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Cover Page Footnote

Student Note

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PROMOTING FAIRNESS: A PROPOSAL FOR A MORE REASONABLE STANDARD OF CONSTRUCTIVE DISCHARGE IN TITLE VII DENIAL OF PROMOTION CASES

I. Introduction

Consider the case of an associate in a law firm who strives to become a partner someday. The associate toils for seven or eight years, just like all the other associates in the office, and does exceptional work. However, this associate happens to be a woman, and she is denied the promotion to the partnership even though she was more qualified than some of the men who were promoted to partner. Angry and disappointed that she has been denied an opportunity to fulfill her dream, she resigns and brings a lawsuit against her former employer. If she can prove her case under Title VII of the Civil Rights Act of 1964,[1] the law firm will be liable for a discriminatory denial of promotion,[2] and she may be eligible for backpay, reinstatement, and dam-

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1. 42 U.S.C. §§ 2000e—2000e-17 (1981 & Supp. 1992). Section 703(a)(1) of Title VII of the 1964 Act provides, in pertinent part:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his 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).

2. The framework for proving a Title VII disparate treatment claim has been established by the Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). The method of proof has three stages. First, the plaintiff must set forth by a preponderance of the evidence a prima facie case of employment discrimination. *See McDonnell-Douglas*, 411 U.S. at 802. To make out a prima facie case of discrimination in promotion, the plaintiff must show that he or she applied for a position, was qualified for that position, was rejected, and that, after the rejection, the employer continued to seek applicants or filled the position with a person in a non-protected class. *See* Jolly v. Northern Telecom, Inc., 766 F. Supp. 480, 493 (E.D. Va. 1991) (citing Patterson v. McLean Credit Union, 491 U.S. 164 (1989)).

If the plaintiff succeeds in proving a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions. *See McDonnell-Douglas*, 411 U.S. at 802. This burden is one of production only, and the burden of proof remains at all times with the plaintiff. *See Burdine*, 450 U.S. at 253.

Thereafter, the plaintiff must prove by a preponderance of the evidence that the employer's proffered non-discriminatory reasons were a pretext for discrimination. *See Burdine*, 450 U.S. at 253. To establish pretext, the plaintiff may demonstrate that, despite the reasons articulated by the defendant, a discriminatory motive led to the challenged decision, or that the employer's explanation is not worthy of credence. Halbrook v. Reichhold Chems., Inc., 766 F. Supp. 1290, 1295 (S.D.N.Y. 1991) (citing *Burdine*, 450 U.S. at 256).

ages.[3] However, unless she can prove that she was "constructively discharged," she probably will not be eligible for backpay past the date of her resignation, nor can the court order her reinstatement.[4]

The constructive discharge rule states that if intolerable working conditions associated with the employer's discrimination force the employee to resign, then the employee will be considered to have been "constructively" discharged on the date of resignation.[5] The employee will be treated as if he or she had been fired by the employer and therefore is eligible for remedies traditionally associated with wrongful termination,[6] such as reinstatement and backpay past the

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3. Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), provides, in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice, . . . the court may enjoin the respondent 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 backpay, . . . or any other equitable relief as the court deems appropriate.

Id.

Section 706(g) as originally enacted only provided for equitable, as opposed to legal, remedies. Hence compensatory and punitive damages were not available remedies. *See, e.g.*, Pearson v. Western Elec. Co., 542 F.2d 1150, 1152 (10th Cir. 1976). The only monetary relief available under section 706(g) was backpay, which is considered an equitable remedy. *See* Curtis v. Loether, 415 U.S. 189, 197 (1974).

However, Congress amended the employement discrimination statutes in the Civil Rights Act of 1991, Pub. L. No. 102-166, Title I, 105 Stat. 1071 (1991) (codified at various sections of 29 U.S.C. and 42 U.S.C.). In order to more effectively "deter unlawful harassment and intentional discrimination in the workplace," Civil Rights Act of 1991 § 2, the 1991 Act provides for compensatory and punitive damages for women and religious minorities in cases of intentional discrimination. 42 U.S.C. § 1981a(a)(1). Compensatory and punitive damages were already available to racial minorities under 42 U.S.C. § 1981. The 1991 Act does place certain monetary limits on the amount of compensatory and punitive damages women and religious minorities can receive. 42 U.S.C. § 1981a(b)(3).

4. "Backpay" is a calculation of an amount equal to what the plaintiff would have earned but for the discrimination, less any amount actually earned, up until the date of the judgment. *See, e.g.*, Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108, 1119 (3d Cir. 1988). The calculation might include both "preresignation backpay," which is the amount of backpay up until the date of the employee's resignation; and "postresignation backpay," which is the amount of backpay from the date of resignation to the date of judgment. *See infra* notes 24-25 and accompanying text. For purposes of this Note, it is important to distinguish between the two, since an employee who has not been constructively discharged will not be eligible for postresignation backpay. *See infra* notes 66-73 and accompanying text.

"Front pay" may also be awarded in a successful Title VII action. Front pay represents an estimation of future lost earnings, calculated from the date of judgment to the date plaintiff would regain the position lost because of the discrimination. *See Gunby*, 840 F.2d at 1123; Goss v. Exxon Office Sys., Co., 747 F.2d 885, 889-90 (3d Cir. 1984); 2 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 14.4.3 (1988).

5. *See infra* notes 48-53 and accompanying text.

6. *See* Jurgens v. EEOC, 903 F.2d 386, 390 (5th Cir. 1990); Levendos v. Stern En-

date of "discharge." If the employee has not been constructively discharged, then under the general rule the employee will only be entitled to preresignation backpay.[7] In examples similar to this one, the courts have taken the position that a discriminatory failure to promote, without more, does not amount to a constructive discharge.[8] Since the employee's "working conditions" are not rendered intolerable by a denial of promotion, the courts say, the employee has not been constructively discharged and therefore will not be entitled to postresignation relief.[9]

However, a few recent denial of promotion cases have begun to ease the restrictions on postresignation relief engendered by the constructive discharge rule.[10] These cases have taken two different approaches to essentially the same reasonableness standard. One case, *Ezold v. Wolf, Block, Schorr and Solis-Cohen*,[11] disregarded the constructive discharge rule and held instead that, even where an employee's working conditions have not become so intolerable as to amount to constructive discharge, the court may still award postresignation relief if the employee's resignation was reasonable under the circumstances.[12] Another case, *Hopkins v. Price Waterhouse*,[13] held that where an employee's reasonable expectations of promotion have been completely frustrated, the employee's "working conditions" have become so intolerable that she has been constructively discharged and is therefore entitled to postresignation relief.[14] This Note examines the unfairness that often results from applying the constructive discharge rule rigidly in Title VII denial of promotion cases, and examines these and other recent cases for a possible solution.

Part II briefly describes the policies behind Title VII and its relief provisions. Part II also explains the constructive discharge rule and illustrates its restriction on postresignation relief. Part III argues that

tertainment, Inc., 860 F.2d 1227, 1230 (3d Cir. 1988); Ralph H. Baxter, Jr., and John M. Farrell, *Constructive Discharge—When Quitting Means Getting Fired*, 7 EMPLOYEE REL. L.J. 346, 347 (1981)[hereinafter Baxter and Farrell, *Constructive Discharge*].

7. *See infra* notes 66-73 and accompanying text. There are, however, cases that represent a minority rule, which allow an award of postresignation relief even where there was no constructive discharge. *See infra* notes 74-81 and accompanying text.

8. *See infra* notes 82-99 and accompanying text.

9. For purposes of this Note, "postresignation relief" includes postresignation backpay, reinstatement, and front pay.

10. *See infra* notes 106-149 and accompanying text.

11. 758 F. Supp. 303 (E.D. Pa. 1991).

12. *Id.* at 310-13. *See infra* notes 109-137 and accompanying text.

13. 825 F.2d 458 (D.C. Cir. 1987), *rev'd on other grounds and remanded*, 490 U.S. 228 (1989), *on remand*, 737 F. Supp. 1202 (D.D.C.), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990).

14. *Id.* at 472-73. *See infra* notes 138-145 and accompanying text.

applying the constructive discharge rule in denial of promotion cases can undermine Title VII's purposes, and analyzes recent cases that have addressed the problem. Finally, Part IV proposes that the courts should adopt the standard of constructive discharge applied in *Hopkins v. Price Waterhouse*, which takes into account an employee's reasonable expectations of promotion. This standard more readily furthers the objectives of Title VII and of the constructive discharge rule, especially where the denial of promotion effectively ends the employee's career with the employer. Part IV also applies the standard in three common denial of promotion situations.

II. The Objectives of Title VII and the Constructive Discharge Rule

A. Title VII and its Relief Provisions

Section 703(a)[15] of Title VII of the Civil Rights Act of 1964 ("Title VII") makes it unlawful for employers to discriminate against any individual on account of race, color, religion, sex, or national origin.[16] Employers are prohibited from discriminating against employees with respect to compensation, terms, conditions, or privileges of employment, in addition to decisions to hire or to discharge.[17] It is also unlawful for employers to limit, segregate, or classify employees or applicants in such a way as to limit employment opportunities or otherwise affect their status as employees.[18]

In *Albemarle Paper Co. v. Moody*,[19] the Supreme Court set forth the purposes of Title VII. The broad public policy objective is prophylactic: "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor" one set of employees over another.[20] The second, more immediate, purpose is "to make persons whole for injuries on account of unlawful employment discrimination."[21]

To further these policy objectives, Congress vested the district courts, in section 706(g),[22] with broad equitable discretion to provide remedies for victims of discrimination. Courts have the power to enjoin the employer from engaging in unlawful discriminatory practices

15. 42 U.S.C. § 2000e-2(a).
16. 42 U.S.C. § 2000e-2(a)(1).
17. *Id.*
18. 42 U.S.C. § 2000e-2(a)(2).
19. 422 U.S. 405 (1975).
20. *Id.* at 417.
21. *Id.* at 418.
22. 42 U.S.C. § 2000e-5(g).

and to "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. . ., or any other equitable relief as the court deems appropriate."[23]

"Backpay" is a calculation of an amount equal to what the plaintiff would have earned but for the discrimination, less any amount actually earned, up until the date of the judgment.[24] The calculation might include both "preresignation backpay," which is the amount of backpay beginning with the discriminatory acts and ending at the date of the employee's resignation; and "postresignation backpay," which is the amount of backpay from the date of resignation to the date of judgment.[25]

There are other Title VII remedies that the courts can award pursuant to section 706(g). For instance, courts have ordered that successful plaintiffs be reinstated into the position they would have occupied absent the discrimination.[26] In addition, courts have awarded "front pay"[27] where reinstatement is impracticable because it would be unfair to "bump" an innocent incumbent,[28] or because animosity exists between the parties as a result of the litigation.[29] Front

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23. *Id.*

24. *See, e.g.*, Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108, 1119 (3d Cir. 1988).

25. As a simple, hypothetical example, assume Emily Employee is earning $25,000 as a personnel representative for XYZ Corp. On July 1, 1991, Employee is discriminatorily denied a raise, which would have brought her salary to $30,000. She resigns on June 31, 1992 (one year later) and sues XYZ under Title VII. On January 1, 1993, the court holds that Employee was denied equal pay for equal work in violation of Title VII. The court would calculate backpay as follows:

> *Preresignation backpay (July 1, 1991 through June 31, 1992)*: $30,000 (amount she would have earned but for discrimination prior to resignation) [minus] $25,000 (amount she actually earned) [equals] $5,000.

If the court also finds that she was constructively discharged, Employee will also be entitled to postresignation backpay. *See infra* notes 48-73 and accompanying text.

> *Postresignation backpay (June 31, 1992 through January 1, 1993)*: The amount she would have earned but for discrimination, from date of resignation to date of court judgment (a total of six months) is $15,000.

Hence the maximum backpay award would be $20,000.

26. Typically, employees who have been unlawfully denied a position, promotion, or transfer are reinstated or instated into the position by a court exercising its equitable discretion. *See, e.g.*, Hopkins v. Price Waterhouse, 920 F.2d 967, 976-79 (D.C. Cir. 1990); Spulak v. K-Mart Corp., 894 F.2d 1150, 1157 (10th Cir. 1990)(Age Discrimination in Employment Act case); Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980); Ezold v. Wolf, Block, Schorr and Solis-Cohen, No. 90-0002, 1991 U.S. Dist. LEXIS 10270, 56 Fair Empl. Prac. Cas. (BNA) 580 (E.D. Pa. July 23, 1991).

27. *See supra* note 4.

28. *See* Nobler v. Beth Israel Medical Ctr., 715 F. Supp. 570, 573 (S.D.N.Y. 1989) (ADEA case). However, Title VII clearly authorizes the bumping of innocent incumbents. Lander v. Lujan, 888 F.2d 153, 158 (D.C. Cir. 1989).

29. *See* Spulak v. K-Mart Corp., 894 F.2d 1150, 1158 (10th Cir. 1990)("the antago-

pay represents an estimation of future lost earnings, calculated from the date of judgment to the date plaintiff would regain a position comparable to the one lost on account of the discrimination.[30]

Although the courts have wide discretion[31] in fashioning appropriate Title VII remedies, that discretion must be exercised with deference to Title VII's statutory objectives:[32] eradicating workplace discrimination and making persons whole for injuries suffered through past discrimination.[33] For instance, in *Albemarle* the Court held that an award of backpay should be denied only if that denial

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nism between Spulak and K-Mart has only increased as a result of the litigation, which the district court described as 'bitterly contested from start to finish' "); Goss v. Exxon Office Sys. Co., 747 F.2d 885, 890 (3d Cir. 1984)(stating that no judicial order could make existing ill feelings engendered by the litigation disappear); Cassino v. Reichhold Chems., Inc., 817 F.2d 1338 (9th Cir. 1987); Whittlesey v. Union Carbide, 742 F.2d 724, 728 (2d Cir. 1984); *see also* Daines v. City of Mankato, 754 F. Supp. 681, 703 (D. Minn. 1990)(in awarding front pay, court referred to both innocent incumbent and potential animosity between parties).

30. *See* Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108, 1123 n.15 (3d Cir. 1988); Goss v. Exxon Office Sys., Co., 747 F.2d 885, 889-90 (3d Cir. 1984); SULLIVAN, *supra* note 4, § 14.4.3.

31. The broad scope of relief under section 706(g) was reaffirmed by the Supreme Court in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). In *Franks*, the Court indicated that the scope of Title VII relief was not limited to the specific remedies - reinstatement and backpay - listed in section 706(g). Rather, Congress had vested federal courts with "broad equitable discretion" and the power "to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination." *Id.* at 763, 764. The Court said that, like the backpay remedy, plaintiffs who are discriminated against in hiring are presumptively entitled to retroactive seniority. *Id.* at 771-73; *see also* ARTHUR LARSON AND LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 55.20, at 11-19 (rev. ed. 1990) ("Although Section 706(g) specifically mentions only reinstatement and hiring as two possible remedies under Title VII, the courts, in an attempt to return the victim of employment discrimination to his proper status, have also ordered promotions, transfers, mergers of segregated seniority systems, alteration or abolition of discriminatory seniority or referral systems, and other miscellaneous forms of affirmative relief").

32. *See* Ford Motor Co. v. EEOC, 458 U.S. 219, 226 (1982).

33. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). In *Albemarle*, the Court held, *inter alia*, that a class of black employees at a paper mill who had been locked into low paying jobs by a discriminatory seniority system were presumptively entitled to backpay. *Id.* The Court rejected Albemarle's argument that its lack of bad faith should preclude an award of backpay:

> If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the "make whole" purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in "bad faith." Title VII is not concerned with the employer's "good intent or absence of discriminatory intent," for "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."

Id. at 422 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)(emphasis in original)(footnote omitted)).

"would not frustrate the central statutory purposes of [Title VII]."[34]

Subsequently, the courts interpreted *Albemarle* to mean that successful Title VII plaintiffs are presumptively entitled to backpay,[35] since backpay furthers both objectives of Title VII. First, backpay liability deters workplace discrimination by serving as a "spur or catalyst" to cause employers to self-evaluate and to correct unlawful practices.[36] Second, the backpay remedy furthers Title VII's "make-whole" objective[37] by restoring successful plaintiffs "to a position where they would have been were it not for the unlawful discrimination."[38]

The former employee's entitlement to backpay, however, is subject to the duty under section 706(g) to mitigate damages by seeking "other suitable employment."[39] Section 706(g) provides, in pertinent part, that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the backpay otherwise allowable."[40] For instance, in *Helbing v. Unclaimed Salvage and Freight Co., Inc.*,[41] the female plaintiff was discriminatorily denied a promotion to store manager on November 1, 1976,[42] and she resigned February 9, 1977.[43] The court found the defendant store liable for failure to promote and awarded the plaintiff backpay in excess of $23,000.[44] However, this amount reflected the court's reduction of "amounts earnable with reasonable

34. 422 U.S. at 421.

35. *See* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 719 (1978) (referring to the "*Albemarle* presumption" in favor of backpay).

36. *See Albemarle*, 422 U.S. at 417-18 (reasoning that if employers faced only the prospect of an injunctive order, rather than presumptive backpay liability, they would have little incentive to "shun practices of dubious legality").

37. *Id.* at 418-19.

38. 118 CONG. REC. 7166, 7168 (1972)(Section 706(g) was "intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible" so that those discriminated against are "restored to a position where they would have been were it not for the unlawful discrimination")(section-by-section analysis of H.R. 1746 introduced by Senator Williams, accompanying the Equal Employment Opportunity Act of 1972 - Conference Report).

Title VII's backpay provision, section 706(g), was expressly modeled on the backpay provision of the National Labor Relations Act, 29 U.S.C. § 160(c) (1988), which has a make-whole purpose. *See Albemarle*, 422 U.S. at 419 n.11.

39. Ford Motor Co. v. EEOC, 458 U.S. 219, 231-32 (1982).

40. 42 U.S.C. § 2000e-5(g). The burden of proving the plaintiff's lack of reasonable diligence rests upon the employer. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

41. 489 F. Supp. 956 (E.D. Pa. 1980).

42. *Id.* at 959.

43. *Id.*

44. *Id.* at 964.

diligence."[45] After her resignation, the plaintiff had only searched for retail management positions, even though her previous management experience was slight.[46] The court did not consider this to be a reasonably diligent search, so it reduced her backpay award by $9,240, the amount plaintiff could have earned working full-time at minimum wage during the backpay period.[47]

B. The Constructive Discharge Rule as a Limitation on Title VII Relief

1. *The Constructive Discharge Rule*

The constructive discharge issue arises frequently in the relief phase of Title VII employment discrimination litigation. Typically, a former employee alleges an underlying discriminatory act — such as unlawful demotion, harassment, or failure to promote — and also claims that her subsequent resignation was involuntary because it resulted from intolerable working conditions associated with the discrimination.[48] To be eligible for any relief at all, the plaintiff must of course prove the underlying Title VII violation. To be eligible for pos-

45. Helbing v. Unclaimed Salvage and Freight Co., Inc., 489 F. Supp. 956, 964 (E.D. Pa. 1980).

46. *Id.* at 964.

47. *Id.* The original award was in excess of $40,000, but the court reduced that sum by amounts actually earned by the plaintiff after the denial of promotion but while she still worked for the defendant, by amounts earned by plaintiff after she resigned, and by amounts received by plaintiff in unemployment compensation. Finally, the court deducted the amounts earnable with reasonable diligence, for a total of $23,251. *Id.* at 963-64.

In another case, Daines v. City of Mankato, 754 F. Supp. 681 (D. Minn. 1990), the female plaintiff was denied a promotion in May 1984 to city Housing Director, *id.* at 684, so she took a one year educational leave of absence to pursue a graduate degree and then resigned. *Id.* at 694. The court held the city liable for discriminatory failure to promote and retaliation, *id.* at 695, and ruled that she was entitled to backpay for the period from May 1984 through December 31, 1989. *Id.* at 694. However, pursuant to the mitigation provision of section 706(g), the court concluded that she was not entitled to backpay for the one year period during which she was a full-time student (July 1984 to July 1985), *id.* at 695, 701, since she had "removed herself from the full-time employment market." *Id.* at 701.

48. An allegation of constructive discharge can actually arise in two different contexts. First, it can arise in the liability phase of an employment discrimination suit. The employee alleges that the constructive discharge itself was the discriminatory act. If he or she is unable to prove this claim, then his or her employer is not liable.

The issue more commonly arises in the relief phase of the lawsuit. The employee alleges separate discriminatory acts and also alleges that his or her subsequent resignation amounted to a constructive discharge. If the court finds the employer liable for the underlying discrimination, the extent of relief will depend on whether the employee was constructively discharged. If the employee was not constructively discharged, the employer's liability for backpay terminates on the date of the employee's resignation. If the employee was forced to resign, then postresignation relief will be available, just as if the

tresignation relief, however, the plaintiff usually must prove constructive discharge.[49]

The general rule of constructive discharge states that "if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation," then the employee has been constructively discharged.[50] The test is an objective one: if the employer's discriminatory acts result in work-

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employee was unlawfully dismissed. *See* Martin W. O'Toole, Note, *Choosing A Standard For Constructive Discharge In Title VII Litigation*, 71 CORNELL L. REV. 587 n.4 (1986).

49. *See, e.g.*, Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 561 (1st Cir. 1986)(ADEA case); Martin v. Citibank, N.A., 762 F.2d 212, 221 (2d Cir. 1985); Levendos v. Stern Entertainment, Inc., 860 F.2d 1227, 1230-32 (3d Cir. 1988); Shealy v. Winston, 929 F.2d 1009, 1013 (4th Cir. 1991)(ADEA case); Jurgens v. EEOC, 903 F.2d 386, 389-91 (5th Cir. 1990); Easter v. Jeep Corp., 750 F.2d 520, 522 (6th Cir. 1984); Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989); Smith v. Goodyear Tire & Rubber Co., 895 F.2d 467 (8th Cir. 1990); Watson v. Nationwide Ins. Co., 823 F.2d 360, 361-62 (9th Cir. 1987); Derr v. Gulf Oil Corp., 796 F.2d 340, 342-43 (10th Cir. 1986); Wardwell v. School Bd. of Palm Beach County, Fla., 786 F.2d 1554, 1557-58 (11th Cir. 1986); Hopkins v. Price Waterhouse, 825 F.2d 458, 472-73 (D.C. Cir. 1987).

See generally Baxter and Farrell, *Constructive Discharge*, *supra* note 6; Ira M. Saxe, Note, *Constructive Discharge Under the ADEA: An Argument For the Intent Standard*, 55 FORDHAM L. REV. 963 (1987); Sheila Finnegan, Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U. CHI. L. REV. 561 (1986); O'Toole, Note, *supra* note 48.

50. Young v. Southwestern Savings & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975). This test has several discrete components: (1) the employer *deliberately* (2) made working conditions intolerable (3) forcing the employee into an involuntary resignation. Subsequent to *Young*, the circuits split in their interpretation of this language. In determining whether the employee has been constructively discharged, at least two circuits apply a subjective "employer intent" test, while the rest employ an objective "reasonable employee" test.

To prove constructive discharge under the "employer intent" approach, a Title VII plaintiff must prove that the employer deliberately made working conditions intolerable, and that the employer's actions were taken with the intention of forcing the employee to quit. *See* Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981). This employer intent approach was imported from National Labor Relations Act cases, where the rule was created to prevent employers from imposing harsh working conditions on union employees in order to force those employees to quit. *See, e.g.*, Crystal Princeton Refining Co., 222 N.L.R.B. 1068 (1976); J.P. Stevens & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972).

The "reasonable employee" test merely requires the employee to prove that the working conditions were intolerable; the employee need not prove that the employer specifically intended to force the employee to quit. *See infra* notes 51-53 and accompanying text.

The intent of this Note is not to resolve the split in the circuits. Several other commentators have discussed this issue. *See* O'Toole, Note, *supra* note 48 (advocating use of objective "reasonable employee" standard); Finnegan, Comment, *supra* note 49 (same); Saxe, Note, *supra* note 49 (advocating use of subjective "employer intent" standard, particularly in ADEA cases). Since only two circuits (4th and 8th) follow the employer intent standard, this Note presupposes that the correct standard is the majority "reasonable employee" test.

ing conditions "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign,"[51] then there has been a constructive discharge. The plaintiff need not prove that the employer subjectively intended to force the employee to resign.[52] Rather, the analysis under this objective test focuses on the conditions imposed and whether they were intolerable to a reasonable person in the employee's shoes.[53]

Courts are reluctant, however, to predicate a finding of constructive discharge solely on a single incident of employment discrimination. Rather, the plaintiff must prove "aggravating factors," such as a continuous pattern of discriminatory treatment,[54] that raise working conditions to the requisite intolerable level so as to constitute constructive discharge.

There are several reasons for the "aggravating factors" requirement. First, rather than allow an employee to quit at the first sign of discrimination,[55] the courts want the employee to attempt to combat

51. *See* Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65-66 (5th Cir. 1980) (quoting Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977)).

All of the circuits, except the 4th and 8th, follow this standard. *See* Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 561 (1st Cir. 1986); Levendos v. Stern Entertainment, Inc., 860 F.2d 1227 (3d Cir. 1988); Jurgens v. EEOC, 903 F.2d 386 (5th Cir. 1990); Easter v. Jeep Corp., 750 F.2d 520 (6th Cir. 1984); Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989); Sanchez v. City of Santa Ana, 915 F.2d 424 (9th Cir. 1990); Spulak v. K-Mart Corp., 894 F.2d 1150 (10th Cir. 1990); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989); Hopkins v. Price Waterhouse, 825 F.2d 458, 472-73 (D.C. Cir. 1987).

The law in the Second Circuit is unclear. It appears as if the plaintiff must prove that the employer deliberately made working conditions intolerable. What is unclear is whether the employer must have imposed the intolerable conditions with the specific intention of forcing the employee to quit. *See* Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983); Martin v. Citibank, N.A., 762 F.2d 212, 221 (2d Cir. 1985). At least one recent district court case, however, applied the employer intent test. Azzolini v. Alitalia Airlines, No. 90 Civ. 3392, 1991 U.S. Dist. LEXIS 16422, 57 Fair Empl. Prac. Cas. (BNA) 758 (S.D.N.Y. Nov. 12, 1991).

52. *See, e.g.*, Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987).

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

54. *See, e.g.*, Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir. 1981) (continuous pattern of discrimination, repeated failed attempts to obtain relief from employer from discrimination, and humiliation and loss of prestige accompanying failure to promote constituted aggravating factors); Satterwhite v. Smith, 744 F.2d 1380, 1382 (9th Cir. 1984)(repeated failure to promote, poor working conditions, embarrassment and humiliation, and racial insults constituted aggravating factors); *see also* Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 66 (5th Cir. 1980)(unequal pay, standing alone, cannot amount to constructive discharge); Pittman v. Hattiesburg Mun. Separate School Dist., 644 F.2d 1071, 1077 (5th Cir. 1981)(same). At least one circuit has held that aggravating circumstances are not absolutely required to support a finding of constructive discharge. *See* Schafer v. Bd. of Pub. Educ., 903 F.2d 243, 250 (3d Cir. 1990).

55. *See* Thorne v. City of El Segundo, 802 F.2d 1131, 1134 (9th Cir. 1986).

the discrimination while still employed: "society and the policies underlying Title VII will best be served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships."[56] Second, courts want to discourage the employee from setting up himself or herself as the judge of every grievance[57] and from walking out of situations that may not be discriminatory.[58] Finally, courts associate the constructive discharge rule with the employee's statutory duty to mitigate damages, stating that the duty to mitigate encompasses remaining on the job rather than resigning.[59]

Examples of the aggravating factors requirement are abundant. In *Bourque v. Powell Electrical Mfg. Co.*,[60] the court held that unequal pay alone did "not constitute such an aggravated situation that a reasonable employee would be forced to resign."[61] However, in *Satterwhite v. Smith*,[62] the plaintiff, a temporary sweeper for the Port of Tacoma, was consistently denied promotion, because of his race, to the position of permanent sweeper.[63] The court found that he had been constructively discharged, because several aggravating factors existed. First, the employer's repeated failure to promote the plaintiff to permanent status prevented him from gaining access to training

56. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 66 (5th Cir. 1980). In other words, the employee is not entitled to relief beyond the date of his or her resignation in the absence of a constructive discharge, because it is unreasonable for him or her to resign where the conditions had not risen to an "intolerable" level. *See* Derr v. Gulf Oil Corp., 796 F.2d 340, 343 (10th Cir. 1986).

57. Levendos v. Stern Entertainment, Inc., 860 F.2d 1227, 1232 (3d Cir. 1988) (quoting Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977)).

58. *Levendos*, 860 F.2d at 1232.

59. Jurgens v. EEOC, 903 F.2d 386, 389 (5th Cir. 1990)("Where an employer discriminatorily denies promotion to an employee, that employee's duty to mitigate damages encompasses remaining on the job"); *see also* Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 66 (5th Cir. 1980)("We think that unequal pay alone does not constitute such an aggravated situation that a reasonable employee would be forced to resign. Unequal pay is not sufficient justification to relieve Ms. Bourque of her duty to mitigate damages by remaining on the job") *but see infra* notes 74-81 and accompanying text (describing minority rule that permits court to award postresignation relief even where no constructive discharge took place).

60. 617 F.2d 61 (5th Cir. 1980).

61. *Id.* at 66. Other employment practices beside unequal pay have been found, in and of themselves, not to amount to constructive discharge. *See* Jurgens v. EEOC, 903 F.2d 386, 392-93 (5th Cir. 1990)(denial of promotion); Weihaupt v. American Medical Ass'n, 874 F.2d 419 (7th Cir. 1989)(unlawful demotion); Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981)(casual and intermittent racial slurs); Alicea Rosado v. Garcia Santiago, 562 F.2d 114 (1st Cir. 1977)(unlawful transfer); *see also* EEOC v. Miller Brewing Co., 650 F. Supp. 739, 748 (E.D. Wis. 1986)("Failure to promote is insufficient by itself to establish constructive discharge. Therefore, the other complaints must be very offensive").

62. 744 F.2d 1380 (9th Cir. 1984).

63. *Id.* at 1381.

and advancement opportunities that the defendant had promised. Second, the defendant regularly promoted white men ahead of him, some of whom he even had to train, which caused him to be humiliated. Third, his supervisor relegated him to working much of his hours in the rope room, where he was assigned the dull task of tying ropes. Finally, an atmosphere existed at the Port in which occasional racial insults were expressed toward all blacks.[64]

In sum, if the underlying discrimination is combined with aggravating factors that make working conditions objectively intolerable, the employee's resignation will be deemed involuntary, and the court will find a constructive discharge.[65] If working conditions were not objectively intolerable, the employee's resignation will be deemed voluntary, and the court will find no constructive discharge. The effects of this rule are analyzed in the next section.

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64. *Id.* at 1383. There are many other cases where the court has found aggravating factors that turned the underlying discrimination into a constructive discharge. *See, e.g.*, Goss v. Exxon Office Sys. Co., 747 F.2d 885 (3d Cir. 1984)(as a result of sex discrimination, plaintiff was verbally abused and threatened and forcibly transferred to a position with substantially lower salary and inferior working conditions); Meyer v. Brown & Root Constr. Co., 661 F.2d 369 (5th Cir. 1981)(involuntary transfer of pregnant employee to heavy manual labor that posed substantial risks to her and her fetus' health); Easter v. Jeep Corp., 750 F.2d 520 (6th Cir. 1984)(discriminatory failure to promote, combined with employer's toleration of continuous course of sexual harassment by male employees directed at plaintiff); Sanchez v. City of Santa Ana, 915 F.2d 424 (9th Cir. 1990)(two removals of plaintiff's merit pay, once while he was on medical leave, and repeated failed attempts to invoke grievance procedure); Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981)(continuous pattern of discriminatory treatment encompassing deprivation of opportunities for promotion, lateral transfer, and increased educational training, existing over a period of several years).

65. The use of the term "aggravating factors" implies that a minimum threshold of discrimination will be required before a court can, as a matter of law, find constructive discharge. Levendos v. Stern Entertainment, Inc., 860 F.2d 1227, 1232 (3d Cir. 1988). The aggravating factors requirement therefore reflects a judicial determination that a single incident of discrimination cannot rise to such an intolerable level as to force the employee to quit. *Id.* Hence, only when the underlying discrimination is combined with aggravating factors will the court find that working conditions are intolerable. There have been no bright-line statements by the courts that indicate what constitutes an "intolerable" level. But courts have implied that the aggravating factors requirement applies to both quantity and quality of the alleged discriminatory acts. *Id.*

Hence, constructive discharge is a factual issue to be decided by the trier of fact under the circumstances of each individual case. *See, e.g.*, Sanchez v. City of Santa Ana, 915 F.2d 424, 431 (9th Cir. 1990); Satterwhite v. Smith, 744 F.2d 1380, 1382 (9th Cir. 1984); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1317 (11th Cir. 1989); *see also Levendos*, 860 F.2d at 1230 ("Courts generally agree that 'constructive discharge' is a heavily fact-driven determination").

2. *The Constructive Discharge Rule's Limitations on Title VII Postresignation Relief*

The constructive discharge rule is significant because it usually limits the relief available to an employee who has suffered employment discrimination and has subsequently resigned. If the court concludes that the employee was not constructively discharged, then even if the underlying practices are found to be discriminatory, the plaintiff can usually only recover preresignation backpay.[66] If, however, the court concludes that the plaintiff was compelled to resign because the underlying discrimination created intolerable working conditions, the plaintiff is entitled to both preresignation backpay and postresignation relief.[67]

A finding of constructive discharge can increase significantly the extent of the plaintiff's award. For instance, in *Goss v. Exxon Office Systems Co.*,[68] the court awarded the plaintiff $78,454 in backpay, most of which was calculated for the period after her resignation. She was also awarded $12,323 in front pay.[69] Had there been no constructive discharge, the plaintiff would have recovered neither postresignation backpay nor front pay, and her award would have been reduced to only a small amount in preresignation backpay.[70] Similarly, in

66. *See* Morrison v. Genuine Parts Co., 828 F.2d 708 n.1 (11th Cir. 1987); Maney v. Brinkley Mun. Waterworks and Sewer Dep't, 802 F.2d 1073, 1075 (8th Cir. 1986); Derr v. Gulf Oil Corp., 796 F.2d 340, 342, 343 (10th Cir. 1986); Irving v. Dubuque Packing Co., 689 F.2d 170, 175 (10th Cir. 1982); O'Toole, Note, *supra* note 48, at 587 n.4.

It is unclear what effect the Civil Rights Act of 1991 will have on the constructive discharge rule's prohibition of postresignation relief. The 1991 Act permits Title VII plaintiffs to sue for compensatory and punitive damages in disparate treatment cases, 42 U.S.C. § 1981a, in addition to those remedies already available under section 706(g) of the 1964 Act, 42 U.S.C. § 2000e-5(g). However, it does seem logical to infer that, where the plaintiff has been constructively discharged, any damage award will be more than would be the case where the plaintiff was not constructively discharged. Therefore, constructive discharge will likely remain a hotly disputed issue in employment discrimination litigation.

67. *See, e.g.*, Goss v. Exxon Office Sys. Co., 747 F.2d 885, 889-90 (3d Cir. 1984); Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1216 (D.D.C.), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990); *see* Baxter and Farrell, *Constructive Discharge*, *supra* note 6, at 365-66. For a description of pre- and postresignation backpay, and of front pay, see *supra* notes 24-30 and accompanying text.

68. 747 F.2d 885 (3d Cir. 1984).

69. *Id.* at 889-90.

70. Ms. Goss had been unlawfully transferred to a less lucrative sales territory on January 5, 1981. In calculating her backpay award, the District Court had included preresignation backpay — lost commissions between January 5 and February 23, when she resigned. *Goss*, 747 F.2d at 889. But a bulk of the total backpay award was for the postresignation period. Though the court did not parse the relative backpay amounts in the opinion, the preresignation backpay probably amounted to only a few thousand dol-

Hopkins v. Price Waterhouse,[71] the court ordered that the plaintiff be reinstated into the position discriminatorily denied.[72] Absent a finding of constructive discharge, an employee who resigns is not entitled to reinstatement.[73]

C. The Minority Rule: An Exception to the Prohibition of Postresignation Relief

Although the general rule of constructive discharge prohibits an award of postresignation relief if the employee was not constructively discharged,[74] a few courts have declined to follow the constructive discharge rule.[75] In awarding postresignation relief even where there was no finding of constructive discharge, these courts generally have

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lars. Hence, most of the backpay and all of the front pay awarded were attributable to the court finding that she had been constructively discharged.

71. 737 F. Supp. 1202 (D.D.C.), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990).

72. *Hopkins*, 737 F. Supp. at 1216.

73. *See* Maney v. Brinkley Mun. Waterworks and Sewer Dep't, 802 F.2d 1073, 1075 (8th Cir. 1986); Derr v. Gulf Oil Corp., 796 F.2d 340, 342-43 (10th Cir. 1986); Irving v. Dubuque Packing Co., 689 F.2d 170, 175 (10th Cir. 1982); Morrison v. Genuine Parts Co., 828 F.2d 708 n.1 (11th Cir. 1987).

74. *See supra* notes 66-73 and accompanying text.

75. Two of the courts are courts of appeals. *See* Wells v. North Carolina Bd. of Alcoholic Control, 714 F.2d 340, 342 (4th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984)(after denial of promotion from stock clerk to sales clerk, plaintiff quit because of back injury; since resignation was "causally linked to the defendant's wrongful denial of a promotion," backpay award would not be cut off); Di Salvo v. Chamber of Commerce, 568 F.2d 593, 598 (8th Cir. 1978)(though employee voluntarily resigned, employer who discriminated in salary payments was liable for backpay until plaintiff could find job that paid more than what employer should have paid, because plaintiff's resignation was "based on mitigative motives").

Most of the courts that have disregarded the constructive discharge rule, however, are district courts. *See* Ezold v. Wolf, Block, Schorr and Solis-Cohen, 758 F. Supp. 303, 310-13 (E.D. Pa. 1991)(female attorney who voluntarily resigned after being denied promotion to partnership was entitled to postresignation backpay and reinstatement; resignation was reasonable, since she was denied "the one significant promotion available" to an attorney); Daines v. City of Mankato, 754 F. Supp. 681, 702 (D. Minn. 1990)(plaintiff entitled to postresignation backpay even though resignation was voluntary, since resignation was based on "mitigative motives"); Nobler v. Beth Israel Medical Ctr., 715 F. Supp. 570, 572-74 (S.D.N.Y. 1989)(plaintiff entitled to postresignation backpay and front pay, even though there was no constructive discharge, since position from which he was denied promotion was "unique"); Harrison v. Dole, 643 F. Supp. 794, 796-97 (D.D.C. 1986)(rejecting defendant employer's argument that plaintiff's voluntary resignation cut off her entitlement to backpay and reinstatement; by quitting, plaintiff could mitigate damages by working at another government agency where she could advance without discrimination); Helbing v. Unclaimed Salvage and Freight Co., Inc., 489 F. Supp. 956, 963 (E.D. Pa. 1980)(plaintiff entitled to postresignation backpay, since she quit as result of disagreements with man who was hired for position she was discriminatorily denied); *cf.* Richardson v. Restaurant Mktg. Assocs., Inc., 527 F. Supp. 690, 696-97 (N.D. Cal. 1981)(plaintiff was fired the same day she turned in resignation effective two days later;

followed two rationales. First, some courts reason that applying the constructive discharge rule undermines the purposes of Title VII as enunciated in *Albemarle*, since the plaintiff does not receive make-whole compensation for his or her injury, and the defendant is not deterred from future discrimination.[76]

Second, some courts reason that, on the issue of whether the plaintiff is entitled to postresignation relief, the relevant inquiry is not whether the plaintiff was constructively discharged, but rather whether the plaintiff mitigated damages. For example, in *Harrison v. Dole*,[77] the plaintiff was discriminatorily denied a promotion to a G-7 position in the United States Maritime Administration (MarAd).[78] Subsequently she resigned and joined another federal agency in a position similar to the one MarAd had denied her.[79] The court awarded the plaintiff backpay past the date of her resignation, even though there was no finding of constructive discharge, reasoning that terminating the backpay award upon resignation would "penalize" the plaintiff for getting on with her career.[80] The court concluded that she had mitigated damages by accepting a position with another employer where she was permitted to advance without discrimination.[81] In sum, under the *Harrison* rule, employees who resign as a result of

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backpay period not cut off after two days, since there was intimate causal relationship between discrimination and plaintiff's decision to resign).

See also Carrero v. New York City Hous. Auth., 890 F.2d 569, 580 (2d Cir. 1989)(plaintiff, after denial of promotion and ultimatum to either accept demotion or quit, reasonably mitigated damages by choosing unpaid leave of absence); Thorne v. City of El Segundo, 802 F.2d 1131, 1134-37 (9th Cir. 1986)(where police department typist was discriminatorily denied opportunity to be hired as police officer, her entitlement to backpay and front pay was not cut off by her voluntary resignation).

76. Ezold v. Wolf, Block, Schorr and Solis-Cohen, 758 F. Supp. 303, 310-12 (E.D. Pa. 1991); *accord* Harrison v. Dole, 643 F. Supp. 794, 796-97 (D.D.C. 1986); *see also* Daines v. City of Mankato, 754 F. Supp. 681, 700 (D. Minn. 1990)(referring to court's duty to award make-whole relief); Helbing v. Unclaimed Salvage and Freight Co., Inc., 489 F. Supp. 956, 963 (E.D. Pa. 1980)(same).

77. 643 F. Supp. 794 (D.D.C. 1986).

78. *Id.* at 795.

79. *Id.*

80. *Id.* at 795-97.

81. Harrison v. Dole, 643 F. Supp. 794, 797 (D.D.C. 1986); *accord* Daines v. City of Mankato, 754 F. Supp. 681, 702 (D. Minn. 1990)(plaintiff discriminatorily denied a promotion to Housing Director for City; court awarded postresignation relief, even though she voluntarily took one year educational leave and then resigned, holding that these decisions were both part of good faith effort to achieve position equivalent to Housing Director, and therefore, were based on "mitigative motives"); Wells v. North Carolina Bd. of Alcoholic Control, 714 F.2d 340, 342 (4th Cir. 1983)(where discriminatory denial of promotion was causally related to plaintiff's resignation, resignation had no relevance to postresignation backpay but rather bore "only upon the amount of the award"); Ezold v. Wolf, Block, Schorr and Solis-Cohen, 758 F. Supp. 303, 310 (E.D. Pa. 1991)(restriction on postresignation relief "would discourage a plaintiff from mitigating damages by

discrimination are entitled to postresignation backpay, subject only to their duty to mitigate.

III. The Constructive Discharge Rule in Denial of Promotion Cases

A. The Illogic of Adhering Rigidly to the Constructive Discharge Rule in Promotion Cases

The constructive discharge rule has been consistently applied to bar postresignation relief to employees who have resigned following a discriminatory denial of promotion. This section argues that application of the rule in denial of promotion cases can be illogical and can frustrate the purposes of Title VII.

Since the guiding principle behind the constructive discharge rule is that discrimination should be attacked from within the existing employment relationship,[82] courts generally hold that the "mere fact of discrimination, without more, is insufficient to make out a claim of constructive discharge."[83] Thus, to prove constructive discharge, the plaintiff must show "aggravating factors" that make working conditions "intolerable" to a reasonable employee.[84] Because of these strict principles, an overwhelming majority of the courts have found that a single denial of promotion, without more, does not constitute a constructive discharge,[85] since a denial of promotion usually does not cre-

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accepting a position at another employer where he or she would be permitted to advance without discrimination").

82. *See supra* notes 54-59 and accompanying text.

83. Hopkins v. Price Waterhouse, 825 F.2d 458, 473 (D.C. Cir. 1987).

84. *See supra* notes 54-65 and accompanying text.

85. *See* Cowan v. Prudential Ins. Co. of America, 852 F.2d 688, 689 (2d Cir. 1988); EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 672 (4th Cir. 1983); Jurgens v. EEOC, 903 F.2d 386, 392 (5th Cir. 1990); Boze v. Branstetter, 912 F.2d 801, 805 (5th Cir. 1990); Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982); Wardwell v. School Bd. of Palm Beach County, Fla., 786 F.2d 1554, 1557 (11th Cir. 1986); Jolly v. Northern Telecom, Inc., 766 F. Supp. 480 (E.D. Va. 1991); Ezold v. Wolf, Block, Schorr and Solis-Cohen, 751 F. Supp. 1175, 1192 (E.D. Pa. 1990); Nobler v. Beth Israel Medical Ctr., 702 F. Supp. 1023, 1030-31 (S.D.N.Y. 1988); Less v. Nestle Co., 705 F. Supp. 110, 114 (W.D.N.Y. 1988); EEOC v. Miller Brewing Co., 650 F. Supp. 739, 748 (E.D. Wis. 1986); *see generally* 3 ARTHUR LARSON AND LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 86.50 at 17-62 (1989)("Claims of constructive discharge have generally not succeeded in cases where they are based on . . . denial of promotion").

See also Satterwhite v. Smith, 744 F.2d 1380, 1381-83 (9th Cir. 1984)(denial of promotion plus "aggravating factors" constituted constructive discharge); Clark v. Marsh, 665 F.2d 1168, 1174-76 (D.C. Cir. 1981) (same); Thomas v. Cooper Industries, Inc., 627 F. Supp. 655 (W.D.N.C. 1985) (same); *but see* Hopkins v. Price Waterhouse, 825 F.2d 458, 473 (D.C. Cir. 1987) (denial of promotion to partnership plus employer's refusal to renominate plaintiff as partnership candidate constituted constructive discharge), *rev'd on other grounds and remanded*, 490 U.S. 228 (1989).

ate "intolerable working conditions."[86]

To illustrate, in *Wardwell v. School Board of Palm Beach County*,[87] the defendant school board denied the female plaintiff a promotion from Assistant Director of Transportation to Acting Director of Transportation, allegedly in violation of Title VII.[88] The Eleventh Circuit held that a discriminatory failure to promote, while relevant to the constructive discharge issue, "is not always sufficient to support a finding of constructive discharge."[89] The court concluded that while the plaintiff was frustrated by her failure to be appointed Acting Director, and was embarrassed by the denial of promotion, these facts, together with her added workload, simply did not "rise to the intolerable level at which a reasonable person would feel compelled to resign."[90]

Similarly, in *Jurgens v. EEOC*,[91] the Equal Employment Opportunity Commission discriminatorily denied a white employee a promotion from Assistant Regional Attorney to Regional Attorney. The plaintiff subsequently took an early retirement.[92] The court held that

86. *See, e.g.*, Jolly v. Northern Telecom, Inc., 766 F. Supp. 480, 497 (E.D. Va. 1991)(three denials of promotion "angered and frustrated" plaintiff but did not render working conditions "objectively intolerable"); Ezold v. Wolf, Block, Schorr and Solis-Cohen, 751 F. Supp. 1175, 1190 (E.D. Pa. 1990)(plaintiff's working conditions at law firm were not intolerable despite unlawful failure to promote her to partnership); Nobler v. Beth Israel Medical Ctr., 702 F. Supp. 1023, 1030 (S.D.N.Y. 1988)(plaintiff's working conditions at hospital not intolerable despite failure to promote him to Director of Radiation Therapy); *see also* Jurgens v. EEOC, 903 F.2d 386, 393 (5th Cir. 1990)("dimmed future job prospects based upon the employer's past discrimination in promotions are not alone enough to support a finding of constructive discharge"); Willmott v. National Railroad Passenger Corp., No. 81-0811 JGP, 1991 U.S. Dist. LEXIS 1208 at *16 (D.D.C. January 31, 1991)(despite fact that discriminatory practices frustrated reasonable expectations of promotion, plaintiff was not constructively discharged, since he "offer[ed] no information regarding his working conditions" and since there was no proof that his position had become intolerable); *cf.* Contardo v. Merrill, Lynch, Pierce, Fenner & Smith, 753 F. Supp. 406, 411 (D. Mass. 1990) (denial of money-making opportunities to female stockbroker not a constructive discharge).

87. 786 F.2d 1554 (11th Cir. 1986).

88. *Id.* at 1555.

89. *Id.* at 1557 (citing Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65-66 (5th Cir. 1980)).

90. *Wardwell*, 786 F.2d at 1558.

91. 903 F.2d 386 (5th Cir. 1990).

92. *Id.* at 387-88. As an ARA, the plaintiff was a grade GS-15 employee and set the legal policies and trial strategies for the cases handled by approximately seven to twelve attorneys. As part of a racially-neutral reorganization, the EEOC abolished the position of ARA but retained that of RA, though reduced in grade from a GS-16 to a GS-15, and assigned managerial responsibilities similar to those of the former ARA. *Id.* at 388. After the denial of promotion to RA, and as part of the reorganization, the EEOC offered the plaintiff the choice of accepting (1) a demotion to Supervising Trial Attorney, a non-management GS-14 position with supervision over three to five attorneys, or (2) an early

while the plaintiff had been unlawfully denied the promotion,[93] he had not been constructively discharged, because his expectation of future discrimination in promotion was "highly speculative" and therefore was not an aggravating factor.[94]

Adhering rigidly to the constructive discharge rule in denial of promotion cases can often lead to harsh results, especially where the denial of promotion completely frustrates the employee's reasonable expectations for advancement.[95] For example, in *Jolly v. Northern Telecom, Inc.*,[96] the African-American plaintiff was discriminatorily denied three promotions into management at a large telecommunications company, and was told that he would not be promoted to management in the foreseeable future, so he resigned.[97] Despite this continuous pattern of discriminatory treatment, the court held that the plaintiff had not been constructively discharged.[98] The court concluded that while the denials of promotion had angered and frustrated the plaintiff, and would have angered and frustrated any reasonable person in his position, his working conditions were not rendered intol-

retirement with a reduced annuity of $15,000 per year. *Id.* The plaintiff chose retirement. He felt that a demotion would be degrading and that, given the apparent pattern of EEOC's discrimination against white males, there was no chance of being promoted to a GS-15 managerial position. *Id.*

93. *Jurgens*, 903 F.2d at 388.

94. *Id.* at 392. The Court further reasoned that "without continuing harassment or repeated discriminatory impediment to any advance, . . . dimmed future job prospects based upon the employer's past discrimination in promotions are not alone enough to support a finding of constructive discharge." *Id.* at 393. The court felt that the plaintiff's expectation of future discrimination in promotion "assumes that a GS-15 job would open, that [he] would in fact be the most qualified candidate, and that EEOC would discriminate against him and select someone else. We agree that as a matter of law such a remote possibility would not make a reasonable employee feel compelled to resign." *Id.* at 392-93.

95. The classic example of a denial of promotion eliminating all avenues of advancement is where the plaintiff is denied a promotion to partner in a law firm, Ezold v. Wolf, Block, Schorr and Solis-Cohen, 758 F. Supp 303 (E.D. Pa. 1991), or in an accounting firm, Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987). A similar example occurs in corporations, where the employee is denied a major promotion into management. *See, e.g.*, Jolly v. Northern Telecom, Inc., 766 F. Supp. 480 (E.D. Va. 1991) (three denials of promotion into management); Halbrook v. Reichhold Chems., Inc., 735 F. Supp. 121 (S.D.N.Y. 1990) (denial of promotion to General Counsel in corporation's legal department). This is commonly known as the "glass ceiling" or "employment ceiling." Another example is where the employee is denied a promotion into a unique position. *See* Nobler v. Beth Israel Medical Ctr., 715 F. Supp. 570 (S.D.N.Y. 1989) (Director of Radiation Therapy at major New York City medical center); EEOC v. Hay Assocs., 545 F. Supp. 1064 (E.D. Pa. 1982)(denial of promotion to senior associate consultant in defendant's "Executive Financial Counseling Service").

96. 766 F. Supp. 480 (E.D. Va. 1991).

97. *Id.* at 497.

98. *Id.* at 496-97.

erable.[99] Hence his resignation was deemed to be voluntary, and he was not entitled to postresignation relief.

As *Jolly* illustrates, because of the constructive discharge rule's focus on an employee's working conditions, strict application of the rule in promotion cases is "almost illogical"[100] and essentially places the employee in a no-win situation:

> [N]o matter how severe an employer's discrimination is with respect to the denial of promotion, an employee would be forced to remain in the inferior employment position so long as the employer does not permit the working conditions of the inferior employment position to become intolerable. If the employee instead resigns the inferior position, her entitlement to a remedy for the discriminatory denial of the superior position would cease at the date of resignation.[101]

For example, in *Jolly*, although the plaintiff was denied three promotions into management, the "working conditions" of his Senior Product Specialist position remained tolerable.[102] Hence, Jolly was placed into a Catch-22 position: if he remained, he would be locked in an inferior position; if he resigned, he would risk becoming unemployed and forfeiting a make-whole remedy. Obviously believing his career to be at an end at NTI, he gambled on the latter choice, and lost. *Jolly* is a prime example of the illogic of rigidly applying the constructive discharge rule in denial of promotion cases.[103]

Application of the constructive discharge rule in promotion cases can also frustrate Title VII's purposes, elimination of workplace discrimination and compensation of the injured employee. First, since employers are not liable for postresignation relief absent constructive discharge, they have less incentive to eliminate discriminatory promotion practices. Second, employers can engage in subtle discrimination — giving inferior work assignments and denying promotions — which, so long as working conditions are not intolerable, will not

99. *Id.* at 497.

100. Ezold v. Wolf, Block, Schorr and Solis-Cohen, 758 F. Supp. 303, 308 (E.D. Pa. 1991).

101. *Id.*

102. Jolly v. Northern Telecom, Inc., 766 F. Supp. 480, 497 (E.D. Va. 1991).

103. The same type of no-win situation could also occur with other forms of employment discrimination, such as unlawful transfer or demotion. For instance, in Marley v. United Parcel Service, Inc., 665 F. Supp. 119 (D.R.I. 1987), the plaintiff, a supervisor at a UPS loading facility, was transferred to a less prestigious supervisor position. There were several other aggravating factors that, together with the demotion, diminished her promotion potential. *Id.* at 130-33. It can be readily seen that Ms. Marley's predicament was identical to Mr. Jolly's. In *Marley*, however, the court held that the plaintiff had been constructively discharged. *Id.* at 130.

make the employer liable past the date at which the employee resigns.[104] Hence, the rule frustrates Title VII's make-whole purpose since, absent a finding of constructive discharge, employees cannot collect postresignation backpay or be reinstated to the position wrongfully denied.[105]

To alleviate this potential unfairness and to better effectuate Title VII's mandate, a few recent cases have taken novel approaches where the plaintiff has resigned following a denial of promotion: (1) circumventing the constructive discharge rule completely; and (2) adhering to the rule, but focusing on the employee's reasonable expectations of promotion and advancement in addition to the employee's working conditions. The next two sections analyze these approaches.

B. *Ezold* and *Nobler*: Circumventing the Constructive Discharge Rule

Two recent failure to promote cases, *Ezold v. Wolf, Block, Schorr and Solis-Cohen*[106] and *Nobler v. Beth Israel Medical Center*,[107] acknowledge the harshness of applying the constructive discharge rule in certain promotion cases and pose a solution to the problem. In the usual case the court will only conduct one inquiry, i.e., whether the employee was constructively discharged. If the employee was not constructively discharged, then he or she is not entitled to postresignation relief at all. However, in *Ezold* and *Nobler* the court conducted *two* inquiries. First, the court asked whether the employee was constructively discharged. Second, if the employee was not constructively discharged, the court further examined whether the employee's resignation was reasonable under the circumstances. If the resignation was found to be reasonable, the court could award postresignation relief, even where no traditional constructive discharge took place.[108]

104. Ezold v. Wolf, Block, Schorr and Solis-Cohen, 758 F. Supp 303, 312 (E.D. Pa. 1991).

105. *See id.* at 310; *but see supra* notes 74-81 and accompanying text.

106. The district court bifurcated the *Ezold* case at the request of the parties. The November 1990 opinion addressed liability only, 751 F. Supp. 1175 (E.D. Pa. 1990) [hereinafter *Ezold I*], and the March 1991 opinion addressed the appropriate relief, 758 F. Supp. 303 (E.D. Pa. 1991) [hereinafter *Ezold II*]. A third opinion, issued in July 1991, addressed the issues of backpay calculation, reinstatement of the plaintiff to partner, and her mitigation of damages. No. 90-0002, 1991 U.S. Dist. LEXIS 10270, 56 Fair Empl. Prac. Cas. (BNA) 580 (E.D. Pa. July 23, 1991) [hereinafter *Ezold III*].

107. The *Nobler* case was also bifurcated. The 1988 opinion addressed liability, 702 F. Supp. 1023 (S.D.N.Y. 1988) [hereinafter *Nobler I*], and the 1989 opinion addressed the appropriate relief, 715 F. Supp. 570 (S.D.N.Y. 1989) [hereinafter *Nobler II*].

108. Both courts followed the minority rule explained in Part II.C, *supra*.

1. Ezold v. Wolf, Block

In *Ezold*, a large law firm denied the plaintiff, a female associate, a partnership position in the litigation department.[109] The firm offered to make her a partner in the domestic relations department effective one year later, but she declined that offer and resigned.[110] Judge James M. Kelly of the Eastern District of Pennsylvania held that Wolf, Block had unlawfully denied Ms. Ezold partnership status on the basis of gender.[111] However, Judge Kelly also held that Wolf, Block had not constructively discharged Ms. Ezold, since her working conditions were not objectively intolerable.[112]

Despite finding that no constructive discharge had occurred, Judge Kelly, relying heavily[113] on the *Harrison v. Dole* line of cases that comprise the minority rule on postresignation relief,[114] held that the constructive discharge rule would not bar postresignation relief.[115] First, Judge Kelly reasoned that Title VII's purposes[116] would be undermined if the constructive discharge rule was strictly applied in this case.[117] Second, he reasoned that the restriction on available relief would discourage the plaintiff from mitigating damages by accepting a

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109. *Ezold I*, 751 F. Supp. at 1189.

110. *Id.* at 1189-90. The firm's offer of a domestic relations partnership effective in one year was contingent on Ms. Ezold remaining at the firm as an associate for that year without an annual salary increase typically granted to associates. *Id.* at 1190.

111. *Id.* at 1189. Several other male associates, who had lesser credentials than the plaintiff, were admitted to the partnership. *Id.* at 1184-87.

112. *Id.* at 1192.

113. *Ezold II*, 758 F. Supp. at 308-10 (citing Helbing v. Unclaimed Salvage and Freight Co., Inc., 489 F. Supp. 956 (E.D. Pa. 1980), Wells v. North Carolina Bd. of Alcoholic Control, 714 F.2d 340 (4th Cir. 1983), Richardson v. Restaurant Mktg. Assocs., Inc., 527 F. Supp. 690 (N.D. Cal. 1981), *and* Harrison v. Dole, 643 F. Supp. 794 (D.D.C. 1986)). For a discussion of these and other cases, see *supra* notes 74-81 and accompanying text.

114. *See supra* notes 74-81 and accompanying text.

115. *Ezold II*, 758 F. Supp. at 310. In the third opinion, issued on July 23, 1991, the court held that Ms. Ezold had mitigated her damages by accepting a position as president and chief counsel of BES Environmental Specialists, instead of remaining in her position as a litigation associate. The court ordered the plaintiff reinstated as a partner in Wolf, Block's litigation department, and awarded her $131,784 in postresignation backpay. *Ezold III*, No. 90-0002, 1991 U.S. Dist. LEXIS 10270, 56 Fair Empl. Prac. Cas. (BNA) 580 (E.D. Pa. July 23, 1991).

Ezold is on appeal at the Third Circuit. In the event the Third Circuit reverses Judge Kelly's award of postresignation relief, Ezold has filed a protective cross-appeal seeking to reverse his finding that no constructive discharge occurred. The appeal relies on Hopkins v. Price Waterhouse, 825 F.2d 458, 472-73 (D.C. Cir. 1987), which held that denial of promotion to partnership at an accounting firm, coupled with the defendant's refusal to renominate plaintiff as a partnership candidate, constituted constructive discharge. Appellee—Cross-Appellant's Brief at 56-58, *Ezold* (Nos. 91-1741, 91-1780).

116. *See supra* notes 19-21 and accompanying text.

117. *Ezold II*, 758 F. Supp. at 310.

position at another law firm where she would be permitted to advance without discrimination.[118]

In awarding Ms. Ezold postresignation relief despite holding that she had not been constructively discharged, Judge Kelly effectively circumvented the constructive discharge rule. His central premise was that, where an employee resigns after having been denied the one significant promotion available within the arena of his or her employment, "a more appropriate standard for determining the entitlement to relief past the date of resignation is one of *reasonableness*."[119] Applying this standard, Judge Kelly concluded that although Ms. Ezold's "working conditions" were not so objectively intolerable as to constitute constructive discharge, her "conduct in leaving the firm *was not unreasonable*,"[120] since she had been denied "the one significant promotion available to an attorney" who works for a law firm.[121]

Although the underlying premise of the constructive discharge rule is that employees should attack discrimination while still employed,[122] Judge Kelly reasoned that applying this premise in promotion cases is impractical. He stated that "the policy of encouraging solutions within the context of the working relationship makes sense only when a possible solution exists."[123] Since the discrimination made it unlikely that Ms. Ezold would ever become a litigation partner,[124] a solution "within the context of the working relationship" was foreclosed. Therefore, Judge Kelly concluded, her resignation was "not unreasonable"[125] and she was entitled to postresignation relief.

2. Nobler v. Beth Israel Medical Center

Two years prior to *Ezold*, the Southern District of New York reached a similar result in *Nobler v. Beth Israel Medical Center*.[126] In *Nobler*, the defendant hospital denied the 53 year-old plaintiff a promotion to the position of Director of Radiation Therapy, allegedly in

118. *Id.* (citing Harrison v. Dole, 643 F. Supp. 794, 796 (D.D.C. 1986)).

119. *Ezold II*, 758 F. Supp. at 308 (emphasis added).

120. *Id.* at 312 (emphasis added).

121. *Id.* at 310.

122. *See* Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 66 (5th Cir. 1980); *supra* notes 54-59 and accompanying text.

123. *Ezold II*, 758 F. Supp. at 311 (quoting Nobler v. Beth Israel Medical Ctr., 715 F. Supp. 570, 572 (S.D.N.Y. 1989)).

124. *Ezold II*, 758 F. Supp. at 311.

125. *Id.* at 312. The court based its conclusion in part on the following observation: "When Wolf, Block unlawfully permitted gender to enter into its consideration of Ms. Ezold for partner, she understandably came to the conclusion that her career at the Firm would be limited to a much greater extent than she could reasonably accept." *Id.*

126. *Nobler II*, 715 F. Supp. 570 (S.D.N.Y. 1989).

violation of the Age Discrimination in Employment Act of 1967 (ADEA).[127] Although there had been no constructive discharge,[128] the court held that postresignation relief might still be available if Mr. Nobler could prove the underlying discrimination claim.[129]

As in *Ezold*, the court reasoned that "the policy of encouraging solutions within the context of the working relationship makes sense only when a possible solution exists."[130] A "possible solution," such as "promotion to an equivalent position,"[131] did not exist for Mr. Nobler because the position of Director of Radiation Therapy was unique.[132] As in *Ezold*, the court found that Mr. Nobler's decision to resign was reasonable under the circumstances[133] and that therefore he would be entitled to postresignation relief if he could prove the underlying discrimination, even though he had not been constructively discharged.[134]

In both *Ezold* and *Nobler*, the discriminatory denial of promotion locked the employee in a position for which he or she was overqualified and in which there was little or no alternative avenue of advancement. Working conditions were not rendered intolerable by the failure to promote, and thus a traditional constructive discharge had not occurred. Yet the harm to each employee was "irremediable."[135]

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127. 29 U.S.C. §§ 621-34 (1985). The standards governing damages in a case brought under the ADEA are the same as those for a Title VII case. *See, e.g.*, Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983); Albano v. Schering-Plough Corp., 912 F.2d 384, 386 n.1 (9th Cir. 1990).

128. *Nobler I*, 702 F. Supp. 1023, 1030 (S.D.N.Y. 1988)(noting that "Nobler's work conditions had not yet changed in any respect," and that the hospital's President had twice asked Nobler to stay). The court also cited Bristow v. Daily Press, Inc., 770 F.2d 1251, 1256 n.4 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986), and Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982), both of which held that a discriminatory denial of promotion, without more, does not constitute constructive discharge.

129. *Nobler II*, 715 F. Supp. at 572-73. The procedural disposition of this case is significant to this holding. The court stated that "the remedy of backpay *may* be available to Nobler if he is able to sustain his discrimination claim." *Id.* at 572 (emphasis added). The holding was conditional, not because it was dictum, but rather because the court was deciding the defendant's motion for summary judgment on the backpay issue. In effect, the court was holding that the plaintiff's claim for backpay could go forward even though there had been no constructive discharge. However, to be eligible for backpay, Nobler would first have to prove the underlying discrimination.

130. *Nobler II*, 715 F. Supp. at 572.

131. *Id.*

132. *Id.*

133. *Id.* at 572-73 ("given the uniqueness of the position sought by Nobler, there was no possible solution after Nobler was passed over").

134. *Nobler II*, 715 F. Supp. at 572. The court noted that this result "recognizes the goal of making a victim of discrimination whole, without inhibiting the goal of encouraging solutions to discrimination within the context of the employment relationship." *Id.* at 573.

135. *Id.* at 572.

Therefore, both courts concluded that in denial of promotion cases, a reasonableness test, rather than the constructive discharge rule, would more effectively further the objectives of Title VII and would fulfill the admonition in *Albemarle* to fashion the most complete relief possible.[136] In short, *Ezold* and *Nobler* challenge the general rule that, absent a finding of constructive discharge, an employee cannot obtain postresignation relief.[137]

C. Adhering to the Constructive Discharge Rule: The Denial of Promotion as a "Career-Ending Action"

Whereas the *Ezold* and *Nobler* courts focused on the availability of postresignation relief despite a finding of no constructive discharge, the District of Columbia Circuit instead has attempted to conform the constructive discharge rule to the promotion setting by analyzing whether the denial of promotion itself amounted to a constructive discharge. In *Hopkins v. Price Waterhouse*,[138] the defendant accounting firm denied the female plaintiff a promotion into the partnership. The district court held that although the denial of promotion was discriminatory,[139] it was not a constructive discharge, since the plaintiff had not shown any history of discrimination, humiliation or other aggravating factors that would have compelled her to resign.[140]

The D.C. Circuit, however, reversed and held that the denial of partnership, coupled with the defendant's failure to renominate Ms. Hopkins as a partnership candidate, constituted a constructive discharge.[141] Hence, postresignation relief would be available.[142] The court emphasized that in assessing whether a constructive discharge

136. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

137. *Ezold*'s and *Nobler*'s challenge to the general constructive discharge rule is more significant than the *Harrison v. Dole* line of cases that first crafted the minority rule. *See supra* notes 74-81 and accompanying text. The latter cases did award postresignation relief, but in most of them the constructive discharge rule was not even mentioned, so the courts never made a decision one way or the other on the constructive discharge issue. In *Ezold* and *Nobler*, however, the courts actually held that no constructive discharge had occurred, yet they still held that the plaintiffs would be entitled to postresignation relief. *See supra* notes 106-36 and accompanying text.

138. 825 F.2d 458 (D.C. Cir. 1987), *rev'd on other grounds and remanded*, 490 U.S. 228 (1989), *on remand*, 737 F. Supp. 1202 (D.D.C.), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990).

139. *Hopkins*, 618 F. Supp. 1109, 1121 (D.D.C. 1985).

140. *Id.* The court added: "Being denied partnership was undoubtedly a professional disappointment and it may have been professionally advantageous for plaintiff to leave the firm when it was unlikely she would not obtain her ultimate goal. Disappointments do not constitute a constructive discharge, however." *Id.* (citing Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65-66 (5th Cir. 1980)).

141. *Hopkins*, 825 F.2d at 472-73.

142. *Id.* at 473.

has occurred, it need not focus solely on the employee's daily "working conditions." Instead, the court reasoned that "the intolerableness of working conditions is very much a function of the *reasonable expectations of the employee, including expectations of promotion or advancement*."[143] Applying this "reasonable expectations" standard, the court held that Price Waterhouse's decision to deny Ms. Hopkins partnership status coupled with her department's failure to renominate her, "would have been viewed by any reasonable senior manager in her position as a *career-ending action*. Accordingly, it amounted to a constructive discharge."[144] In short, the denial of promotion had itself created such an intolerable employment situation that a constructive discharge had occurred.

Hopkins thus denotes a break from the established rule that a denial of promotion does not constitute constructive discharge.[145] It stands for the proposition that, where a denial of promotion amounts to "career-ending" discrimination by the employer — as where the employee's reasonable expectations of future advancement have been completely frustrated — then the employee has been constructively discharged and is entitled to postresignation relief.

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143. *Id.* at 472 (emphasis added).

144. *Hopkins*, 825 F.2d at 473 (emphasis added). The court also noted that Ms. Hopkins " 'reasonably expected . . . opportunities for advancement' and that the employer's actions 'essentially locked [her] into a position from which she could apparently obtain no relief.' " *Id.* at 472 (quoting Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir. 1981)).

Price Waterhouse appealed the case to the Supreme Court, but on other grounds. The Supreme Court remanded the case so that appropriate relief could be awarded. 490 U.S. 228 (1989). On remand, the District Court held that Ms. Hopkins was entitled to postresignation backpay and reinstatement as a partner. 737 F. Supp. 1202, 1216 (D.D.C. 1990). The D.C. Circuit affirmed, reasoning that reinstatement would be " 'the most complete relief possible' and in fact the *only* possible relief that would restore Ann Hopkins to 'the situation [s]he would have occupied if the wrong had not been committed.' " 920 F.2d 967, 977 (D.C. Cir. 1990)(quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975)) (emphasis and brackets in original).

145. *See supra* notes 82-99 and accompanying text. The *Hopkins* notion of "career-ending" discrimination has been reiterated in subsequent cases, with varying results. *See* Jurgens v. EEOC, 903 F.2d 386, 392-93 (5th Cir. 1990) (implying that career-ending denial of promotion might create enough embarrassment and humiliation to result in constructive discharge, though not in this case); Contardo v. Merrill, Lynch, Pierce, Fenner & Smith, 753 F. Supp. 406, 411 (D. Mass. 1990) (applying *Hopkins*, court held that denial of money-making opportunities to female stockbroker, while discriminatory, was not career-ending); Halbrook v. Reichhold Chems., Inc., 735 F. Supp. 121, 127-28 (S.D.N.Y. 1990) (absence of any further chance of advancement with defendant, coupled with other aggravating factors, raised inference that plaintiff was constructively discharged); Howard v. Daiichiya-Love's Bakery, 714 F. Supp. 1108, 1112 (D. Haw. 1989) (court denied defendant's motion for summary judgment on constructive discharge issue, citing *Hopkins'* reasoning that working conditions are a function of reasonable expectations for promotion or advancement; plaintiff could present case to jury).

D. Harmonizing *Ezold* and *Hopkins*

Both *Ezold* and *Hopkins* correctly acknowledge that it can be reasonable for an employee to resign after a denial of a major promotion. However, under similar circumstances, the courts took different analytical approaches to the constructive discharge inquiry. In *Ezold*, Judge Kelly first found no constructive discharge but then conducted a second inquiry that focused on the reasonableness of the plaintiff's resignation.[146] In contrast, the *Hopkins* court used a "reasonableness" test in the constructive discharge inquiry itself.[147] Under the *Hopkins* reasonable expectations test, if the denial of promotion is career-ending, then the employee has been constructively discharged and can obtain postresignation relief.[148] However, even though the courts concluded differently on the constructive discharge issue, they awarded similar relief using similar reasoning — whether, in light of the employee's employment expectations, it was reasonable for her to resign.[149]

The combined rationale of *Hopkins* and *Ezold*, both of which focused on the reasonableness of the employee's resignation, will be applied in the next section, which advocates that a "reasonable expectations" constructive discharge test should be applied in all denial of promotion cases, including those that are not "career-ending."

IV. A Proposal for a More Reasonable Standard of Constructive Discharge in Denial of Promotion Cases

Despite the decisions in *Ezold* and *Nobler*, a majority of courts still hold that a finding of no constructive discharge bars postresignation relief.[150] These majority courts implicitly reason that an award of postresignation relief to an employee who was not constructively discharged is inconsistent with the whole premise of constructive discharge — that only when an employer's actions forced an *involuntary* resignation would the employee be entitled to post-termination remedies. Furthermore, despite the decision in *Hopkins*, most courts still hold that a discriminatory denial of promotion, without more, does not constitute a constructive discharge.[151] When applied in the pro-

146. *See supra* notes 109-25 and accompanying text.
147. *See supra* notes 138-45 and accompanying text.
148. *Hopkins*, 825 F.2d at 472-73.
149. *Ezold II*, 758 F. Supp. at 310, 312 (plaintiff had been denied the one significant promotion available to an attorney, and therefore it was "not unreasonable" for her to resign); *Hopkins*, 825 F.2d at 472-73 (in light of plaintiff's "reasonable expectations" for promotion, denial of partnership amounted to "career-ending action").
150. *See supra* notes 48-73 and accompanying text.
151. *See supra* notes 82-99 and accompanying text.

motion setting, however, the constructive discharge rule often operates harshly, because it precludes make-whole relief to deserving plaintiffs.[152] For these reasons, this Note proposes that the constructive discharge rule be applied in the denial of promotion context by using the *Hopkins* "reasonable expectations" test as part of the aggravating factors analysis of the traditional constructive discharge rule.

A. Reasonable Expectations of Promotion as a Potential Aggravating Factor

The general constructive discharge rule states that the trier of fact must find that "working conditions were so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign."[153] In order to find that working conditions were "intolerable," most courts require the plaintiff to prove the presence of "aggravating factors."[154]

As in the traditional analysis, the issue under a *Hopkins* approach would be whether enough "aggravating factors" exist to make working conditions so intolerable as to amount to a constructive discharge.[155] Under this "reasonable expectations" analysis, however, "intolerableness" would be a function not only of the employee's daily working conditions but also of the employee's reasonable expectations of career advancement. The more apparent it becomes that the employee's reasonable opportunities for promotion have been frustrated, the more serious is the aggravating factor. The more serious the aggravating factor, the closer the employee is to constructive discharge.[156] In those cases where the negation of the employee's reasonable expectations of promotion rises to an extreme level, as in the case of career-ending discrimination, then a "reasonable employee" would be compelled to resign and would be considered to have been constructively discharged, even though no other aggravating factors were present.[157] However, in those cases where the denial

152. *See supra* notes 100-105 and accompanying text.

153. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980) (quoting Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977)).

154. *See supra* notes 54-65 and accompanying text.

155. *See supra* notes 54-65 and accompanying text.

156. It should be made clear that this would be an objective analysis. The court would consider whether a reasonable employee in the position of the plaintiff would feel that the plaintiff's reasonable prospects for promotion or advancement have been curtailed to an intolerable degree.

157. *See infra* notes 173-86 and accompanying text. A Third Circuit case provides additional support for *Hopkins*' emphasis on the employee's reasonable expectations of

of promotion is less than career-ending, the plaintiff would have to prove that there were aggravating factors accompanying the denial of promotion that compelled his or her resignation.[158]

B. Policy Justifications for the Reasonable Expectations Analysis

The policies of Title VII and of the constructive discharge rule support the use of this reasonable expectations analysis in denial of promotion cases. First, the reasonable expectations analysis more readily furthers the statutory purposes of Title VII than does the traditional constructive discharge rule.[159] It furthers the first objective of eradicating workplace discrimination by deterring employers from unlawfully denying promotions to deserving employees. Where the employee's reasonable prospects for advancement were frustrated by discrimination, the employee would not forfeit postresignation relief by resigning. This added prospect of postresignation liability would encourage employers to eliminate discriminatory promotion practices.[160] The analysis also furthers the second objective of making the plaintiff whole, since he or she will receive compensation that would have been due but for the unlawful failure to promote. Hence, the analysis permits employees to avoid the no-win predicament of being forced to choose between remaining in the inferior position, and

promotion. In Levendos v. Stern Entertainment, Inc., 860 F.2d 1227 (3d Cir. 1988), the court, in denying the defendant employer's motion for summary judgment, stated:

> [W]e cannot state as a broad proposition of law that a single non-trivial incident of discrimination can never be egregious enough to compel a reasonable person to resign. An employment discrimination plaintiff may simply face a more difficult burden of proof in establishing the employer's liability, when relying on a single discriminatory incident as a basis for arguing the occurrence of constructive discharge.

Id. at 1232. In the promotion context, where a "single non-trivial" denial of promotion curtails or eliminates the employee's reasonable prospects for advancement, the employee should be allowed to present his or her case to the trier of fact. *See also* Schafer v. Bd. of Pub. Educ., 903 F.2d 243, 250 (3d Cir. 1990)(employees claiming constructive discharge need not prove aggravating factors).

158. *See infra* notes 190-207 and accompanying text; *e.g.*, Halbrook v. Reichhold Chems., Inc., 735 F. Supp. 121, 128 (S.D.N.Y. 1990) (reasonable inference of constructive discharge raised where female plaintiff was denied promotion to General Counsel; several aggravating factors were present, including "change in responsibilities, reduction in workload, humiliation and embarrassment, and *the absence of any further chance of advancement within Reichhold*") (emphasis added).

159. *See supra* notes 104-105 and accompanying text (arguing that applying the constructive discharge rule in denial of promotion cases can frustrate the purposes of Title VII).

160. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (reasoning that presumptive backpay liability creates an incentive for employers to "shun practices of dubious legality").

forfeiting full compensation by resigning.[161]

Second, the reasonable expectations analysis furthers the underlying purposes of the Glass Ceiling Act of 1991,[162] which is intended to focus greater attention on the elimination of "artificial barriers to the advancement of women and minorities to management and decision-making positions in business."[163] To this end, Congress established the Glass Ceiling Commission to study and to recommend ways to: eliminate artificial barriers to the advancement of women and minorities; and, to increase opportunities and developmental experiences of women and minorities to foster advancement to upper levels of business.[164] By deterring employers' discriminatory promotion practices, the reasonable expectations analysis would further the goal of removing barriers to the advancement of women and minorities in business.

Third, the analysis upholds the courts' command that employees should not quit at the first sign of discrimination, but rather should, *wherever possible*, attack discrimination from within the existing employment relationship.[165] This policy has a very important caveat: where it is not "possible" for the employee to attack the discrimination while still employed — as is the case with a "career-ending" denial of promotion — the employer should be deemed to have compelled the employee to quit. As illustrated below,[166] employees denied promotions that are less than "career ending" might still be required to fight the discrimination while employed.

Fourth, the reasonable expectations analysis is a sounder approach than that of *Ezold*. In circumventing the constructive discharge rule, the *Ezold* line of cases correctly acknowledged the unfairness that often results in applying the rule rigidly in every case. They held that the relevant inquiry is mitigation of damages, reasoning that if the employee can prove he or she attempted to mitigate damages after resigning, the employee would be entitled to postresignation relief even where there was no finding of constructive discharge.[167]

However, the *Ezold* approach is fundamentally inconsistent. When a court finds a "constructive" discharge, it is holding implicitly that

161. *See supra* notes 100-103 and accompanying text.

162. Pub. L. No. 102-166, Title II, 105 Stat. 1081 (1991). This Act is part of the Civil Rights Act of 1991, *supra* note 3.

163. *Id.* § 202(a)(5)(A).

164. *Id.* § 203(a).

165. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 66 (5th Cir. 1980) (emphasis added).

166. *See infra* notes 187-207 and accompanying text.

167. *See supra* notes 77-81, 113-18 and accompanying text.

the employee was unlawfully *dismissed*, in effect, fired.[168] Hence an award of wrongful termination (postresignation) remedies is justified. But when a court finds that the employee was not constructively discharged, it is holding that the employee resigned *voluntarily*. An award of wrongful termination remedies is not justified where the employee resigned voluntarily, because the employee has not been wrongfully terminated. In short, to hold that an employee, who resigned *voluntarily*, is nonetheless entitled to damages for wrongful discharge, is inconsistent.[169]

Furthermore, if the sole issue was mitigation of damages, arguably every employee who was denied any promotion — no matter how minor — would be entitled to postresignation relief, subject only to the employee's duty to mitigate. Again, this undermines the policy that employees should attack discrimination within the employment relationship, since employees would be permitted to "quit at the first sign of discrimination"[170] (the denial of promotion) and to receive postresignation relief nonetheless.

The better approach is to view the employer's negation of the employee's reasonable expectations of promotion as a potential aggravating factor, so that, like Hopkins, employees such as Ezold and Nobler would be considered to have been constructively discharged and would be properly entitled to postresignation remedies. However, employees denied minor promotions would still be required to attack the discrimination while employed, and would not be entitled to postresignation relief if they resigned.[171]

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168. *See supra* note 6 and accompanying text.

169. *See* Derr v. Gulf Oil Co., 796 F.2d 340, 343 (10th Cir. 1986) ("The trial court's findings that Ms. Derr was not constructively discharged and that she acted reasonably in resigning are inconsistent when viewed in light of the proper test for determining when an employee is constructively discharged").

To the extent Judge Kelly was constrained by *stare decisis* in being compelled to find that Ms. Ezold had not been constructively discharged, the author does support his effort to utilize his equitable discretion in fashioning make-whole relief. *See* 42 U.S.C. § 2000e-5(g) (giving district court equitable discretion to fashion Title VII remedies). Hopefully, if the *Hopkins* approach advocated in this Note is applied in the future, there will be no need to circumvent the constructive discharge rule. Rather, plaintiffs such as Ezold would be found to have been constructively discharged, thus properly entitling them to postresignation relief.

170. Thorne v. City of El Segundo, 802 F.2d 1131, 1134 (9th Cir. 1986).

171. *See infra* notes 187-207 and accompanying text. There is an additional justification for the reasonable expectations analysis. The analysis recognizes that the traditional constructive discharge rule, used initially to protect union employees in National Labor Relations Board cases, is not completely compatible with employment discrimination litigation. In NLRB cases, the constructive discharge rule was created specifically to prevent employers from inflicting harsh working conditions upon their employees in order to force those employees to quit. *See* Crystal Princeton Refining Co., 222 N.L.R.B. 1068

C. Applying the Reasonable Expectations Analysis

The reasonable expectations analysis might be applied in three distinct factual situations: (1) the "career-ending" denial of promotion, where an employment ceiling has been neared or reached; (2) the single denial of promotion with no employment ceiling; and (3) a denial of promotion joined with other claims of discrimination or with aggravating factors. The following three sections apply the analysis in each of the three factual situations.[172]

1. Career-ending Denial of Promotion

Under the *Hopkins* analysis, where the employee's "reasonable expectations" of promotion or advancement have been frustrated to an intolerable degree by the employer's discriminatory actions, then this denial would be an aggravating factor that, together with the denial of promotion, would amount to a constructive discharge.[173] This type of "career-ending" discrimination can occur with a single denial of promotion that eliminates virtually all potential for advancement.[174]

(1976); J.P. Stevens & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972). Hence the rule focused on the *daily working conditions* of the blue collar union employee.

Subsequently, courts borrowed the constructive discharge rule without fully adapting it to the realities of employment discrimination law under Title VII. In the white collar context especially, "working conditions," such as hours, safety, and relations with supervisors, are not the sole focus. Rather, the focus is on employment opportunities, such as the hire, promotion and transfer of employees, and other career-related issues. *See Ezold II*, 758 F. Supp. at 313. In Title VII cases, employment opportunities — such as opportunities for promotion and advancement — can become quite intolerable even though everyday working conditions remain bearable. The traditional constructive discharge rule, with its focus on daily working conditions, is not fully equipped to remedy this situation. However, the reasonable expectations analysis, with its added focus on opportunities for career advancement, would make the constructive discharge analysis more more relevant to Title VII litigation.

172. It should be made clear that this Note is not simply advocating that the *Hopkins* reasonable expectations test be applied only where the plaintiff has suffered "career-ending" discrimination, as was the case in *Hopkins* itself. Rather, the Note goes one step further in advocating that the reasonable expectations test be used in *all* cases where the plaintiff alleges a denial of promotion. *See infra* notes 173-207 and accompanying text.

173. The negation of an employee's reasonable expectations of promotion or advancement could be considered "intolerable," where, for example, a reasonable employee in the position of the plaintiff felt that he or she had no reasonable prospect of obtaining comparable alternative employment with the defendant employer. *Cf.* Whittlesey v. Union Carbide Corp., 742 F.2d 724, 729 (2d Cir. 1984) (listing three prerequisites for award of front pay in lieu of reinstatement, one of which is, "where the factfinder can reasonably predict that the plaintiff has no reasonable prospect of obtaining comparable alternative employment").

174. *See, e.g.*, Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987)(denial of promotion into partnership); *Ezold II*, 758 F. Supp. 303 (E.D. Pa. 1991)(same); *Nobler I*, 702 F. Supp. 1023 (S.D.N.Y. 1988)(denial of promotion to Director of Radiation Therapy, a unique position).

This was the case with Nancy Ezold and Ann Hopkins, both of whom were denied a promotion into a partnership, and with Myron Nobler, who was denied a promotion into a unique position. Under the reasonable expectations analysis, these three employees would be found to have been constructively discharged, since their reasonable expectations for advancement were frustrated completely.[175]

Career-ending discrimination might also occur with multiple denials of promotion, as was the case in *Jolly v. Northern Telecom, Inc.*[176] Edward Jolly, an African-American, was hired as a Product Specialist for Northern Telecom, Inc. (NTI), a communications company, in May 1985.[177] He was promoted to Senior Product Specialist in July 1986[178] and resigned in July 1988.[179] Throughout his tenure at NTI, Jolly attempted to obtain promotions into management, but was rebuffed three times.[180] After the third denial of promotion, the Marketing Manager for the Eastern Region insinuated to Jolly that Jolly's management opportunities at NTI were a virtual nullity.[181]

The district court held that the third denial of promotion was unlawful and in violation of Title VII. Claims for the other two denials of promotion were time-barred.[182] However, the court held that NTI

175. Under the reasonable expectations analysis advocated in this Note, a "career-ending" denial of promotion might also encompass a university's denial of tenure or full professorship to a college professor. *See* Brown v. Trustees of Boston Univ., 891 F.2d 337, 359-61 (1st Cir. 1989)(affirming that retroactive tenure is an appropriate Title VII remedy); Bennun v. Rutgers State Univ., 737 F. Supp. 1393 (D.N.J. 1990), *aff'd in relevant part*, 941 F.2d 154 (3d Cir. 1991)(retroactive promotion to full professorship is an appropriate Title VII remedy); Jew v. Univ. of Iowa, 749 F. Supp. 946, 960-63 (S.D. Iowa 1990)(same).

In these three cases, the plaintiff had not resigned after the denial of promotion, so constructive discharge was not at issue. However, if the plaintiff had resigned, the *Hopkins* analysis might dictate that a constructive discharge had occurred, since a denial of tenure or full professorship would seem to be "career-ending."

176. 766 F. Supp. 480 (E.D. Va. 1991).

177. *Id.* at 482.

178. *Id.*

179. *Id.* at 487.

180. In his first bid, Jolly was passed over for a promotion to Technical Marketing Manager for the Eastern Region, and the position was given to a less-qualified white male. *Jolly*, 766 F. Supp. at 484. In his second bid, Jolly was passed over for promotion to Marketing Manager for a product called "Meridian Digital Centrex," which NTI sold to business customers. The position was given to a white male who had no substantive product knowledge. *Id.* at 485. In his third bid, Jolly was denied a promotion to Regional Support Manager, and the position was given to a white male who had much less experience and education than Jolly. *Id.* at 486-88.

181. *Id.* at 487, 497.

182. *Id.* at 493-96. In a prior opinion, this court held that the first two instances of failure to promote were time barred. Nonetheless, in the present case, the court ruled that prior discriminatory acts that were not made the basis for a timely charge could

had not constructively discharged Jolly.[183] A court applying the reasonable expectations analysis most likely would find that a constructive discharge had occurred. The three discriminatory denials of promotion into management, viewed cumulatively as career-ending action, would constitute an employment ceiling and therefore an intolerable aggravating factor.[184] Hence Jolly's resignation would be deemed reasonable under the circumstances, and the court would find a constructive discharge, entitling Jolly to postresignation relief.[185]

The reasonable expectations analysis is therefore most beneficial where the denial of promotion effectively ends the employee's career

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constitute relevant background evidence in a proceeding brought to redress subsequent injury. *Jolly*, 766 F. Supp. at 493.

183. *Id.* at 496-97. The district court, sitting in the Fourth Circuit, applied the "employer intent" version of the constructive discharge rule, which only two Circuits follow. *See* Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981). The employer intent test requires the employee to prove that working conditions were objectively intolerable, and that the intolerable working conditions were imposed with the specific intent of forcing the employee to resign. *See supra* note 50. The court found that NTI had not intended to force Jolly to quit and therefore had not constructively discharged him. *Jolly*, 766 F. Supp. at 496-97.

However, even if the court had applied the reasonable employee test, *see supra* notes 48-65 and accompanying text, it would not have found constructive discharge, since it did not believe that Jolly's working conditions had been made objectively intolerable. *Jolly*, 766 F. Supp. at 497 ("It cannot be said, however, that [the three denials of promotion] rendered working conditions objectively intolerable, even though Jolly himself may have found that he could no longer stand it").

184. Incredibly, even though the court noted that he had run into an employment ceiling ("it is clear that he had reached his zenith at NTI as a senior product specialist and could not hope to achieve anything more," *Jolly*, 766 F. Supp. at 496), it held that he had not been constructively discharged. *Id.* at 496-97.

Jolly represents the classic case of a court refusing to take into account the complete frustration of an employee's reasonable expectations of advancement as representing an intolerable working condition:

> It is true that [Jolly] was thrice passed over for promotional opportunities that he should have received, and it is also true that [the Marketing Manager] dropped him an unmistakable hint that he would not be promoted to NTI management in the foreseeable future. The sum total of these events undoubtedly increased Jolly's anger and frustration. Indeed, they would have angered and frustrated any reasonable person in Jolly's position. It cannot be said, however, that they rendered working conditions objectively intolerable, even though Jolly himself may have found that he could no longer stand it.

Id. at 497. Under the reasonable expectations analysis advocated in this Note, three discriminatory denials of promotion into management would be considered "career-ending action" and therefore constructive discharge. *See* Hopkins v. Price Waterhouse, 825 F.2d 458, 472-73 (D.C. Cir. 1987).

185. *See also* Cowan v. Prudential Ins. Co. of America, 703 F. Supp. 177 (D. Conn. 1987), *aff'd*, 852 F.2d 688 (2d Cir. 1988)(four denials of promotion from insurance agent to sales manager over five year period could be considered career-ending action under analysis advocated in this Note, though court held that there was no constructive discharge).

with the employer. Because their opportunities for advancement have been eliminated entirely or diminished to an intolerable degree, employees like Ezold, Nobler, Hopkins, and Jolly should be deemed to have been constructively discharged.[186] In short, the reasonable expectations approach would alleviate the unfairness of denying postresignation relief to employees who have run into an employment ceiling and have subsequently resigned.

2. Single Denial of Promotion With No Employment Ceiling

Where an employee has been unlawfully denied a single promotion but where no employment ceiling precludes the possibility of further advancement, and no other aggravating factors are present, no constructive discharge would be found.[187] Under the reasonable expectations analysis, the employee still has the duty, as he or she does under the traditional constructive discharge rule, to combat the discrimination while remaining employed. Hence, the reasonable expectations approach would not open the floodgates to postresignation relief in every denial of promotion case. Rather, it would only impose postresignation liability where the opportunities for advancement are completely frustrated,[188] or where a denial of promotion is combined with other forms of discrimination or aggravating factors.[189] In short, the reasonable expectations analysis strikes a balance between the unfairness to employees of denying postresignation relief in every promotion case and the unfairness to employers in awarding postresignation relief in every promotion case.

3. Denial of Promotion Joined With Other Claims of Discrimination or Aggravating Factors

A third situation would arise where the denial of promotion is less

186. Other fact situations might approach "career-ending action." *See, e.g.*, Thomas v. Cooper Industries, Inc., 627 F. Supp. 655 (W.D.N.C. 1986) (denial of promotion to Employee Relations Manager, head of defendant's personnel department); EEOC v. Hay Associates, 545 F. Supp. 1064 (E.D. Pa. 1982) (denial of promotion to senior associate consultant in defendant's "Executive Financial Counselling Service," a unique position within company); Halbrook v. Reichhold Chems., Inc., 735 F. Supp. 121, 128 n.7 (S.D.N.Y. 1990) (denial of promotion from Assisant General Counsel to General Counsel in corporation). Denial of tenure or full professorship to a college professor would also seem to be "career-ending." *See supra* note 175.

187. *See, e.g.*, Jurgens v. EEOC, 903 F.2d 386, 392 (5th Cir. 1990) (renewed advancement in the EEOC not necessarily unexpected, after discriminatory denial of promotion and lawful demotion due to reorganization). For an extended discussion of *Jurgens*, see *supra* notes 91-94 and accompanying text.

188. *See supra* notes 173-86 and accompanying text.

189. *See infra* notes 190-207 and accompanying text.

than career-ending, but where there also exists other discrimination and/or aggravating factors. This section illustrates the reasonable expectations analysis, operating as a functional test,[190] in two broad situations.[191]

First, if the employee's opportunities for advancement have been curtailed to a high degree[192] — though not so intolerable to be considered career-ending — this would be factored into the reasonable expectations analysis as a serious aggravating factor. With a relatively serious "reasonable expectations of promotion" aggravating factor, the quantity and quality of other aggravating factors would not have to be great to find constructive discharge. Hence, the presence of other aggravating factors would tip the scale toward a finding of constructive discharge. The lack of any additional forms of discrimination or aggravating factors, however, would preclude a finding of constructive discharge, since the denial of promotion was not career-ending.

For example, in *Halbrook v. Reichhold Chemicals, Inc.*,[193] the plaintiff Rebecca Halbrook was Assistant General Counsel for Reichhold Chemicals from 1982 to 1987. In 1983 Reichhold hired Charles Lorelli, who also became Assistant General Counsel in 1986. In September 1987, Lorelli was promoted to General Counsel, so in November 1987 plaintiff resigned. Plaintiff alleged that she had been unlawfully denied a promotion to General Counsel and constructively

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190. *See supra* notes 155-58 and accompanying text.

191. Obviously, it is impossible to illustrate every potential application of this functional analysis. Hence, this Note will only discuss two broad situations that can be easily applied in other cases.

192. A "high degree" might be where, although the plaintiff has other avenues of advancement with the employer, he or she would be required to relocate in order to obtain a promotion. *Cf.* Churchill v. International Business Machines, Inc., 759 F. Supp. 1089, 1106 (D.N.J. 1991) (implying that offering employee positions at other company locations, though not such an intolerable condition as to amount to constructive discharge, is a significant burden); Cherchi v. Mobil Oil Corp., 693 F. Supp. 156, 163 (D.N.J. 1988), *aff'd*, 865 F.2d 249 (3d Cir. 1988)(same).

Another example is where an employee rises to a certain level in a particular department and then is denied a promotion to the head of that department. *See, e.g.*, Halbrook v. Reichhold Chems., Inc., 735 F. Supp. 121 (S.D.N.Y. 1990) (denial of promotion to General Counsel, head of defendant corporation's legal department); Thomas v. Cooper Industries, Inc., 627 F. Supp. 655 (W.D.N.C. 1986) (denial of promotion within the Personnel Department from acting Employee Relations Manager to permanent Employee Relations Manager). In such a case, the employee would appear to have little opportunity for advancement in that particular department. Hence obtaining a promotion would require either (i) a lateral transfer into the same department at another company location, or (ii) a transfer into a different department at the same company location. Obviously, in both instances, the employer's discrimination has placed a "high degree" of burden upon the employee, though perhaps not high enough to amount to a career-ending action.

193. 735 F. Supp. 121 (S.D.N.Y. 1990).

discharged.[194]

In support of her constructive discharge claim, Halbrook alleged that her working conditions were intolerable after Lorelli's promotion. First, she asserted that she had little to do and was stripped of concrete responsibilities; second, she asserted that she was humiliated on a day-to-day basis by having to work with the very supervisors who had discriminatorily denied her promotion; finally, she claimed that she had no opportunity for further promotion at Reichhold.[195]

The defendant moved for summary judgment, but the court, applying a test similar to that proposed in this Note, denied the motion. The court cited *Hopkins* for the proposition that "dashing reasonable expectations of career advancement may create intolerable working conditions that rise to the level of constructive discharge."[196] Applying this standard, the court stated "that a reasonable person in Halbrook's position after Lorelli's promotion might have concluded that she effectively had no more chances for advancement within Reichhold."[197] At the very least, there was a question of fact on this issue.[198]

However, plaintiff's lack of promotional opportunities was not the sole basis of the court's decision; rather, the court considered the allegations "as a whole."[199] The court held that the "combination of factors" — change in responsibilities, humiliation and embarrassment, and the absence of any further chance of advancement — raised a reasonable inference that Halbrook had been constructively discharged.[200] Because the court considered the plaintiff's reasonable expectations of promotion — in conjunction with other aggravating factors — *Halbrook* represents an excellent application of the functional test proposed in this Note.[201]

A second fact pattern would arise where the employee's opportunities for advancement have been only minimally affected, as where

194. *Id.* at 122-23.

195. *Id.* at 126.

196. *Id.* at 127 (citing *Hopkins*, 825 F.2d at [472-73]).

197. *Halbrook*, 735 F. Supp. at 128 n.7.

198. *Id.* at 128.

199. *Id.*

200. *Id.*

201. There are other examples of this first fact pattern. *See, e.g.*, Howard v. Daiichiya-Love's Bakery, Inc., 714 F. Supp. 1108, 1112 (D. Haw. 1989) (citing *Hopkins*, 825 F.2d at 472); Marley v. United Parcel Service, Inc., 665 F. Supp. 119 (D.R.I. 1987); Thomas v. Cooper Industries, Inc., 627 F. Supp. 655 (W.D.N.C. 1986); EEOC v. Hay Assocs., 545 F. Supp. 1064 (E.D. Pa. 1982).

In *Thomas*, Rebecca Thomas, the acting Employee Relations Manager in defendant Cooper Industries' Personnel Department, was unlawfully denied a promotion to permanent Employee Relations Manager in favor of a less-qualified male. *Thomas*, 627 F.

comparable alternative positions exist with the employer. This minimal curtailment of promotion opportunities would be considered only a slight aggravating factor, and if no or only a small quantity or quality of other aggravating factors were present, there would be no constructive discharge.[202]

However, the existence of other aggravating factors of a serious quality or quantity, combined with the slight curtailment of promotion opportunities, would push the equation toward a constructive discharge. For example, in *EEOC v. Miller Brewing Company*,[203] Lester Binns was hired in November 1975 as a First Line Supervisor in the Packaging Department of the Miller Brewery in Milwaukee, Wisconsin.[204] Binns resigned in May 1979 and sued for discriminatory denial of promotion to "Group Supervisor," and for constructive discharge.[205] In support of his constructive discharge claim, Binns al-

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Supp. at 662. Thomas resigned and sued for Cooper's failure to promote and for constructive discharge. *Id.*

Had the failure to promote Thomas to Employee Relations Manager been the only violation of Title VII, there is little doubt that the court would not have found a constructive discharge under the traditional rule, since courts generally hold that a denial of promotion does not amount to constructive discharge. However, under the reasonable expectations analysis, the result might be different. Ms. Thomas' reasonable prospects for advancement with Cooper have been curtailed to a fairly high degree, since she has been denied a promotion into the head of her department. *See supra* note 192. Because this is a serious aggravating factor, the quantity and quality of other aggravating factors present need not be great for her to prove constructive discharge. In fact, an argument could be made under the reasonable expectations test that she was constructively discharged, since Employee Relations Manager, the head of the Personnel Department, is a "unique" position. *See Nobler II*, 715 F. Supp. at 572 (denial of promotion to Director of Radiation Therapy).

In *Hay*, the female plaintiff was an employee in Hay's "Executive Financial Counselling Service" (EFCS), a unit of Hay that furnished personal financial services to the executives of Hay's corporate clients. *Hay*, 545 F. Supp at 1068. She proved that Hay had unlawfully delayed her promotion to associate consultant during 1975-76, and then unlawfully denied her a promotion to senior associate consultant in February 1977. *Id.* at 1082. She also proved a violation of the Equal Pay Act. *Id.* at 1083-84.

Under the functional analysis, it is probable that the plaintiff's prospects for advancement with Hay were curtailed to a high degree, since the desired position was relatively unique. *See id.* at 1068 (stating that the EFCS was "an insular unit within Hay and not directly related to Hay's principal business activities"). Since this is a serious aggravating factor, the quantity and quality of other aggravating factors would not have to be great to find constructive discharge. The argument could also be made here that the denial of promotion itself was career-ending and therefore a constructive discharge, *see supra* notes 173-86 and accompanying text, since the position was unique.

202. Such a case would be one of a "single denial of promotion with no employment ceiling," as described in Part IV.C.2.

203. 650 F. Supp. 739 (E.D. Wis. 1986).

204. *Id.* at 740.

205. *Id.*

leged several aggravating factors.[206]

In applying the functional analysis to Binns' case, the court would first determine to what degree his opportunities for advancement had been frustrated. Since there were "approximately hundreds of openings" with Miller,[207] Binns' prospects for advancement with Miller were viable. Since his opportunities for advancement were curtailed to a low degree, this would be a slight aggravating factor. Therefore, the only way the court could find a constructive discharge is if the quality and quantity of the other aggravating factors were of a serious magnitude.

In sum, the reasonable expectations analysis would not only alleviate the remedial injustice that occurs with a career-ending denial of promotion. It could also be used as a potential aggravating factor, within the traditional constructive discharge analysis, in cases where there are multiple discrimination claims and/or aggravating factors.

V. Conclusion

Application of the traditional constructive discharge rule can lead to unfair results in denial of promotion cases brought under Title VII. The rule focuses on whether an employee's working conditions have risen to an intolerable level as a result of discrimination and whether those conditions compelled the employee to resign. But the employee whose working conditions remain tolerable — but whose reasonable expectations for advancement have been thwarted as a result of the unlawful failure to promote — is left without a make-whole remedy if he or she resigns. This employee, deserving of promotion, is placed in a no-win situation: to remain is to be locked in an inferior employment position; to resign is to risk unemployment and to be denied a postresignation remedy. Recent cases have begun to recognize that where opportunities for promotion and advancement have been frustrated to an intolerable degree, the constructive discharge rule should not preclude postresignation relief. The employment ceiling has created such an intolerable employment situation that the employee's resignation from the inferior position should be deemed reasonable.

The reasonable expectations analysis draws on this reasoning and applies it in the constructive discharge/aggravating factors inquiry of every promotion case. The analysis adapts the constructive discharge rule to the promotion context, since an employee's "working conditions" would include his or her reasonable expectations of promotion.

206. *Id.* at 741-43.
207. *Id.* at 741.

The analysis alleviates the injustice of denying a postresignation remedy to an employee who has been the victim of a career-ending denial of promotion. Where the denial of promotion is less than career-ending, the analysis serves as a barometer of the seriousness of aggravating factors.

The reasonable expectations analysis advances the statutory purposes of Title VII more readily than does the traditional constructive discharge rule, since it deters unlawful promotion practices and provides make-whole relief to deserving plaintiffs. At the same time, it furthers the constructive discharge policy that employees should not quit at the first sign of discrimination, by requiring employees denied less-than-career-ending promotions to combat discrimination while remaining employed. Moreover, by deterring discriminatory promotion practices, the analysis advances the Congressional policy of breaking down the artificial barriers to the advancement of women and minorities in business. Furthermore, since the analysis is a component of the established constructive discharge rule, courts will avoid the inconsistency of circumventing the rule in order to fashion a postresignation remedy. Finally, because the analysis focuses on the employee's reasonable expectations for career advancement — rather than solely on the employee's daily working conditions — it makes the constructive discharge rule more compatible with the underlying principles of employment discrimination law.

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