NLRA, the existence of a constructive discharge requires that "the burdens imposed upon the employee must cause and be intended to cause, a change in . . . working conditions so difficult or unpleasant as to force [the employee] to resign."[31] Therefore, for an employee to prevail on a claim of constructive discharge, the NLRA standard requires proof of the employer's specific intent to force the employee to resign.[32]

The First Circuit considered the NLRA's standard but developed a different view of constructive discharge in *Rosado v. Santiago*.[33] After rejecting the NLRA's specific intent standard for constructive discharge, the *Rosado* court set forth an objective view of the constructive discharge doctrine.[34] The *Rosado* court based its objective standard on the premise that, in order to show a constructive discharge, the employee need only show that working conditions became "so difficult or unpleasant that a reasonable person in the employee's shoes [would have felt] compelled to resign."[35]

In addition to both Title VII and the NLRA recognizing the applicability of the constructive discharge doctrine, other sources of statutory law have also recognized its applicability.[36] While *all* of the various circuit courts universally recognize the appropriateness of applying the constructive discharge doctrine in Title VII cases, there is a split in authority among the circuits over the proper standard for determining whether an employee has been constructively discharged.[37] Some circuit courts have applied the objective standard for constructive discharge set forth in

---

31. Crystal Princeton Refining Co., 222 N.L.R.B. 167, 169 (1976).

32. *See* J.P. Steven & Co., Inc. v. N.L.R.B., 461 F.2d 490, 494 (4th Cir. 1972) (finding when an employer deliberately makes an employee's working conditions intolerable, thereby forcing the employee to quit, that employee has been constructively discharged in violation of § 8(a)(3) of the NLRA); N.L.R.B. v. Tennessee Packers, Inc., 339 F.2d 203, 204 (6th Cir. 1964) (finding that employer forced employee to quit by making working conditions intolerable).

33. 562 F.2d 114, 120 (1st Cir. 1977) (stating that the trial court must make a factual inquiry to determine whether a public employee who had received a punitive transfer for exercising a first amendment right had been constructively discharged).

34. Rosado v. Santiago, 562 F.2d 114 (1st Cir. 1977).

35. *Id.* at 119. The *Rosado* court compared this standard for constructive discharge to the doctrine of avoidable consequences, which requires that an unlawfully discharged public employee must mitigate damages by avoiding foreseeable harm to receive damages. *Id.* (citing McKenna v. Commissioner of Mental Health, 199 N.E.2d 686 (Mass. 1964)).

36. *See, e.g.*, Kelley v. TYK Refractories, 860 F.2d 1188 (3d Cir. 1988) (applying the constructive discharge doctrine to a discrimination case brought under § 1981 of the 1964 Civil Rights Act); Guthrie v. J.C. Penney Co., 803 F.2d 202, 207-08 (5th Cir. 1986) (stating that the ADEA recognizes the doctrine of constructive discharge as an avenue of relief from discrimination).

37. Goss v. Exxon Office Systems Co., 747 F.2d 885, 887 (3d Cir. 1984) (describing the difference in opinion concerning the appropriate constructive discharge standard by stating that "while the application of the constructive discharge doctrine to Title VII cases has received . . . universal recognition among the courts of appeals . . . there is a divergence of opinion as to the findings necessary for such application in specific instances").

Rosado v. Santiago,[38] while other circuit courts have applied the specific intent standard for constructive discharge developed under labor law.[39]

The Fifth Circuit was the first circuit to apply the constructive discharge doctrine in a Title VII discrimination case.[40] In *Bourque v. Powell Electric Manufacturing Co.*,[41] the Fifth Circuit accepted the *Rosado* court's reasoning and applied the objective standard for constructive discharge.[42] The *Bourque* court stated that a constructive discharge exists in a Title VII case when "working conditions [are] so difficult or unpleasant that a reasonable person in the employee's shoes [feels] compelled to resign."[43] The *Bourque* court reasoned, however, that a mere isolated instance of unlawful discrimination under Title VII is not enough to constitute a constructive discharge.[44] Rather, the court stated that certain "aggravating factors" must exist before it would find

---

38. 562 F.2d at 119. *See also* Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986) (applying the objective standard for constructive discharge); *Goss*, 747 F.2d at 887-88 (applying the objective rather than subjective standard for constructive discharge); Pena v. Brattleboro Retreat, 702 F.2d 322, 325-26 (2d Cir. 1983) (adopting the objective standard for constructive discharge); Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982) (applying the objective standard for constructive discharge); Noland v. Cleland, 686 F.2d 806, 812-13 (9th Cir. 1982) (adopting the objective standard for constructive discharge in Title VII cases); Henson v. City of Dundee, 682 F.2d 897, 907 (11th Cir. 1982) (applying the objective standard for constructive discharge set forth in *Rosado v. Santiago*); Clark v. Marsh, 665 F.2d 1168, 1173-74 (D.C. Cir. 1981) (applying the objective standard for constructive discharge in Title VII cases).

39. Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981); *see also* Muller v. United States Steel Corp., 509 F.2d 923, 929 (10th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975) (applying the subjective standard for constructive discharge developed under labor law). When applying the specific intent standard for constructive discharge in a Title VII case of unlawful discrimination, the Eighth and Tenth Circuits require "a finding that the discrimination complained of amounted to an intentional course of conduct calculated to force the victim's resignation." *Goss*, 747 F.2d at 887.

40. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980).

41. 617 F.2d 61 (5th Cir. 1980) (considering a former female employee's claim of constructive discharge in a Title VII action for sex discrimination against her employer for failing to provide equal pay for equal work).

42. *Id.* at 65. The *Bourque* court discussed the standard for constructive discharge the Fifth Circuit had previously recognized in Calcote v. Texas Education Foundation, Inc., 578 F.2d 95, 97 (5th Cir. 1978), and Young v. Southwestern Savings & Loan Association, 509 F.2d 140, 143-44 (5th Cir. 1975), which required the plaintiff to show that it was their employer's intent to make working conditions so intolerable that the employee would be forced to resign. *Bourque*, 617 F.2d at 65. The *Bourque* court reasoned that "[n]either in *Young* nor in *Calcote* did this Court examine the facts under the stringent test that requires an employer's intent to rid itself of an employee. In neither case did the Court attempt to divine the state of mind of the employer. Rather, analysis proceeded upon an examination of the conditions imposed." *Id.* at 65 (citing *Calcote*, 578 F.2d at 97-98; *Young*, 509 F.2d at 144).

43. *Bourque*, 617 F.2d at 65 (quoting *Rosado v. Santiago*, 562 F.2d 114, 119 (1st Cir. 1977)). Before *Bourque*, the Fifth Circuit relied upon the subjective NLRA approach to constructive discharge. *Young*, 509 F.2d at 144. In *Young*, the Fifth Circuit stated 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.

Id.

44. *Bourque*, 617 F.2d at 65.

that a reasonable person in the employee's situation felt forced to resign.[45]

While most circuit courts have followed the *Bourque* court's reasoning and have adopted a purely objective view of the constructive discharge doctrine in Title VII cases,[46] a few circuit courts have required a showing of specific intent on the part of the employer to prove the existence of a constructive discharge.[47] For example, the Third Circuit in *Goss v. Exxon Office Systems Co.*,[48] applied the specific intent standard for constructive discharge in a pregnancy discrimination case.[49] The *Goss* court determined that the employee had been discriminated against on the basis of her pregnancy and that the defendant had

---

45. *Id.*

46. *See supra* note 38 (citing the various circuit court cases which apply the objective standard for constructive discharge in discrimination cases).

47. Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981); Muller v. United States Steel Corp., 509 F.2d 923, 929 (10th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975). When an employee brings a Title VII suit alleging that he or she has been constructively discharged, the employee must, under either approach, establish a prima facie case of employment discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Under the disparate treatment theory of unlawful discrimination, the employee must present circumstantial evidence of unlawful discrimination to make out a prima facie case. *Id. McDonnell Douglas* involved an employer's refusal to rehire a black employee because of his participation in illegal civil rights demonstrations. *Id.* at 796. *McDonnell Douglas* set forth the pattern of proof under disparate treatment which required that employee must carry the initial burden of establishing a prima facie case of race discrimination by showing that: (1) the employee is a member of a protected class; (2) that he or she applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his or her qualifications, he or she was rejected; and (4) that, after his or her rejection, the position remained open and the employer continued to seek applicants from persons with complainant's qualifications. *Id.* at 802. The Supreme Court explained in a footnote that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n. 13. Once an employee presents a prima facie case of discrimination, the burden shifts to the employer to show a nondiscriminatory reason for its employment decision. *Id.* at 802. In *Texas Department of Community Affairs v. Burdine*, the Supreme Court established that the burden of persuasion remains at all times with the plaintiff while only a burden of production shifts to the defendant in articulating a nondiscriminatory reason for the employment decision. 450 U.S. 248, 254-55 (1981). If an employer articulates a nondiscriminatory reason for its employment decision, then the employee must be "afforded a fair opportunity to show" that the purported nondiscriminatory reason was merely a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 804. If the employee establishes that the employer's stated reason was merely pretext, the employer may be liable for discrimination under Title VII. *Id.* at 807. The determination of whether the employer's stated reason is pretextual, is one of fact rather than one of law. *See* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993) (stating that when the employer's proffered reasons for its employment decision are proven false, courts may "infer the ultimate fact of . . . discrimination" but are not compelled to do so as a matter of law). To make out a prima facie case of discrimination where the act of discrimination is the employee's discharge, the employee must show that 1) he or she is a member of a protected class, 2) was qualified for the position he or she was discharged from, 3) that he or she was replaced by a person outside of a protected class, and 4) that the discharge occurred in circumstances which give rise to an inference of unlawful discrimination. Pena v. Brattleboro Retreat, 702 F.2d 322, 324 (2d Cir. 1983). In *Pena*, the plaintiff brought an age discrimination case alleging that she had been constructively discharged from her job as an administrator of a psychiatric nursing home facility when she was replaced by a younger woman. *Id.*

48. 747 F.2d 885, 888 (3d Cir. 1984).

49. Goss v. Exxon Office Systems Co., 747 F.2d 885, 888 (3d Cir. 1984).

intentionally made the employee's working conditions so intolerable that she had been constructively discharged.[50]

Moreover, in *Johnson v. Bunny Bread Co.*,[51] the Eighth Circuit set forth its standard for constructive discharge[52] which required both subjective and objective elements to prove the existence of a constructive discharge.[53] Under the *Bunny Bread* standard, an employer constructively discharged an employee if "[the] employer deliberately render[ed] the employee's working conditions intolerable and thus force[d] [the employee] to quit."[54] To prove that an employer deliberately altered working conditions to the detriment of the employee, the employee must show that "the employer's actions [were] taken with the intention of forcing the employee to quit."[55] An employee must also demonstrate that "a reasonable person [in the employee's situation] would find conditions intolerable."[56] Thus, although most circuits apply either the objective or the subjective standard for constructive discharge,[57] the Eighth Circuit required the employee to show elements of both standards to prove the existence of a constructive discharge.[58]

The constructive discharge doctrine universally applies to all forms of discrimination, including sexual harassment claims[59] under Title

---

50. *Id.*

51. 646 F.2d 1250 (8th Cir. 1981).

52. Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981). Black employees brought an action claiming racial discrimination in their employment. *Id.* at 1252-53. Plaintiffs made out a prima facie case for discrimination in that plaintiffs were members of a protected class, capable of performing the job, and discharged from the job. *Id.* at 1253. Because the employer presented admissible evidence that the employer fired one plaintiff for insubordination, the plaintiffs' prima facie case was rebutted and therefore insufficient evidence existed to establish a claim. *Id.* at 1254. The Eighth Circuit Court of Appeals affirmed, and in doing so, outlined the standard for constructive discharge. *Id.*

53. *Id.* at 1256.

54. *Id.* (citing Slotkin v. Human Dev. Corp., 454 F. Supp. 250, 255 (E.D. Mo. 1978)). *See* Thompson v. McDonnell Douglas Corp., 552 F.2d 220, 223 (8th Cir. 1977) (stating that to constitute a constructive discharge, the employee must show that it was the employer's intent to force the employee to resign).

55. *Bunny Bread Co.*, 646 F.2d at 1256.

56. *Id.*

57. *See supra* note 38 and 39 (discussing cases which apply either the objective and subjective tests).

58. *Bunny Bread Co.*, 646 F.2d at 1256. The Eighth Circuit required that the employee may not be unreasonably sensitive to his [or her] working environment. *Id.* Even though the court includes an element of reasonableness, it is not the central inquiry to the Eighth Circuit determining whether an employee was constructively discharged. *Id.*

59. Sexual harassment is defined as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" in the workplace. 29 C.F.R. § 1604.11(a) (1994). Subsections (1), (2), and (3), provide that unwelcome sexual conduct constitutes sexual harassment when:

> (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
>
> (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or

VII.[60] Sexual harassment is not explicitly prohibited by Title VII, however the Supreme Court has opined that sexual harassment nevertheless violates the Act.[61] Because Title VII does not explicitly prohibit discrimination in the form of harassment, it took almost ten years from the time Congress enacted Title VII for the lower courts to recognize harassment as a form of discrimination under the Act.[62]

By 1976, lower courts began to recognize sexual harassment as a form of sex discrimination when the harassment affected an employee's economic benefits.[63] In *Barnes v. Costle*,[64] the D.C. Circuit produced one of the most explicit treatments of sexual harassment as a form of sex discrimination when it stated that:

> [b]ut for her womanhood . . . her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel. Put another way, she became the target of her superior's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job. The circumstances imparting high visibility to

---

(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id.

Courts recognize two types of sexual harassment claims under Title VII: quid pro quo and hostile environment. Jones v. Wesco Inv., Inc., 846 F.2d 1154, 1156 (8th Cir. 1988). Quid pro quo sexual harassment "occurs when submission to sexual conduct is made a condition of concrete employment benefits." *Id.* (citing Hall v. Gus Constr. Co., 842 F.2d 1010, 1013 (8th Cir. 1988) (quoting St. Mary's Honor Ctr. v. Hicks, 833 F.2d at 1413)). Hostile environment sexual harassment is defined as "conduct [which] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564-65 (8th Cir. 1992) (quoting 29 C.F.R. § 1604.11(a)(3) (1988)). It is important to note however, that "[n]ot all harassment rises to the level of an actionable claim[,] [r]ather, the conduct must be so severe or pervasive that it creates an abusive working environment." *Id.* at 564 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

60. *Henson*, 682 F.2d at 904.

61. *See Meritor*, 477 U.S. at 66 (stating that sexual harassment constitutes a form of sex discrimination and is therefore actionable under Title VII).

62. *See* Rogers v. EEOC, 454 F.2d 234, 239-40 (5th Cir. 1971) (stating that creating a harassing work environment was a discriminatory employment practice proscribed by Title VII). The *Rogers* court reasoned that because the employee's working environment is important and may fall victim to "nuances and subtleties of discriminatory employment practice," the employee's work environment is no longer limited to wages and hours, and is entitled to Title VII protection. *Id.* at 238.

63. Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds*, 587 F.2d 1240 (D.C. Cir. 1978). In *Williams*, the court ruled that sex discrimination exists when a male supervisor discharges a female employee as retaliation after the female employee refuses the supervisor's sexual advances. *Id.* at 657.

64. 561 F.2d 983 (D.C. Cir. 1977).

> the role of gender in the affair is that no male employee was susceptible to such an approach by appellant's supervisor. Thus gender cannot be eliminated from the formulation which appellant advocates, and that formulation advances a prima facie case of sex discrimination within the perview of Title VII.[65]

In 1986, the Supreme Court in *Meritor Savings Bank v. Vinson*[66] ruled for the first time that a plaintiff claiming hostile environment sexual harassment stated a claim under Title VII of the 1964 Civil Rights Act.[67] In concluding that sexual harassment was actionable under Title VII as sex discrimination, the Supreme Court stated that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[68] However, for sexual harassment to be actionable, it must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[69]

In *Henson v. City of Dundee*,[70] the Eleventh Circuit applied the constructive discharge doctrine in a sexual harassment case[71] and reasoned that "[w]hen 'an employee involuntarily resigns in order to escape intolerable and illegal employment requirements' to which he or she is subjected to because of . . . sex, the employer has committed a constructive discharge in violation of Title VII."[72]

Even though every circuit and the Supreme Court agree that sexual harassment is sex discrimination in violation of Title VII, the circuit courts continue to be divided over the appropriate standard for determining whether an individual has been constructively discharged as a re-

---

65. Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977).
66. 477 U.S. 57 (1986).
67. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-66 (1986).
68. *Id.* at 65.
69. *Id.* at 67.
70. 682 F.2d 897 (11th Cir. 1982).
71. *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982). In *Henson*, the court stated that "[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." *Id.* Sexual conduct "directed at women raises an inference that the harassment is based on the woman's sex." Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992). To make out a prima facie case of discrimination resulting from sexual harassment, the *Henson* court required the employee to show that she is a member of a protected class; that she was subject to unwelcome sexual harassment; that the harassment was based on her sex; that the harassment affected her employment; and that the employer knew or should have known of the harassment and failed to take action. *Henson*, 682 F.2d at 907-08.
72. *Henson*, 682 F.2d at 907. In *Henson*, the court did not find that the plaintiff had been constructively discharged because the court believed her resignation was voluntary and for reasons other than sexual harassment. *Id.* (citing Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975)).

sult of that harassment.[73] The majority of circuits, however, have adopted an objective standard for constructive discharge which requires a showing that a reasonable person in the employee's position would feel forced to resign.[74]

III. ANALYSIS

The district court, in *Hukkanen v. International Union of Operating Engineers*,[75] relied on the constructive discharge standard that the Eighth Circuit set forth in *Johnson v. Bunny Bread Co.*,[76] to determine whether the plaintiff, Nancy J. Hukkanen, had been constructively discharged from her position with the Union.[77] Misapplying the *Bunny Bread* standard, the district court found sufficient evidence that Long's continual and unwelcome harassment of Hukkanen made her working conditions intolerable, that such intolerable working conditions would have had the same effect on a reasonable person in Hukkanen's situation, and as a result, she had been constructively discharged.[78] The district court further found that the cumulative effect of Long's continual sexual harassment of Hukkanen created intolerable working conditions, and that a reasonable person in Hukkanen's situation would be forced to resign as a result of those working conditions.[79]

The district court did not, however, require Hukkanen to show that Long's actions were taken with the intention of forcing her to resign as required by *Bunny Bread*.[80] Rather, the court only required Hukkanen to show that a reasonable person in her position would have been forced to resign.[81]

---

73. *See supra* notes 37 and 39 (citing the various circuit court cases which apply either the objective or the subjective standard for constructive discharge in discrimination cases).

74. *See supra* note 37.

75. 3 F.3d 281 (8th Cir. 1993).

76. 646 F.2d 1250 (8th Cir. 1981). The *Bunny Bread* standard requires that an employer must render an employee's working conditions intolerable; an employer's actions must have been taken with the intention of forcing the employee to quit; and a reasonable person in employee's situation must find working conditions intolerable. Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981). In *Bunny Bread*, the plaintiffs were unable to show that the employer's actions were taken with the intention of forcing the employees to quit because all the employees were treated the same way. *Id.*

77. Hukkanen v. International Union of Operating Eng'rs, 3 F.3d 281, 284 (8th Cir. 1993).

78. *Id.* at 285. The district court found that Long subjected Hukkanen to unwelcome harassment over a two-year period that consisted of Long propositioning Hukkanen to have sex with him, attempting "to engage her in offensive conversations about sex, touch[ing] her breasts, and paw[ing] between her legs." *Id.* On one occasion in his office, Long brandished a gun and threatened to rape Hukkanen. *Id.*

79. *Id.* at 285.

80. *Id.*

81. *See id.* The Eighth Circuit did not explicitly state this, however, it may be inferred from the court's discussion equating the intent requirement with the reasonable person requirement. *Id.* The court stated that "[w]hether a court applies *Bunny Bread*'s language about the employer intending to

The Eighth Circuit reviewed the standard for constructive discharge it set forth in *Johnson v. Bunny Bread Co.*, and noted that it had required both that a reasonable person in the employee's situation must find conditions intolerable and feel forced to resign, and that the "employers actions must have been taken with the intention of forcing the employee to quit."[82] Because the district court did not require Hukkanen to show Long's intent, the Eighth Circuit stated that the district court had incorrectly applied the constructive discharge standard as set forth in *Johnson v. Bunny Bread Co.*[83]

The Union alleged that Hukkanen had not proven this element of constructive discharge.[84] The Union argued that Hukkanen had not proven that she been constructively discharged because Long's intent in sexually harassing Hukkanen was for his own sexual gratification and not to force her to quit.[85]

In rejecting the Union's argument, the Eighth Circuit looked to the other circuits and their assessment of the standard for constructive discharge.[86] The court first examined *Derr v. Gulf Oil Corp.*,[87] where the Tenth Circuit clarified its constructive discharge standard in the Title VII context when it stated that "constructive discharge cases turn simply on whether the employer, by its illegal discriminatory acts, has made working conditions so difficult that a reasonable person in the

---

force the employee to quit or its language about a reasonable employee finding conditions intolerable, the same evidence is involved and the constructive discharge finding is the same." *Id.*

82. Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981). The Eighth Circuit affirmed on the issue of constructive discharge but remanded the case to determine attorney's fees. Hukkanen v. International Union of Operating Eng'rs, 3 F.3d 281, 287 (8th Cir. 1993). The district court had applied an attorney fee multiplier, tripling the lodestar amount of attorney's fees to compensate for the increased risk involved in a discrimination claim against a "high profile defendant." *Id.* Since the district court's award, the United States Supreme Court held that the "federal fee shifting statutes do not allow enhancement of a fee award beyond the lodestar amount to reflect that a party's attorneys were retained on a contingency basis." *Id.* (citing City of Burlington v. Dague, 112 S. Ct. 2638, 2641-44 (1992)).

83. 646 F.2d 1250 (8th Cir. 1981). The *Bunny Bread* standard explicitly required the employee to show the employer's actions were taken with the intent of forcing the employee to resign. *Id.* at 1256. By not requiring Hukkanen to show Long's actions were taken with the intention of forcing her to resign, the district court ultimately and perhaps unknowingly applied the majority view of the constructive discharge doctrine which requires only a showing that a reasonable person in the employee's situation felt forced to resign. *Accord* Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986); Goss v. Exxon Office Systems Co., 747 F.2d 885, 887-88 (3d Cir. 1984); Pena v. Brattleboro Retreat, 702 F.2d 322, 325-26 (2d Cir. 1983); Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982); Noland v. Cleland, 686 F.2d 806, 812-13 (9th Cir 1982); Henson v. City of Dundee, 682 F.2d 897, 907 (11th Cir. 1982); Clark v. Marsh, 655 F.2d 1168, 1173-74 (D.C. Cir. 1981).

84. *Hukkanen*, 3 F.3d at 284.

85. *Id.* In fact, Long even went so far as to say that he wanted her to stay on the job so he could continue to sexually harass her. *Id.*

86. *Hukkanen*, 3 F.3d at 284 (citing *Derr*, 796 F.2d at 344; *Held*, 684 F.2d at 432; and *Clark*, 665 F.2d at 1173).

87. 796 F.2d 340 (10th Cir. 1986).

employee's position would feel compelled to resign."[88] The Tenth Circuit struggled with the problems the plaintiff faces in proving that the employer's explicit subjective intent in discriminating was to force the plaintiff to quit.[89] In simplifying the standard, the Tenth Circuit directed the focus away from the employer's subjective intent to an objective standard, where an employee shows a constructive discharge exists when a reasonable person in the employee's situation finds working conditions so intolerable that the employee feels forced to resign.[90]

The Eighth Circuit looked next to *Held v. Gulf Oil Co.*,[91] where the Sixth Circuit stated that the issue of "constructive discharge . . . depends upon the facts of each case and requires an inquiry into the intent of the employer and the reasonably foreseeable impact of the employer's conduct upon the employee."[92] The court further noted that "a man is held to intend the foreseeable consequences of his conduct."[93] Even though the Sixth Circuit recognized that the intent of the employer is a consideration for determining whether an employee has been constructively discharged, proving it may be accomplished by showing the employer's actions would ultimately result in the employee's resignation, regardless of intent.[94]

The Eighth Circuit, in *Hukkanen*, applied the language and reasoning proffered by the Sixth and Tenth Circuits to modify the Eighth Circuit's constructive discharge standard.[95] The court appeared to adopt the language from the Sixth Circuit regarding a discharge being a "reasonably foreseeable consequence of the employer's actions."[96] Using the Sixth Circuit's language, the Eighth Circuit reasoned that the *Bunny Bread* standard does not require the employee prove his or her employer "*consciously* meant to force [the employee] to quit" but rather the employee must prove only that his or her resignation was "a reasonably foreseeable consequence" of the employer's actions.[97] The court stated that where "an employer denies a conscious effort to force an employee

88. Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986).
89. *Id.*
90. *Id.*
91. 684 F.2d 427, 432 (6th Cir. 1986).
92. Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1986) (citing Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir. 1977)).
93. *Id.*
94. *Id.*
95. Hukkanen v. International Union of Operating Eng'rs, 3 F.3d 281, 284 (8th Cir. 1993).
96. *Held*, 684 F.2d at 432.
97. *Hukkanen*, 3 F.3d at 284-85 (emphasis added). The court applied the facts in the instant case concerning Long's "sexual corruption" of Hukkanen to find that Hukkanen's resignation was a reasonably foreseeable consequence of Long's conduct. *Id.*

to resign, . . . the employer must necessarily be held to intend the reasonably foreseeable consequences of its actions."[98]

In characterizing its standard, the Eighth Circuit recognized the resulting absurdity if the court required an employee prove that the employer's conduct was the result of an intent to force the employee to resign.[99] Those employees whom their employers discriminated against because they intended for them to resign could prove constructive discharge, where an employee who suffered discrimination without the underlying intent would not be able to prove the existence of a constructive discharge.[100]

Under this analysis, even though the Eighth Circuit did not expressly adopt the objective standard for constructive discharge, the result was effectively and functionally equivalent. Applying the language from *Held v. Gulf Oil Co.*, the Eighth Circuit no longer requires the plaintiff to show an employer's actual intent when that employer denies a conscious intent to force the employee to resign.[101] By applying the language in *Held*, the *Hukkanen* court seems to abandon *Bunny Bread*'s specific intent requirement because presumably every defendant employer would deny intent in forcing the employee to resign. Moreover, the Eighth Circuit went on to state that an employee satisfies the intent requirement of *Bunny Bread* when the employee can show that their resignation was a reasonably foreseeable consequence of the employer's actions.[102] By making this showing, the employee is not required to show actual intent at all. In conclusion, it is clear that the Eighth Circuit modified its standard for constructive discharge in *Hukkanen* to require something less than required under *Bunny Bread*, however, it is unclear whether this modification undermines the *Bunny Bread* standard all together.

IV. IMPLICATIONS

The Eighth Circuit's decision in *Hukkanen v. International Union of Operating Engineers*,[103] will undoubtedly have an impact on future constructive discharge cases in the Eighth Circuit.[104] The Eighth Circuit's modified standard for constructive discharge creates a

98. *Id.* at 284.
99. *Id.*
100. *Id.* at 284-85.
101. *Id.* at 284. It seems reasonable that every employer would deny any intent in forcing the employee to resign, therefore it appears that an employee would not be required to fulfill an intent requirement whether it is specific intent or inferred intent because quitting is a reasonably foreseeable consequence of an employer's unlawful discrimination.
102. Hukkanen v. International Union of Operating Eng'rs, 3 F.3d 281, 284 (8th Cir. 1993).
103. 3 F.3d 281 (8th Cir. 1993).
104. Hukkanen v. International Union of Operating Eng'rs, 3 F.3d 281 (8th Cir. 1993).

smoother path for the plaintiff-employee to travel in proving the existence of a constructive discharge. Even though the Eighth Circuit did not explicitly adopt the objective standard for constructive discharge, the effect of requiring that an employee's resignation be a reasonably foreseeable consequence of an employer's actions, and that the employer must be held to intend the reasonably foreseeable consequences of its actions, is functionally equivalent. While it appears that this modified constructive discharge standard follows the majority view of constructive discharge, it is unclear how far the court's decision in *Hukkanen* will reach.

Examining the *Hukkanen* decision closely however, what is clear from the Eighth Circuit's modification of its constructive discharge standard, is that it categorically places the employee in a better position to prove a constructive discharge, regardless of whether the *Hukkanen* court meant that a "reasonably foreseeable consequence" required some showing of intent, or if it meant to eliminate the intent requirement altogether. In either situation, the employee shoulders a lighter burden in proving the elements of a constructive discharge in the Eighth Circuit.[105]

The implication of the Eighth Circuit's decision in *Hukkanen v. International Union of Operating Engineers*, and its view of employment law may be better understood in light of other recent Eighth Circuit decisions in the area of employment discrimination.[106] In *Hukkanen*, it is clear that the Eighth Circuit allowed greater protection for the employee and a better opportunity to gain relief by proving a constructive discharge as a result of an unlawful employment practice. The court's employee-friendly indications in *Hukkanen* however, did not necessarily extend to other recent Eighth Circuit employment law cases. In *Wilde v. County of Kandiyohi*,[107] the Eighth Circuit ruled that it would continue to follow the common law or hybrid test,[108] rather than

105. Regardless of a requirement to show any amount of intent on the part of the employer, if an employee does not adequately demonstrate that a reasonable person in the same or similar circumstances would have felt forced to resign, the plaintiff would automatically lose on the issue of constructive discharge.

106. *See, e.g.*, Wilde v. County of Kandiyohi, 15 F.3d 103, 105 (8th Cir. 1994) (stating that the correct test for determining whether an individual is an employee or an independent contractor is the common law or hybrid test and not the economic realities test); Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269 (8th Cir. 1993) (stating that conduct not explicitly sexual in nature may be offensive enough to establish hostile environment sexual harassment under Title VII).

107. 15 F.3d 103 (8th Cir. 1994).

108. *Wilde*, 15 F.3d at 105-06. Under the common law or hybrid test, a court examines the totality of the working relationship in light of the factors listed in the Restatement (Second) of Agency. *Id.* at 106. Under the Restatement (Second) of Agency, those factors include:

> [T]he hiring party's right to control the manner and means by which the product is accomplished[;] . . . the skills required [for the job]; the source of the instrumentalities

adopt the minority view, the economic realities test,[109] in determining whether an individual was an "employee" or an "independent contractor" for purposes of employer liability under Title VII.[110] In making its decision, the Eighth Circuit reasoned that, in application, the economic realities test would result in Title VII coverage for "some common law independent contractors because they are vulnerable to discrimination arising in the course of their work."[111] The court further reasoned that the economic realities test is broader than the common law or hybrid test and is therefore an inapplicable test because it distorts the underlying purpose of Title VII.[112] In *Wilde*, the Eighth Circuit refused to adopt a more plaintiff-friendly position by redefining its test for determining whether an individual is an "employee" or an "independent contractor" for Title VII purposes.[113]

In *Kopp v. Samaritan Health System, Inc.*,[114] the Eighth Circuit maintained its employee-friendly position in an employment discrimination case concerning the type of predicate acts necessary to support a claim for hostile environment sexual harassment.[115] The *Kopp* court concluded that the predicate acts necessary to sustain a claim of discrimination under Title VII need not be explicitly sexual in nature.[116] The court reasoned that even though defendant Alaghdadi's conduct toward Kopp was not explicitly sexual in nature, examination of the facts provided sufficient proof that his conduct was offensive and was therefore actionable under Title VII as sex discrimination.[117]

> and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over . . . hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

109. *Wilde*, 15 F.3d at 105. The expansive economic realities test consists of looking at the economic realities "underlying the work relationship to decide whether the worker is likely to be susceptible to the discriminatory practices Title VII was designed to eliminate." *Id.*

110. *Id.* The plaintiff in *Wilde* owned a small business that rented executive office space and provided secretarial services. *Id.* at 104. The defendant in *Wilde*, was an executive director for the County who rented office space and secretarial services from the plaintiff. *Id.* The plaintiff brought suit against the defendant for sexual harassment in violation of Title VII of the 1964 Civil Rights Act. *Id.*

111. *Id.* at 105-06.

112. *Id.* at 106.

113. *Id.*

114. 13 F.3d 264 (8th Cir. 1993).

115. Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269 (8th Cir. 1993).

116. *Id.* The plaintiff, a cardiology technician, brought suit against defendants, Dr. Saadi Albaghdadi and Samaritan Health Systems for hostile environment sexual harassment in violation of Title VII. *Id.* at 265-66. Defendant Albaghadi subjected the plaintiff to harassment by shouting at her; throwing his stethoscope at her; referring to one of her co-workers as "that stupid bitch[;]" grabbing her with both hands by the lapels of her scrub jacket, along with her bra straps and her skin; and shaking her and shoving her backward. *Id.* at 266.

117. *Id.* at 269-70.

In light of the recent Eighth Circuit cases, it is not exactly clear what path the Eighth Circuit is taking in the area of employment discrimination. What is clear, however, is that the Eighth Circuit in *Hukkanen v. International Union of Operating Engineers*, created a more plaintiff-friendly environment in the area of employment discrimination when addressing the issue of constructive discharge.

Stacey Elizabeth Tjon Aasland