

The Legal Fiction of Constructive Discharge as Decided by Federal Courts In Employment Discrimination Claims

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ABSTRACT

The legal theory of constructive discharge was first adopted by the U.S. Supreme Court in *Sure-Tan, Inc. v. National Labor Relations Board*,¹ a case involving a wrongful termination claim under the National Labor Relations Act, and subsequently applied to several notable employment law decisions,² culminating in the seminal case of *Pennsylvania State Police v. Suders*³ in 2004. In *Suders* and subsequent cases, the Supreme Court has held that harassment so intolerable as to cause a resignation may be caused by co-worker conduct, unofficial supervisory conduct, or official company acts. Although the U.S. Supreme Court has given broad guidelines to lower courts as to how to assess upon what specific circumstances a “reasonable person” could find working conditions “so intolerable” that he or she has the right to quit, the federal district courts and federal appellate courts have been primarily responsible for the application of this doctrine to employment discrimination claims, thus defining its parameters and the extent of its impact in wrongful termination cases. Unfortunately, this judicial action typically has occurred at the summary judgment phase of litigation, where the judge determines the sufficiency of the evidence from the “paper case” presented by the litigants and decides alone whether the action will continue.

A review of the treatment of constructive discharge claims by the lower federal courts over the past decade suggests that the doctrine recognized by the Supreme Court in 1984 has become nothing but a legal fiction in wrongful termination claims except in the most egregious cases. Indeed, in the opinion of the authors, a careful review of recent case law could lead to the conclusion that unless an employer is homicidal or an employee is suicidal as a direct result of intolerable behaviors by the employer, a constructive discharge claim does not exist.⁴ These lower court decisions have left a significant legal loophole through which employers can exploit their obligations to act lawfully in honoring employment discrimination laws and fairly in engaging in employment termination actions. Because the constructive discharge claim seems to be rarely successful, the unlawful firings sought to be quelled by anti-discrimination laws can now be and have been achieved by employers who have made an employee’s tenure so distasteful that he or she is, in effect, forced to quit without any legal recourse. This article will discuss the history of the development of the constructive discharge theory, the impact of the *Suders* case on this cause of action, the effect of a motion for summary judgment on constructive discharge claims, as well as what has happened to constructive discharge in the lower courts

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¹ 467 U.S. 883 (1984).

² See *Faragher v. Boca Raton*, 524 U.S. 775 (1998), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

³ 542 U.S. 129 (2004).

⁴ See *infra* EEOC v. University of Chicago Hospitals, note 111 (employer turned employee’s office into storage); and *Neal v. Honeywell*, note 112 (employer could not ensure employee’s safety).

post-Suders, and finally propose some solutions to remedy the erosion of the constructive discharge doctrine.

Part I: Introduction

Jane Tatum worked as a nurse for the state health unit in Monroe County, Arkansas. “Eight Ball” was Tatum’s tormenter. According to her allegations, Tatum was repeatedly sexually harassed while employed by Monroe County. Eight Ball, the alleged harasser, was the sobriquet for Bob McCuan, a coworker in Tatum’s unit. He had already allegedly harassed at least one other woman in the unit by engaging in lewd comments and asking inappropriately personal questions.⁵ His behavior was evidently disturbing, because the other woman, Dena Grimes, broke down crying as she made her formal complaint.⁶ However, it appears Tatum may have had it worse. One day Eight Ball approached Tatum from behind in the break room as she bent to get a soft drink from the refrigerator. When she turned, he quipped: “I want you”, and then lunged for her hand, seized it, and thrust it onto his penis, saying “[s]ee how hard it is? Doesn’t that feel good?” Shocked, Tatum jerked her hand away and fled to her office.⁷ The next day Eight Ball approached Tatum in the parking lot as she was coming back from lunch, told her that his wife would be out of town for weekend, and invited her over.⁸ Tatum went straight to the boss to make a complaint.⁹ Shirley Coburn was the unit administrator, and she listened to Tatum’s account, but as the record indicates, she did nothing.¹⁰

Tatum waited five days for Coburn to take action, and then she took matters into her own hands, insisting that Coburn accompany her to Eight Ball’s office for a confrontation. Tatum approached Eight Ball and confronted him about his behavior. In response, Eight Ball rose up from his desk and told her to “get out of my office now.”¹¹ Coburn, after meeting privately with Eight Ball, then followed up with Tatum and told her that there would be “hell to pay” if Tatum proceeded with her complaint.¹²

One week later, when no official action had been taken against Eight Ball by Coburn, Tatum made a complaint directly to Cheri Anthes, Coburn’s supervisor.¹³ It took a week before an official investigation commenced.¹⁴ In spite of the corroboration of Eight Ball’s behaviors by Dena Grimes, company investigators found that no sexual harassment had occurred.¹⁵ One investigator said he “neither believed nor disbelieved” Tatum’s story on the grounds that no one

⁵ *Tatum v. Arkansas Department of Health*, 411 F.3d 955, 958 (8th Cir. 2005).

⁶ *Id.*

⁷ *Id.* at 957.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 958.

¹⁵ *Id.*

else was there to witness it.¹⁶ Ms. Grimes' complaint was disregarded for lack of corroboration.¹⁷ Following Tatum's complaint to management, coworkers began ostracizing her, and she testified that she was being shunned.¹⁸ Even supervisor Coburn admitted that Tatum was given the "cold shoulder" after making her complaint.¹⁹ Tatum testified to being afraid of working beside Eight Ball every day,²⁰ and every time she asked management personnel about the progress of the investigation, they stonewalled.²¹ Tatum made multiple requests to Coburn for information on the progress of the investigation, but was informed of nothing.²² Shunned and afraid, and left in ignorance about the disposition of her complaint, Tatum submitted her resignation about a month and a half after the harassment had occurred.²³ She was finally informed of the results of the investigation a month after she resigned: No harassment was found, and no disciplinary action would be taken against Eight Ball.²⁴

Tatum filed suit in federal Eastern District Court of Arkansas alleging hostile work environment sexual harassment and constructive discharge.²⁵ The Arkansas Department of Health moved for summary judgment. The district court dismissed both the hostile environment and constructive discharge claims filed by Tatum.²⁶ The district court found that Tatum had failed to show that: "(1) the harassment was severe and pervasive enough to alter the term, condition, or privilege of her employment, or (2) the Arkansas Department of Health knew or should have known that Tatum had been harassed and failed to take prompt and corrective action to end the harassment."²⁷ Tatum appealed the decision to the Eighth Circuit Court of Appeals. The appellate court looked at the circumstances and the law and concluded that while "she [Tatum] subjectively may have found the working conditions intolerable," a reasonable person would not.²⁸ Specifically, it upheld the district court's refusal to allow the constructive discharge question to go to the jury because, according to the court of appeals, Jane Tatum had neither demonstrated that her working conditions were intolerable nor that she was forced to quit. Her expressed fears were, per the appellate court, not reasonable under the circumstances, because "McCuan's alleged behavior, while lewd, was not directly threatening."²⁹ Further, the

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 960.

²⁹ *Id.*

ostracism of coworkers, even as admitted by her supervisor, was not enough such that “a reasonable person would find her working conditions intolerable.”³⁰

The case described above, *Tatum v. Arkansas Department of Public Health*,³¹ is but one of a litany of cases in which courts have granted summary judgment in favor of the employer in a manner that does violence both to the common law and logic. This case sets forth facts, such as severe and/or pervasive harassment, retaliation, and official inaction or inadequate responses in the face of both, that arguably could lead a reasonable person to conclude that his or her workplace had become intolerable. However, two federal courts, acting without the opportunity to hear testimony or evaluate the veracity of witnesses, found to the contrary. The *Tatum* case is one ripe for speculation. Could the appellate judges have really meant what they said? Did they actually think, at the end of the day, that Tatum had “fail(ed) to show that a reasonable person could find her...conditions intolerable”?³² Would the judges have soldiered on at their jobs under identical conditions? Or would they, like Tatum, have acted in an “unreasonable” manner and quit? Is not the point of no return reached with a crotch grab, an admonition of “hell to pay”³³ if you complain, ostracism from your coworkers brought about essentially because you were a victim who fought back, and an employer who turns a blind eye? This is but one of many cases that have eroded the constructive discharge cause of action until it has nearly ceased to exist. Later in this article the authors will examine a series of cases decided by the lower courts during the last quarter of 2010, highlighting their contention that despite calls from scholars, attorneys, and even judges to severely limit or do away with summary decisions of constructive discharge and hostile environment claims, the constructive discharge doctrine continues to be whittled away by the lower courts to almost nothing.

Part II: History and Overview of Constructive Discharge

Constructive discharge is a court created remedy that has developed over three quarters of a century of holdings in both the common law and federal statutory environments. It was first recognized as a cause of action in connection with a National Labor Relations Act (also known as the Wagner Act)³⁴ violation in 1938.³⁵ The Act, which established the National Labor Relations Board (NLRB), sought to end unfair employment discrimination against employees who engaged in unionizing activities. Among these prohibited discriminatory acts was “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.”³⁶ Prohibited discrimination under the Act includes firing an employee for joining a union.³⁷ But it was not long before the NLRB began to realize that the unlawful firings it sought to quell could be achieved almost as effectively by an employer who made an employee’s tenure so distasteful

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 957.

³⁴ 29 U.S.C. § 151.

³⁵ *In re Sterling Corset Co.*, 9 N.L.R.B. 858 (1938).

³⁶ 29 U.S.C. § 158(a)(3).

³⁷ *Federal Labor Laws: Early Labor Laws: New Deal Era Reforms: The Wagner Act*, CONG. DIG. (June-July 1993).

that the employee was, in effect, forced to quit. An employer could claim to the NLRB that the employee voluntarily resigned while simultaneously doing everything in its power to make that employee's resignation a *fait accompli*—following the letter of the law, but obliterating the spirit.

In response to such practices, the NLRB developed the constructive discharge doctrine in the *Matter of Sterling Corset Co.*³⁸ The NLRB held that an employer ran afoul of the Act not only when it directly fired an employee in contravention of the Act, but also when it purposefully made conditions on the job so intolerable that the employee had no meaningful choice but to quit.³⁹ Thus, under constructive discharge, an employee could quit, yet still have grounds for wrongful termination under the Act as if he or she had been fired, so long as the employee could demonstrate that the employer had purposefully made conditions on the job so intolerable that the employee had no meaningful choice but to quit. Within the next few decades, courts in the Fifth,⁴⁰ First,⁴¹ Sixth,⁴² Seventh⁴³ and Eighth Circuits⁴⁴ had recognized the doctrine. Eventually, the constructive discharge doctrine became the law of the land, albeit with varying standards for application.

In 1984, the United States Supreme Court fully recognized constructive discharge as a viable and stand-alone cause of action in *Sure-Tan, Inc. v. National Labor Relations Board*.⁴⁵ The Court, drawing upon the language used by the NLRB decades prior, cited with approval the long-standing practice of finding constructive discharge when an employer “purposefully creates working conditions so intolerable that the employee has no option but to resign.”⁴⁶ However, ambiguities in the language of *Sure-Tan* eventually resulted in confusion in lower courts’ decisions regarding the application of the constructive discharge doctrine in employment discrimination claims.

Part III: The *Ellerth/Faragher* Defense and Workplace Harassment Prior to *Suders*

Prior to *Suders*, constructive discharge claims were upheld if an employee could prove a tangible employment consequence as a result of the employer’s actions designed to force the employee to quit.⁴⁷ According to court interpretation, tangible employment actions occur, for example, where the worker has endured harassment but rebuffed the harasser and then is subjected to termination through firing, demotion or transfer to a less than desirable employment

³⁸ 9 N.L.R.B. 858 (1938).

³⁹ *Id.*

⁴⁰ NLRB v. Waples-Platter Co, 140 F.2d at 230 (5th Cir. 1944).

⁴¹ NLRB. v. Saxe-Glaxman Shoe, 201 F.2d 238, 244 (1st Cir. 1953).

⁴² NLRB v. Tenn. Packers, Inc., 339 F.2d 203 (6th Cir. 1964).

⁴³ NLRB v. Vacuum Platers, Inc., 374 F.2d 866 (7th Cir. 1967).

⁴⁴ NLRB v. Century Broad. Corp., 419 F.2d 771 (8th Cir. 1969).

⁴⁵ 467 U.S. 883 (1984).

⁴⁶ *Id.* at 894.

⁴⁷ See generally Katz v. Dole, 709 F.2d 251 (4th Cir. 1983), Horn v. Duke Homes, 755 F.2d 599 (7th Cir. 1985).

circumstance.⁴⁸ The definition of tangible employment actions was illuminated by the Supreme Court *Burlington Industries v. Ellerth*⁴⁹ and *Faragher v. City of Boca Raton*.⁵⁰ In those cases, the Court ruled that vicarious liability for sexual harassment applies to employers if a supervisor creates a hostile environment resulting in a tangible employment action, which includes the type of situations previously envisioned by the lower courts, such as firing, demotion, or other activities that negatively affect the employee.⁵¹ But the *Ellerth* and *Faragher* cases also provide the employer an out, which has come to be known as the *Ellerth/Faragher* defense. This defense protects an employer when a supervisor, coworker, customer or client is charged with harassment so long as it: (1) “exercised reasonable care to prevent and promptly corrected any sexually harassing behavior,”⁵² and (2) that the employee “unreasonably failed to take advantage of preventive or corrective opportunities.”⁵³ The authors like to refer to this as the “policy, procedure and prompt remedial action” defense. Thus if, in an effort to fix the problem of workplace harassment, an employer takes prophylactic steps to prevent and corrective measures to remedy acts of harassment and the employee does not reasonably avail himself or herself of these measures, the employer has a defense to the constructive discharge claim.

Part IV: Pennsylvania v. Suders and its Impact on Constructive Discharge

In 2004, six years after the *Ellerth* and *Faragher* decisions, the Supreme Court reconciled some of the confusion about the impact of the *Ellerth/ Faragher* defense on constructive discharge claims arising in employment discrimination in *Pennsylvania State Police v. Suders*.⁵⁴ Nancy Suders worked for the Pennsylvania State Police (PSP). According to Suders’ account, her three supervisors subjected her to a torrent of abuse. In her presence they engaged in ribald, freewheeling discussions of oral sex, genital piercings and bestiality;⁵⁵ they grabbed their own genitalia and made rude remarks when she entered the room;⁵⁶ and one of her supervisors made obscene gestures to Suders as often as five to ten times per shift during her five months at the station.⁵⁷ A third supervisor called Suders a “liar” and told her that “the village idiot could do [your] job.”⁵⁸ At some point, Suders sought out Virginia Smith Elliot, the Equal Employment Opportunity Officer of the PSP.⁵⁹ Without mentioning details, she told Smith Elliot that she

⁴⁸ Shari M. Goldsmith, *The Supreme Court’s Suders Problem: Wrong Question, Wrong Facts Determining Whether Constructive Discharge Is a Tangible Employment Action*, 6 U. PA. J. LAB. & EMP. L. 817, 839-840 (2004).

⁴⁹ 524 U.S. 742 (1998).

⁵⁰ 524 U.S. 775 (1998).

⁵¹ *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

⁵² Maria Greco Danaher, *Constructive Discharge is ‘Tangible Employment Action’ - Court Report*, HR MAGAZINE, (July, 2003).

⁵³ *Id.*

⁵⁴ 542 U.S. 129 (2004).

⁵⁵ See *Suders v. Easton*, 325 F.3d 432,436 (3d Cir. 2003).

⁵⁶ *Id.*

⁵⁷ *Id.* at 437.

⁵⁸ *Id.*

⁵⁹ *Id.* at 438.

“might need some help”.⁶⁰ Sometime later, and approximately five months after Suders had gone to work for the PSP, she sought out Smith Elliot again, at which point she confided that she was being “harassed” and was “afraid”.⁶¹ Suders testified that Smith Elliot was “insensitive and unhelpful”, and instructed her to file a complaint but did not tell her where she could find the appropriate form.⁶² Suders attempted to find, but could not find, the appropriate form.⁶³ Matters came to a head soon thereafter when Suders was forced to repeatedly take a computer skills examination as a condition of continued employment.⁶⁴ Each time she took it, her bosses claimed she had failed.⁶⁵ Suders later found the collection of exams, ungraded, in a set of drawers at the job site.⁶⁶ She realized her supervisors had almost certainly been playing a game with her; she grabbed the ungraded exams, and when caught, her bosses “arrested” her for “theft”.⁶⁷ They detained her, staged a mock interrogation, and pretended to charge and “Mirandize” her, although no formal charges were ever brought.⁶⁸ During the detention, Suders tendered her resignation, which she had previously prepared.⁶⁹ Initially, the supervisors refused to release her, but eventually they let her go.⁷⁰ Suders testified to feeling “abused, threatened and held against her will.”⁷¹

Suders then filed suit against the PSP for, *inter alia*, sexual harassment and constructive discharge.⁷² The district court granted PSP’s motion for summary judgment in its entirety, holding that the *Ellerth/Faragher* defense protected the PSP from vicarious liability for the actions of its employees because the PSP had provided a means of addressing complaints (i.e., the Affirmative Action office and Ms. Smith Elliot) and Suders had “unreasonably failed to avail herself of the [PSP’s] internal procedures for reporting any harassment”.⁷³ Suders appealed to the Third Circuit Court of Appeals, which overturned the District Court on grounds that the elements of constructive discharge were present in the “pervasive sexual harassment”⁷⁴ of Suders, and that the harassment to which Suders was subjected “would have been intolerable to any reasonable person.”⁷⁵ Crucially, the Third Circuit also held that constructive discharge can

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 439.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 443.

⁷⁵ *Id.* at 446.

be a “tangible employment action” that would prevent an employer from asserting the *Ellerth/Faragher* affirmative defense.⁷⁶

On appeal to the U.S. Supreme Court, the Court held that discrimination under Title VII of the Civil Rights Act of 1964⁷⁷ contemplates employer liability for constructive discharge.⁷⁸ Further, to establish constructive discharge after *Suders* in a hostile work environment situation, the Supreme Court confirmed that an employee must now show that: (1) the harassing behavior is “sufficiently severe or pervasive to alter the condition of [his or her] employment,”⁷⁹ and that (2) the abusive working environment became so intolerable that the resignation was a “fitting response”.⁸⁰

For the first time since *Ellerth* and *Faragher*, the Court resolved the issue of whether a constructive discharge is, in effect, a tangible employment action. This is significant because the Court had already ruled in the tandem cases in 1998⁸¹ that a tangible employment action on the part of the employer would trigger strict liability for an employer in hostile work environment cases. Thus, in *Suders*, the question of whether an employee could claim that she had experienced a tangible employment action so as to trigger strict liability on the part of her employer if that negative employment consequence happened to be her own resignation was answered by the Court in the affirmative.⁸²

The *Suders* decision recognized the Court’s willingness, under certain circumstances, to find an employee’s resignation as fitting the definition of a tangible employment act. However, it does not appear that those “circumstances” have a universal definition that has been adopted by the lower courts. Indeed, there is also some question as to whether the Supreme Court clearly explained the interplay between a constructive discharge claim and the *Ellerth/ Faragher* defense. Justice Ginsburg, writing for the Court noted that “[w]e conclude that an employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor’s *official act* precipitates the constructive discharge; absent such a tangible employment action, however, the defense is available to the employer whose supervisors are charged with harassment” (emphasis added).⁸³ Thus, the Supreme Court recognized the ineffectiveness of the *Ellerth/Faragher* defense to certain constructive discharge claims, but only when the behavior of a supervisor that precipitated the resignation was an “official act”. According to Justice Ginsberg, writing for the court, an “official act” is “the means by which the supervisor brings the official power of the enterprise to bear on subordinates,”⁸⁴ where the supervisor will “use [the company’s] internal processes”⁸⁵ to thereby “obtain the imprimatur” of the company.⁸⁶ Ginsberg noted that both

⁷⁶ *Id.* at 455.

⁷⁷ 42 U.S.C. 2000e.

⁷⁸ 542 U.S. 129 (2004).

⁷⁹ *Id.* at 133.

⁸⁰ *Id.* at 134.

⁸¹ *Ellerth*, *supra* note 49, and *Faragher*, *supra* note 50.

⁸² In the opinion of the authors, the language used by the Supreme Court left much room for interpretation.

⁸³ *Suders*, 542 U.S. at 140.

⁸⁴ *Id.* at 144.

⁸⁵ *Id.*

Ellerth and *Faragher* assign to the employee a duty to “use such means as are reasonable under the circumstances to avoid or minimize the dangers” of the harassment. However, there can be no doubt that Ginsberg also squarely put the burden on the *employer* to prove that the employee “unreasonably” failed to avoid or reduce harm,⁸⁷ a condition which rarely, if ever, is acknowledged by lower courts in constructive discharge claims decided at the summary judgment phase.

At the end of the day, the Supreme Court held that the facts of the *Suders* case “presents a ‘worse case’ harassment scenario, harassment ratcheted up to the breaking point.”⁸⁸ Further, and very importantly, the Court made clear that the affirmative defense of *Ellerth* and *Faragher* rests on the employer, and that while “the plaintiff who alleges no tangible harm has the duty to mitigate harm. . . *the defendant bears the burden to allege and prove that the plaintiff failed in that regard*” (emphasis added).⁸⁹ The Court was critical of the Third Circuit’s failure to direct lower courts as to when and how the *Ellerth/Faragher* considerations “would be brought home to the trier of fact.”⁹⁰ Not content to rely on “the wisdom and expertise of trial judges to exercise their gatekeeping authority when assessing whether all, some, or none of the employers’ anti-harassment programs and to employees’ exploration of alternative avenues warrants introduction at trial,”⁹¹ the Court pointedly held that “[t]he plaintiff *might* elect to allege facts relevant to mitigation in her pleading or to present those facts in her case in chief, but she would do so in anticipation of the employer’s affirmative defense, not as a legal requirement.”⁹² This language suggests that the Supreme Court believed that issues of constructive discharge were factual and thus exclusively in the province of the jury should any genuine issue of fact be in dispute. This makes sense, as the employer’s intent is typically in dispute in employment discrimination cases.⁹³

To simplify the Court’s ruling, a reasonable interpretation of the language of *Suders* is that constructive discharge activated by hostile environment harassment is a tangible employment action. Importantly, *Suders* also establishes that the burden of proof is not on the *plaintiff* but the *defendant* to show that the employee failed to take reasonable measures to avoid harm. This standard, taken together with the requirement that all evidence be construed in the light most favorable to the non-moving party (typically the plaintiff) upon a motion for summary judgment, ultimately leads to the conclusion that constructive discharge is, in most cases, a factual question that should be determined by a jury. Absent strict judicial definitions of “working conditions so intolerable that a reasonable person would be compelled to resign” and

⁸⁶ *Id.*

⁸⁷ *Id.* at 146.

⁸⁸ *Id.* at 147.

⁸⁹ *Id.*

⁹⁰ *Id.* at 151.

⁹¹ *Id.*

⁹² *Id.* at 152.

⁹³ Deanna C. Brinkerhoff, *A More Employee-Friendly Standard for Pretext Claims After Ash v. Tyson*, 8 NEV. L. J. 474, 477 (2007).

what constitutes “reasonable measures” to avoid harm, such cases will likely result in genuine issues of fact for the jury.

But this reasoned interpretation of appropriate constructive discharge analysis is not what seems to have been adopted by the district and circuit courts in the cases following *Suders*. Unfortunately, because of the extreme level of behavior required from employers by the lower federal courts, repeatedly, these courts have effectively disregarded *Suders* and rewritten the constructive discharge cause of action into little more than a legal fiction.⁹⁴ According to research conducted by Brinkerhoff in 2007, there is a significant discrepancy in the success of litigants in employment discrimination cases at the summary judgment stage. For example, at the trial court level, forty-two percent of summary judgment motions are awarded to the defendant while only eleven percent to the plaintiff. Further, the disparity becomes even more pronounced when these cases are appealed, resulting in forty-two percent victory to the defendant and only seven percent to the plaintiffs.⁹⁵ Brinkerhoff notes that this trend is particularly troubling because “witness credibility is more critical in employment discrimination cases than in many other types of civil cases because the focus of the dispute is based on the thought processes of the decision maker.”⁹⁶ As a matter of law, if a genuine issue of fact remains, summary judgment *cannot* be granted.

Part V: The Overzealous Application of Summary Judgment

Federal courts have too often relied upon summary judgment as a method of clearing constructive discharge cases from dockets.⁹⁷ In far too many cases, a defendant to a harassment-based constructive discharge case will, upon motion for summary judgment, stop the plaintiff in his or her tracks except for the most egregious cases of harassment.⁹⁸ This is particularly true in sexual harassment cases,⁹⁹ but it applies to all other forms of employment discrimination as well.

⁹⁴ See Cathy Shuck, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKLEY J. EMP. & LAB. L. 401, 447 (explaining that the constructive discharge doctrine is an essential component of employment law, but the lack of coherence exposes the doctrine to erosion in the courts).

⁹⁵ Brinkerhoff, *supra* note 93.

⁹⁶ Id. at 495 (the author argues that this should make reversals in such disputes rare, but in reality they are rare only in employer victories, and this disparity exists in every circuit.)

⁹⁷ See generally Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 140 - 141 (May 2007)(according to the author, “[t]he extensive use of summary judgment is cited as a significant reason or the dramatic decline in the number of jury trials in civil cases in the federal courts”. Further, “[a] group of scholars agree that judges overuse summary judgment, especially in civil rights cases ”); and John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 525-526, 551 (April 2007)(Bronsteen notes that “[s]ummary judgment might be a wonderful procedure were it not inefficient, unfair, and unconstitutional”).

⁹⁸ See generally Suja A. Thomas, *Symposium: Procedural Justice: Perspectives on Summary Judgment, Peremptory Challenges, and the Exclusionary Rule: The Unconstitutionality of Summary Judgment: A Status Report*, 93 IOWA L. REV. 1613 (July, 2008); Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 100 (Spring, 1999)(the author surveyed cases from 1987 to 1998 to determine whether there was an increasing trend in the courts’ grant of summary judgment in employment discrimination cases. The results suggest that more defendants are making motions for summary judgment based on the severity or pervasive ground. The rate of summary judgments being upheld on appeal appears to have increased).

⁹⁹ See Elizabeth A. Keller and Judith B. Tracy, *Hidden in Plain Sight: Achieving More Just Results in Hostile Work Environment Sexual Harassment Cases by Re-Examining Supreme Court Precedent*, 15 DUKE J. GENDER & POLICY 247 (January 2008), (here the authors make a compelling argument that courts should minimize their disposition of

From a reading of the constructive discharge cases that have been decided in federal courts following *Suders*, it is clear that the doctrine is not a favorite among federal circuit judges.¹⁰⁰ There appear to be issues in play that, in the opinion of the authors, make this an unreasonable usurpation of a juror's duty and that the implications of what judge-made definitions of threshold standards, such as intolerable conditions that no reasonable person should endure, are too seldom considered.

Since Rule 56 of the Federal Rules of Civil Procedure¹⁰¹ was adopted in 1938, innumerable summary judgment motions have been granted by courts, which have had the effect of denying many millions of litigants an opportunity to have their case heard before a jury. It is easy to regard summary judgment as a matter of mere trial protocol. It has beneficial effects as aforementioned: it clears dockets and, at least it is so thought, enables courts to operate efficiently.¹⁰² But some are now stepping back and asking a larger question: Is something of great importance being sacrificed on the altar of judicial efficiency? A growing body of scholars, led by Professor Arthur R. Miller of Harvard Law School, have posited that in the interests of the efficient disposition of cases, courts are by summary judgment allowing the judiciary to "encroach upon the jury's prerogative."¹⁰³ Of course, that prerogative is a constitutional mandate, and the Seventh Amendment dictates that "the right of trial by jury shall be preserved."¹⁰⁴ The right to jury trial is a significant constitutional right, and it follows that any procedure denying such a bedrock right should bear close scrutiny, so that any court with a mind to preserving the fundamental rights of our legal system should tread lightly when denying it. However, it appears that such due caution is becoming the exception rather than the rule, particularly with constructive discharge claims. Data shows that *seventy-three percent* of summary judgment motions in employment cases are granted to the defendant, making them the highest of all types of federal cases.¹⁰⁵

hostile environment sexual harassment claims and that the fact-finder should apply the synthesis of the Supreme Court's reasoning to the conduct to determine if it violates Title VII, and appellate courts should exercise restraint in respecting the fact-finders' determinations. This is necessary, according to the authors, as these cases are fact intensive, and require an evaluation of the totality of circumstances and the cumulative effect of individual acts).

¹⁰⁰ See *Swearnigen-El v. Cook County Sheriff's Dep't*, 602 F.3d 852 (7th Cir. 2010); *Helton v. Southland Racing Corp.*, 600 F.3d 954 (8th Cir. 2010); *Whitten v. Fred's, Inc.*, 601 F.3d 231 (4th Cir. 2010); *Young v. Temple Univ. Hosp.*, 2009 U.S. App. LEXIS 28715 (3rd Cir. 2009) (Unpublished); *O'Brien v. Dep't of Agric.*, 532 F.3d 805 (8th Cir. 2008).

¹⁰¹ Fed. R. Civ. Pro. Rule 56.

¹⁰² Though even this seemingly noncontroversial point is challenged; *see generally* D. Theodore Rave, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875 (May, 2006).

¹⁰³ Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1016 (June, 2003)(in his extensive survey, Miller suggests that "judges view prompt rulings on summary judgment and Rule 12(b)(6) motions as the most effective procedural devices for filtering out frivolous litigation", and that summary judgment has become a significant offensive tool for the defense as plaintiffs struggle to survive the motion in order to reach trial as defendants increasingly involve it in an attempt to prevent them from doing so).

¹⁰⁴ U.S. Const, Amend. VII.

¹⁰⁵ See Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007). (Schneider points out the problems associated with the granting of summary

Many scholars consider summary judgment to be overused,¹⁰⁶ and it is by no means a crackpot view that summary judgment is itself unconstitutional.¹⁰⁷ But, unconstitutional or not, it cannot be denied that while summary judgment in practice is a simple procedure, it is a heavy hammer that can severely affect constitutional rights. The body of common law surrounding summary judgment has established certain safeguards to supposedly discourage the unwarranted grant thereof. The U.S. Supreme Court itself established the standard that a judge should not impose his or her personal view of the strengths and weaknesses of the respective cases upon the decision to grant the motion. In *Anderson v. Liberty Lobby*, Justice Byron White, writing for the majority, said “at the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”¹⁰⁸ The initial burden of establishing a solid basis for a summary judgment motion falls squarely upon the movant,¹⁰⁹ and evidence is to be viewed in a light most favorable to the non-moving party.¹¹⁰ Taken as a whole, it is clear that summary judgment is neither a matter for the light consideration nor perfunctory application that it has come to be in current federal court practice. It is against this backdrop of overzealous application of a procedure to the denial of basic rights that the routine federal court granting of summary judgment in constructive discharge cases must be viewed.

Part VI: A Thing Left Undone: A Survey of the Law Post *Suders*

At first blush, the Supreme Court’s treatment of a constructive discharge claim in *Suders* would suggest that it has the potential to be an effective tool in preventing employers from doing what they cannot do overtly, i.e. discharge an employee for illegal reasons by covertly terminating an unwanted employee through a barrage of hostile and intimidating behaviors designed to encourage or force the employee to quit, thus hiding actionable claims. However, the treatment of the *Suders* holding in subsequent decisions by district and circuit courts suggests that, at least in the minds of many judges, this covert behavior must not happen in today’s workplace and thus such a remedy is unnecessary. Were Justice White still alive today, he would likely agree that in cases involving issues of constructive discharge, summary judgment requires a very fact specific review and that too often judges fail to exercise judicial discretion, playing

judgment, especially in employment discrimination claims. She challenges whether summary judgment is judicially efficient and whether judicial opinions on summary judgment have become so “mechanistic that they become ‘sliced and diced,’” failing to flesh out the facts of a case and deciding cases on “the basis of [the judges’] predilections about the worthiness of a case [rather] than . . . [on] the principles encompassed in Rule 56.” Schneider, at 727, citing Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897 (1998)).

¹⁰⁶ See generally Morton Denlow, *Summary Judgment: Boon or Burden*, <http://www.ilnd.uscourts.gov/judge/denlow/mdsumjdg.htm> (in which Judge Morton Denlow of the U.S. District Court of the Northern District of Illinois argues that not only do summary judgment motions fail to promote efficiency, but that they tend, in his experience, to “delay resolution of cases which would otherwise settle or be tried”).

¹⁰⁷ See generally Thomas, *supra* note 97; see also Bronsteen, *supra* note 97.

¹⁰⁸ *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986).

¹⁰⁹ *Celotex v. Catrett*, 477 U.S. 317, 232 (1986).

¹¹⁰ *Anderson*, 477 U.S. at 255.

the role of both judge and jury in the name of judicial expediency. Unfortunately this dual-role playing by the courts often results in a loss of the litigants' Constitutional rights.

Both before and after *Suders*, very few lower court judges have found an employee's working conditions to be so intolerable that, under a reasonable person standard, a jury should be permitted to determine whether the employee's resignation was justified. In a rare verdict for the plaintiff, in *EEOC v. Univ. of Chicago Hosps.*,¹¹¹ the Court recognized a cause of action where the employee had not only been warned of the employer's intent to terminate her, but arrived at her work to find her desk packed, boxes piled up, and her office being used as storage. In another unusual case, *Neal v. Honeywell, Inc.*,¹¹² the Circuit Court affirmed a jury's finding of constructive discharge where an employee resigned after her employer admitted that it could not keep her safe at work. According to these rulings, if an employee finds that the employer has literally shut the employee out of his or her office or if coming to the job puts the employee at risk of physical harm, then he or she is permitted to quit and seek damages for constructive discharge. The authors agree that a finding of constructive discharge certainly is appropriate under these circumstances. However, based upon subsequent court decisions, it appears that beyond these extreme circumstances there are scant others that are legally so intolerable as to justify resignation according to judicial decisions.

Immediately following the *Suders* decision, a rash of law review articles were published which challenged the dangers of summary judgment,¹¹³ the application of the reasonable person standard in employment discrimination cases,¹¹⁴ the informal power dynamics in the workplace,¹¹⁵ and the need for a broader definition of tangible employment actions.¹¹⁶ These articles make reasoned arguments that judges should, for example, "think carefully about the law and evidence that is presented, look at the evidence holistically, resist the impulse to slice and dice the facts and the law, and consider the 'public dimension' of federal civil litigation."¹¹⁷ Further, these scholars caution that courts improbably have held as a matter of law that "no reasonable person would feel compelled to leave where, for example, she was publicly humiliated, she was required to work under unsafe conditions, a change in work hours made it more difficult to meet family responsibilities, or that she was transferred so as to require

¹¹¹ 276 F. 3d 326 (7th Cir. 2002).

¹¹² 191 F. 3d 827 (7th Cir. 1999).

¹¹³ Schneider, *supra* note 105.

¹¹⁴ Lisa J. Bernt, *Finding the Right Jobs for the Reasonable Person in Employment Law*, 77 UMKC L. REV. 1 (Fall 2008).

¹¹⁵ Susan D. Carle, *Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harassment Cases*, 13 DUKE J. GENDER L. & POL'Y 85, 86 (Spring 2006)(according to Carle, "The availability of an affirmative defense to employer vicarious liability in supervisor hostile environment sexual harassment cases serves important policy objective. Chief among those objectives is the creation for incentives for employers to design and implement policies that will deter and punish sexual harassment at the workplace level, avoiding the need to involve the courts").

¹¹⁶ Aric G. Elsenheimer, *Agency and Liability in Sexual Harassment Law: Toward a Broader Definition of Tangible Employment Actions*, 54 AM. U. L. REV. 1635 (August 2005) (Elsenheimer laments that "in an effort to deter future instances of sexual harassment, many courts have forgotten the actual victims of sexual harassment").

¹¹⁷ See Schneider, *supra* note 105 at 777.

relocation, or substantially longer commute.”¹¹⁸ It is further suggested that plaintiffs are losing sexual harassment cases at the summary judgment stage based on the employer’s assertion of the *Ellerth* affirmative defense, even though these same plaintiffs have alleged facts that should allow them to recover if proven at trial.¹¹⁹ Finally, scholars opine that if courts make the mistake of narrowing recovery in constructive discharge claims, “employees harassed by means of conduct which does not result in direct economic loss will most likely be unable to survive summary judgment, thus discouraging victims to come forward and complain about abuses of power.”¹²⁰ Unfortunately, these arguments, no matter how rationally or passionately made, seem to have fallen upon the deaf ears of the federal judiciary.

For example, one needs to look at several reported cases following *Suders* involving issues of hostile environment and/or constructive discharge, such as *Aryain v. Wal-Mart Stores Texas, LP*,¹²¹ *Fischer v. Avanade, Inc.*,¹²² *O’Brien v. Dept. of Agriculture*,¹²³ and *Fischer v. Forestwood Co., Inc.*,¹²⁴ to sample the continuous narrowing of the constructive discharge claim until it has virtually become a court-created legal fiction. In *Aryain*, the district court found as a matter of law that no reasonable person could find the plaintiff’s work conditions so intolerable as to justify her resignation where the plaintiff, a college student and a part-time employee, suffered unwelcome sexual comments and advances, almost daily, from her superior, Darrel Hayes. Hayes made comments about Aryain’s “butt” and breasts, he repeatedly asked her for dates, he told her that she could “urinate in his mouth,” and that he “sometimes wakes up with a hard on thinking about her,” to name a few of Aryain’s allegations.¹²⁵ Aryain complained to a supervisor about Hayes’ behavior and her father also called the store manager and complained on her behalf, but the store manager determined that Aryain’s harassment complaint could not be substantiated, even though another employee was making similar complaints against Hayes at the same time.¹²⁶

Subsequently, Aryain was moved to another department following her complaints.¹²⁷ She alleged that after her transfer, her new supervisors subjected her to continued harassing behavior, including requiring her to disassemble clothing racks and move them to the back of the store on a hot day, a task typically performed by the night personnel; that on one occasion one of her supervisors intentionally knocked a load of clothes out of her arms; and that she was denied breaks by her supervisors and subjected to angry looks and jeers.¹²⁸ In Aryain’s letter of

¹¹⁸ Bernt, *supra* note 114 at 33.

¹¹⁹ Carle, *supra* note 115 at 93.

¹²⁰ Elsenheimer, *supra* note 116 at 1667.

¹²¹ 534 F. 3d 473 (5th Cir., 2008).

¹²² 519 F. 3d 393 (7th Cir., 2008).

¹²³ 532 F. 3d 805 (8th Cir., 2008).

¹²⁴ 525 F. 3d 972 (10th Cir., 2008).

¹²⁵ *Id.*, at 477.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 477-478.

resignation, she indicated that Wal-Mart had responded ineffectively to her complaints about Hayes and that her other supervisors had engaged in behavior designed to force her to resign.¹²⁹ Although the district court recognized that it must view the evidence in the light most favorable to the plaintiff, it concluded that no reasonable jury could find that Aryain's work conditions were so intolerable as to justify her resignation.¹³⁰ This finding was upheld by the appellate court.¹³¹

In *Fischer v. Avanade, Inc.*, the plaintiff was denied an opportunity to have her case decided by a jury upon evidence that she was twice passed over for promotions that were ultimately filled by men,¹³² that she was retaliated against when she objected to her co-workers (males) engaging in "morale building" dinners at gentlemen's clubs,¹³³ that she was given a poor performance review after joining with a group of other female employees to make a formal complaint about gender issues at the company,¹³⁴ that her performance was audited,¹³⁵ and that ultimately she was required to relocate or transfer in order to keep her position with the company.¹³⁶ In sum, the plaintiff alleged that the "writing was on the wall" that her employer wanted her to resign.¹³⁷ Upon this evidence, the district court found and the circuit court upheld that these incidents were "insufficient to establish that her working conditions. . . had become *unbearable*,"¹³⁸ (emphasis added) inserting what these authors believe is a different and significantly higher burden than that established by the U.S. Supreme Court in *Suders*.

Consistent with this heightened requirement of "intolerable conditions" to support a factual issue on a plaintiff's constructive discharge claim, the 8th Circuit Court of Appeals in *O'Brien* held that "the bar is quite high in constructive discharge cases," that "the conditions must be sufficiently extraordinary and egregious," and that "the conduct must be extreme in

¹²⁹ *Id.* at 478.

¹³⁰ *Id.*

¹³¹ Compare with *Lauderdale v. Texas Dept. of Criminal Justice, Institutional Division*, 512 F. 3d 157 (5th Cir. 2007). (Just a year before *Aryain*, the 5th Circuit had ruled that the test for harassment, the "severe or pervasive" component, was to be read in the disjunctive and that an egregious, yet isolated, incident could be found to alter the terms, conditions or privileges of employment. However, in *Lauderdale*, like in *Aryain* and the subsequently discussed cases, the courts seemed to get hung up on the application of the *Ellerth/Faragher* defense and, in the opinion of these authors, set an unrealistic and, more importantly, unlawful standard that if an aggrieved employee at first does not succeed in getting her employer to stop the harassing behavior, then as a matter of law she must "try and try again"; i.e., the Lauderdale court held that: "Lauderdale's failure to use one of the *other* reporting avenues provided by the TDCJ was *unreasonable*. In most cases, as here, *once an employee knows his initial complaint is ineffective, it is unreasonable for him not to file a second complaint*, so long as the employer has provided multiple avenues for such a complaint." [emphasis added])

¹³² *Fischer*, 519 F. 3d at 397-399.

¹³³ *Id.* at 398.

¹³⁴ *Id.* at 399-400.

¹³⁵ *Id.* at 399.

¹³⁶ *Id.* at 400.

¹³⁷ *Id.* at 410.

¹³⁸ *Id.*

nature and not merely rude or unpleasant.”¹³⁹ Using these articulated standards, the Court upheld an award of summary judgment to the defendant on the plaintiff’s constructive discharge claim.¹⁴⁰ This was in spite the fact that the plaintiff’s evidence showed that after she filed a complaint with the EEOC for race discrimination, her supervisor interfered with her work on a daily to weekly basis; embarrassed, isolated, and ostracized her; closely scrutinized and criticized her work; and increased her workload.¹⁴¹ The lower court concluded that the plaintiff had failed to allege enough facts to survive summary judgment because the record did not contain evidence suggesting: “(1) the requisite objectively intolerable working conditions, or (2) that Trice [the supervisor] intentionally created the condition in an effort to cause [the plaintiff] to quit.”¹⁴² Upon review, the appellate court agreed with the lower court that both the plaintiff’s claims for a hostile work environment and for constructive discharge were legally insufficient to create a question of fact for the jury.¹⁴³ Instead, the Court pointed to another case in which a black employee had his name written in a shower at his workplace with an arrow connecting his name with a burning cross and a KKK sign as the type of case that alleged sufficient evidence for a hostile work environment claim to be considered.¹⁴⁴

Finally, in *Fischer v. Forestwood Co. Inc.*, 525 F. 3d 972 (10th Cir. 2008), the Court of Appeals, in ruling against the plaintiff in what is admittedly a weak constructive discharge claim, citing Tenth Circuit precedent, argued that if it could find that an Iranian worker who was subjected to derogatory remarks by his supervisor about his national origin, who was ordered to take a polygraph examination because of his national origin, who was belittled and mistreated at company seminars, and who was ordered to fire or eliminate other Iranians employed by the company,¹⁴⁵ could not survive a motion for summary judgment on his constructive discharge claim, neither could Fischer.¹⁴⁶ These cases, as the authors’ research shows, are not the exception, but the rule on constructive discharge, and the authors’ premise that constructive discharge has become nothing more than a legal fiction is well supported by case law and other scholarly writings.

Part VII: The Need for a Re-examination of Constructive Discharge Claims

Some legal scholars may disagree that the issue of whether an employee has been constructively discharged by an employer’s harassing behaviors should almost always be a question for the jury. Certainly the authors recognize that not all aggrieved employees have a legal remedy for their employment distress. However, by making a constructive discharge claim

¹³⁹ *O’Brien*, 532 F. 3d at 810. (The authors agree with the O’Brien court that the bar should be high, but disagree as to whose standards this bar should be measured, the trial judge’s on summary judgment or a jury).

¹⁴⁰ *Id.* at 811.

¹⁴¹ *Id.* at 808.

¹⁴² *Id.* at 809.

¹⁴³ *Id.* at 810.

¹⁴⁴ *Id.*

¹⁴⁵ *Fischer*, 519 F. 3d at 981.

¹⁴⁶ The court in *Fischer* was referencing a prior Tenth Circuit holding, which in the view of the authors is unconscionably anti-employee and anti-constructive discharge; see *Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379 (10th Cir. 1991).

nearly impossible to survive a summary judgment motion, and thus creating a “legal fiction,” courts have handed unscrupulous employers a ticket to getting rid of an unwanted employee for illegal reasons or through improper means that are literally free from scrutiny. It is not uncommon for an employer, when discussing how to handle a troublesome employee, to float the idea of “making things so unpleasant that the employee will choose to quit” as a way to avoid the potential EEOC complaint or to protect against liability due to sloppy record keeping or perhaps even illegal motives.¹⁴⁷ Giving interpretation to the federal courts’ distaste for constructive discharge claims, the legal response may be that such actions would likely lead to favorable results for the employer, but the ethical response suggests otherwise.

Despite scholarly articles and public debate discussed earlier in the article about the proper use of summary judgment for issue of hostile environment and constructive discharge claims in employment discrimination cases, the courts have failed to pay heed to these articulated concerns. In the last quarter of 2010 alone, the authors have found at least five decisions from at least three federal circuits that bring this point home. For example, in *Hinojosa v. CCA Properties of America, LLC*, decided by the Seventh Circuit on November 4, 2010,¹⁴⁸ the plaintiff sued for age, gender, race, and national origin discrimination and also claimed constructive discharge. The trial court found in favor of the defendant on summary judgment and the Court of Appeals affirmed. The appellate court held that although the plaintiff had offered evidence to show badgering, harassment, and humiliation by the employer calculated to encourage the employee’s resignation, and offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not (two out of seven factors tending to show the existence of intolerable conditions), there was no evidence supporting a conclusion that the conditions of Hinojosa’s job were so intolerable that he had no reasonable choice but to retire.

Similarly, in *Thompson v. Memorial Hospital of Carbondale*,¹⁴⁹ the Seventh Circuit ruled against the plaintiff, the only African-American paramedic in the Southern Illinois Regional Emergency Medical System, who brought a claim of race discrimination, hostile environment, and constructive discharge against his employer, and was successful in presenting his claim to a jury. Despite the fact that the jury found that the plaintiff had been put on probation because of his race and awarded him \$500,000, the Court of Appeals upheld the district court’s earlier ruling against the plaintiff in favor of the defendant’s summary judgment motion as to the plaintiff’s hostile work environment and constructive discharge claims, thus precluding these factual issues from being decided by a jury. In this case, the plaintiff introduced several remarks that were made to him or about him related to his race to support his claim for hostile environment, but the court of appeals held that while it did not condone this conduct, it agreed that the circumstances did not reflect severe or pervasive enough conduct to be actionable under Title VII. The court of appeals also held that without evidence of hostile environment, the plaintiff’s claim for constructive discharge must fail.

¹⁴⁷ This observation comes directly from the authors’ own experiences in advising employer clients on discipline and termination issues.

¹⁴⁸ 210 WL 4323062 (C. A. 7, Nov. 4, 2010).

¹⁴⁹ 210 WL 4323062 (C.A. 7, Nov. 3, 2010).

In *Smith v. Fairview Ridges Hospital*,¹⁵⁰ decided by the Eighth Circuit in October of 2010, an African-American transportation aide for the hospital emergency room brought an action against her employer contending that the hospital constructively discharged her after subjecting her to a hostile work environment and retaliation in violation of Title VII. The district court held and the court of appeals affirmed that evidence of a racially motivated picture in the workplace, a comment about fried chicken, a co-worker's reference to the ghetto, racial material on the employer's website, a comment regarding "black aides", and references to runaway slaves, which unambiguously permitted an inference of racial animus against the African American employee, were, under a totality of the circumstances, insufficient to satisfy the high threshold of actionable harm necessary to show hostile environment or constructive discharge. This is despite the fact that the court noted that summary judgment is an inappropriate remedy in "very close" employment cases, (citing *Kehoe v. Anheuser-Busch, Inc.*, 995 F. 2d 117, 120 (8th Cir. 1993)).

The Third Circuit had its say in *Eldeeb v. Allied Barton Security Services L.L.C.*,¹⁵¹ in September of 2010, when an employee brought an action against his employer for hostile work environment, wrongful termination, retaliation and constructive discharge based on his religion and national origin. The District Court granted summary judgment to the defendants, which was upheld by the Court of Appeals. The plaintiff introduced evidence that a co-worker told him that his first name, "Osama," was a very bad name and that he should change it. He also introduced evidence that despite this, his co-worker repeatedly called him by his first name, and then eventually introduced him to her son as "Saddam." Upon his complaint to the employer, Eldeeb accepted a transfer to another location, and then was informed that he would have to go part-time until another full time position opened. Although the district court admitted that the "temporal proximity" of a few days between Eldeeb's complaint about Adamek and the facility manager's complaint about Eldeeb, which brought about Eldeeb's transfer, required close scrutiny, it ultimately held that "it is simply not suggestive enough to infer a causal connection."¹⁵²

Perhaps in one of the most surprising decisions, the Seventh Circuit actually overturned a jury verdict in favor of the plaintiff for constructive discharge. In *Chapin v. Fort- Rohr Motors, Inc.*,¹⁵³ the plaintiff, a car salesman, was awarded judgment by a jury on his retaliation and constructive discharge claim against his employer for discriminating against white Christians in favor of Pakistani Muslims. The Seventh Circuit Court of Appeals disagreed with the jury's verdict, and entered judgment in favor of the defendant. The appellate court, in overturning the jury's finding of constructive discharge, noted that courts have properly found constructive discharge when there is a threat to an employee's personal safety" (citing *Porter v. Erie Foods, Int'l, Inc.*, 576 F. 3d 629 (7th Circuit 2009)), where constructive discharge claim included repeated use of a noose and implied threats of physical violence; and where supervisor brandished firearm and held it to employee's head (citing *Taylor v. W. & S. Life Ins. Co.*, 966 F. 2d 1188, 1198-1199 (7th Cir. 1992)), suggesting that an employee must stay in a hostile environment until it is a matter of life or death.

¹⁵⁰ 2010 WL 4226529 (C. A. 8, Oct. 27, 2010).

¹⁵¹ 2010 WL 3590640 (C.A. 3, Sept. 16, 2010.).

¹⁵² *Id.* at * 3.

¹⁵³ 619 F. 3d 673 (C.A. 7, Sept. 3, 2010).

Over two decades ago in *Sure-Tan*, the U.S. Supreme Court recognized that employers must not be allowed to insulate themselves from liability and cheat the spirit of the NLRA by intentionally creating working conditions so intolerable that employees feel compelled to resign. Likewise, federal courts should now stop undermining the letter and spirit of the anti-discrimination statutes by allowing unscrupulous employers to escape potential liability through lenient grants of summary judgment, and should further practice judicial restraint in all but the most legally insufficient constructive discharge claims. It is not the province of the trial judge or appellate judges to determine questions of fact. Thus, factual issues such as whether behavior is “severe or pervasive”, or whether a “reasonable person would have felt compelled to resign” should be left for the jury. Cases in which the plaintiff has presented evidence of constructive discharge that, if accepted by the jury, should proceed to trial.

Part VIII: Recommendations

The separation of powers in our federal form of government exists to provide appropriate checks and balances so that each branch of government acts according to its designated powers. It has long been known that the general province of the courts is to interpret the law, not to usurp the legislative function and make it. However, when courts begin to regularly invade the province of the jury and set legal precedent for factual issues, they are indeed judicially legislating. In response to the continuing pervasive discrimination in American society related to race, gender, national origin, religion, age, and disability, Title VII of the Civil Rights Act and the following federal anti-discrimination statutes need to continue to be effective tools to stop behaviors today that may not be changed by attitude for many more decades to come. The federal anti-discrimination statutes were designed to stop acts of discrimination, but it would be absurd to believe that legislation alone could eradicate all stereotypes and biases in society. A recent Gallup poll reported that fifteen percent of American workers claim their employers discriminated against them during a one-year period spanning from 2004 – 2005. Employment discrimination cases are also the largest single category of federal civil cases, comprising nearly ten percent of the total federal civil docket.¹⁵⁴ As a result, what was once acceptable to do in an overt manner pre- anti-discrimination legislation must now be, and often is, achieved covertly. Because constructive discharge, as interpreted by the courts, has virtually become a legal fiction, employers have nearly a free reign to avoid the consequences of discriminatory behavior by simply looking the other way when an unwanted employee is harassed so severely or pervasively that he or she can no longer tolerate the conditions of the job.

If trial courts and appellate courts cannot properly balance the need for judicial efficiency with the need for conservative judicial actions in fact finding rulings, then perhaps Congress should amend the anti-discrimination statutes such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act to prohibit the award of summary judgment to settle factual questions regarding hostile environment and constructive discharge claims. Such congressional intervention would not be unprecedented. Federal sentencing guidelines, for example, greatly limited the province of the courts. The Sentencing Reform Act of 1984¹⁵⁵ shifted powers from the judiciary to the legislature. While the

¹⁵⁴ Brinkerhoff, *supra* note 93, at 492-493.

¹⁵⁵ The *Sentencing Reform Act of 1984* is Chapter II of the *Comprehensive Crime Control Act of 1984*, Pub. L. No. 98-473, reprinted in 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1976 (1984) (It was subsequently found unconstitutional in part by the U.S. Supreme Court in two cases).

guidelines no longer have the weight they once carried constitutionally,¹⁵⁶ they nonetheless still are in force with advisory power. For another example of congressional intervention in the province of the courts, one need only look to the Federal Rules of Evidence, which were passed by Congress and signed into law in 1975.¹⁵⁷ In short, Congress clearly does have the power to intervene in judicial affairs and has exercised this power in matters of evidence and sentencing. It is a logical step for Congress to move similarly to protect the constitutional rights of litigants with Title VII and other employment discrimination claims.

Part IX: Conclusion

Constructive discharge, a doctrine recognized and upheld by the U.S. Supreme Court for several decades, has been eviscerated in most cases of workplace harassment brought by employees. This evisceration has come at the hands of the federal courts at both the trial and circuit court levels. Case law has clearly established the trend of the courts to disfavor the doctrine in all but the most egregious cases of harassment and intolerable conditions suffered by employees.¹⁵⁸ Wrongfully, summary judgment has been the primary means by which the constitutional right to a jury trial has been diminished. This procedural tool of the courts has caused an imbalance, leading to the appearance that many courts are now decidedly anti-employee in hostile environment and constructive discharge cases brought pursuant to federal employment laws.¹⁵⁹ An adjustment needs to take place. Potentially meritorious claims that involve minimally sufficient evidence ought to go to the jury for resolution. The wholly insufficient claims can be weeded out on a motion to dismiss, leaving factual determinations where they belong, in the province of the jury. This would then do justice to the letter and the spirit of the anti-discrimination statutes which were enacted so all employees could be judged on their individual knowledge, skills, and abilities, and thus hold employers accountable for

¹⁵⁶ See *United States v. Booker*, 543 U.S. 220 (2005) and *Blakely v. Washington*, 542 U.S. 296 (2004) (the U.S. Supreme Court established that the Sixth Amendment right to a jury trial necessitated that provisions of the Federal Sentencing Guidelines be struck down).

¹⁵⁷ Pub.L. 93-595, 88 Stat. 1926 (1975).

¹⁵⁸ See Sarah H. Perry, *Enough is Enough, Per Se Constructive Discharge for Victims of Sexually Hostile Work Environments Under Title VII*, 70 WASH. L. REV. 541,548 (1995) ("[t]he constructive discharge doctrine as applied in Title VII hostile environment actions requires victims either to remain in intolerable and abusive conditions or to resign and risk losing back pay; ...[f]or over a decade, circuit courts have applied different constructive discharge tests, resulting in varying standards for sexual harassment victims. Courts have misapplied these tests. As a result, victims are subjected to inconsistent results and unfair burdens"); Mark S. Kende, *Deconstructing Constructive Discharge: The Misapplication of Constructive Discharge Standards in Employment Discrimination Remedies*, 71 NOTRE DAME L. REV. 39 (1995).

¹⁵⁹ See Stephen F. Befort and Sarah J. Gorajski, *When Quitting Is Fitting: The Need for a Reformulated Sexual Harassment/Constructive Discharge Standard in the Wake of Pennsylvania State Police v. Suders*, 67 OHIO STATE L. J., 593, 599 (2006); Cathy Shuck, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKELEY J. EMP. & LAB. L. 401 (2002) (arguing that Courts are "uniform in requiring ever greater mitigation efforts by employees and ever more egregious instances of discrimination by employers before they are willing to recognize a constructive discharge"); Martin O'Toole, *Choosing a Standard for Constructive Discharge in Title VII Litigation*, 71 CORNELL L. REV. 587 (1986).

discriminatory biases that result in overt or covert unlawful employment actions.¹⁶⁰ To do any less would be to rewrite a long, tumultuous and ultimately proud history of progress toward ensuring fair and equitable treatment to diverse employees and an equal opportunity for all.

¹⁶⁰ Stephen D. Underwood, *Constructive Discharge and the Employer's State of Mind: A Practical Standard*, 1 U. PA. J. LAB. & EMP. L. 343, 345-346 (1998); Irma M. Saxe, *Constructive Discharge Under the ADEA: An Argument for the Intent Standard*, 55 FORDHAM L. REV. 963, 980 (1987).