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Whitt v. Harris Teeter, Inc.: Take This Doctrine and Shove It - Recognizing Constructive Discharge in North Carolina

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WHITT V. HARRIS TEETER, INC.: TAKE THIS DOCTRINE AND SHOVE IT - RECOGNIZING CONSTRUCTIVE DISCHARGE IN NORTH CAROLINA

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INTRODUCTION

In the summer of 2004, the North Carolina Court of Appeals recognized the doctrine of constructive discharge in a wrongful termination action where the termination contravenes public policy. This recognition expands employer liability for wrongful discharge in cases where the employer intentionally creates such a poor work environment that it effectively forces the worker to quit. This note will explore the history of constructive discharge in wrongful termination cases in North Carolina, the reasoning behind the case of *Whitt v. Harris Teeter, Inc.*,[1] the ability of North Carolina courts to recognize the doctrine, and the adoption of the Fourth Circuit's constructive discharge elements by the North Carolina Court of Appeals. This note will further argue against the automatic adoption of the Fourth Circuit's strict standards for constructive discharge.

BACKGROUND

North Carolina is an employment at-will state: "[A]bsent an employment contract for a definite period of time, both employer and employee are generally free to terminate their association at any time and without reason."[2] Thus, an employee without a definite term of employment is typically an employee at-will and may be discharged without reason.[3] In 1989, the Supreme Court of North Carolina, in *Coman v. Thomas Manufacturing Co.*, held that an employer would be liable for terminating an employee for a reason that contravenes public policy.[4] The court defined public policy as "the principle of law which holds that no citizen can lawfully do that which has a tendency

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1. Whitt v. Harris Teeter, Inc., 598 S.E.2d 151 (N.C. Ct. App. 2004).

2. Gravitte v. Mitsubishi Semiconductor Am., Inc., 428 S.E.2d 254, 258 (N.C. Ct. App. 1993) (quoting Salt v. Applied Analytical, Inc., 412 S.E.2d 97, 99 (N.C. Ct. App. 1991)).

3. Coman v. Thomas Mfg. Co., 381 S.E.2d 445, 446 (N.C. 1989) (quoting Still v. Lance, 182 S.E.2d 403 (N.C. 1971)).

4. *Id.* at 447.

to be injurious to the public or against the public good."[5] Sexual harassment as well as racial, sexual, and disability discrimination are typical examples of public policy principles that bring about wrongful discharge claims.

However, if a plaintiff *resigned* from her employment, she could not bring a claim for wrongful discharge.[6] Thus, an employer could create intolerable working conditions to compel an employee's resignation and not have to worry that the aggrieved employee might bring a wrongful discharge claim. To counter such abuses, ten of the eleven other states to consider such an issue have extended the public policy exception to at-will employees to prohibit constructive discharge.[7] Further, constructive discharge is recognized in federal Title VII cases.[8]

Constructive discharge is *not* its own separate cause of action; the doctrine merely allows injured parties to sue on a wrongful discharge claim when they have quit under certain circumstances. Just as an employer can fire an employee legally, an employer can constructively discharge an employee legally as well.

Before *Whitt*, North Carolina courts had not recognized constructive discharge for employment at-will relationships.[9] However, the North Carolina courts had "recognized the validity of a claim for constructive discharge 'in the context of interpreting whether constructive termination by [a plaintiff's] employer triggered the termination payment provision of [an] employment contract.'"[10] In transitioning from the employment contract with durational terms to the employment at-will scenario, three key cases provided the basis for the reasoning in the *Whitt* decision.

In *Coman*, the plaintiff was a long distance truck driver who was ordered by his employer to drive over the maximum hours allowed by

5. *Id.* at 447 n.2 (quoting Petermann v. Int'l Bhd. of Teamsters, 344 P.2d 25 (Cal. Ct. App. 1959)).

6. *Gravitte*, 428 S.E.2d at 258.

7. *Whitt*, 598 S.E.2d at 157; Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380, 386 (Ark. 1988); Smith v. Brown-Forman Distillers Corp., 241 Cal. Rptr. 916, 920 (Cal. Ct. App. 1987); Seery v. Yale-New Haven Hosp., 554 A.2d 757, 761 (Conn. App. Ct. 1989); Balmer v. Hawkeye Steel, 604 N.W.2d 639, 643 (Iowa 2000); Beye v. Bureau of Nat'l Affairs, 477 A.2d 1197, 1203 (Md. Ct. Spec. App. 1984); Bell v. Dynamite Foods, 969 S.W.2d 847, 853 (Mo. Ct. App. 1998); Barker v. State Ins. Fund, 40 P.3d 463, 468 (Okla. 2001); Dalby v. Sisters of Providence, 865 P.2d 391, 394-95 (Or. Ct. App. 1993); Slack v. Kanawha County Hous. & Redevelopment Auth., 423 S.E.2d 547, 558 (W. Va. 1992); Strozinsky v. Sch. Dist. of Brown Deer, 614 N.W.2d 443, 464 (Wis. 2000); *but see* Grey v. First Nat'l Bank, 523 N.E.2d 1138 (Ill. App. Ct. 1988) (rejecting a claim for constructive discharge).

8. EEOC v. Tar Heel Capital, Inc., No. 1-98CV84, 1998 U.S. Dist. LEXIS 22268, at *7 (W.D.N.C Dec. 3, 1998) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1986)).

9. Graham v. Hardee's Food Sys., Inc., 465 S.E.2d 558, 560 (N.C. Ct. App. 1996).

10. Beck v. City of Durham, 573 S.E.2d 183, 190 (N.C. Ct. App. 2002) (quoting Doyle v. Asheville Orthopaedic Assocs., P.A., 557 S.E.2d 577, 579 (N.C. Ct. App. 2001)).

federal and state regulations.[11] Upon his refusal to violate these regulations, his employer informed him that his wages would be reduced by one-half.[12] The court found this reduction to be "tantamount to a discharge of [the] plaintiff."[13] The employer's directive to exceed the hours prescribed by federal and state regulations was illegal and contrary to public policy.[14] The court reasoned that

> [W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.[15]

Thus, the court found there was a public policy exception to the employment at-will doctrine.[16]

In *Graham v. Hardee's Food System, Inc.*, the plaintiff, Graham, claimed that district manager Ronald Rogers harassed her through his unwanted physical contact, sexual advances and inappropriate comments.[17] Because of this harassment, Graham wanted to hold their mutual employer, Hardee's, liable for negligent supervision and retention, wrongful discharge, and negligent infliction of emotional distress.[18] Although the plaintiff claimed that her actions against Hardee's were independent from her claims against Rogers, both the trial court and the appellate court found the claims against Hardee's to be derivative.[19] Thus, the appellate court confirmed the trial court's grant of summary judgment for Hardee's because Graham's second voluntary dismissal against Rogers barred Graham's derivative claims against Hardee's itself.[20]

Although Graham's wrongful discharge claim was improper,[21] the court, assuming, *arguendo*, considered her claim for constructive dis-

11. Coman v. Thomas Mfg. Co., 381 S.E.2d 445, 445-46 (N.C. 1989).
12. *Id.* at 446.
13. *Id.*
14. *Id.* at 447.
15. *Id.* (quoting Sides v. Duke Univ., 328 S.E.2d 818, 826 (N.C. Ct. App. 1985)).
16. *Id.*
17. Graham v. Hardee's Food Sys., Inc., 465 S.E.2d 558, 559 (N.C. Ct. App. 1996).
18. *Id.* at 560.
19. *Id.*
20. *Id.*; N.C. Gen. Stat. § 1A-1, Rule 41(a)(1)(ii) (2004) ("[A] notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim."). Because the appellate court decided the action based upon procedural rules, the court's opinion contains very little factual content.
21. *Graham*, 465 S.E.2d at 561 ("[The plaintiff had] to prove the discharge was in contravention of North Carolina public policy or statute. The only allegations made by the plaintiff, which could show a violation of public policy or statute involved the claims against Rogers for which it has been judicially determined he is not liable.") (citation omitted).

charge.[22] The court used the Fourth Circuit's constructive discharge standard that a plaintiff "must demonstrate that the employer deliberately made working conditions intolerable and thereby forced [the plaintiff] to quit."[23] Deliberateness is found only if the "actions complained of were intended by the employer as an effort to force the employee to quit."[24] Using this standard, the *Graham* court could find no evidence of either intolerable conditions or deliberateness by Hardee's.[25]

In *Garner v. Rentenbach Constructors, Inc.*, the North Carolina Supreme Court held that the termination of the plaintiff's employment based on a positive reading of a drug test did not constitute a wrongful discharge simply because the drug test was not performed consistently with a state statute.[26] The plaintiff claimed that the employer's use of a non-approved laboratory violated Section 95-230 of the North Carolina General Statutes.[27] The plaintiff argued that by violating the statue, the employer violated public policy. The court recognized that the statute reflected public policy but found that the termination itself must be motivated by an unlawful reason or purpose that is against public policy.[28] The court found no evidence that the employer acted for an unlawful reason and affirmed the trial court's grant of summary judgment.[29] The essential part of *Garner* for constructive discharge purposes, although *dicta*, is the court's characterization of the *Coman* facts. In summarizing the facts of *Coman*, the North Carolina Supreme Court stated, "[t]he plaintiff refused to [violate the regulations], and his pay was reduced by fifty percent, which amounted to a *constructive discharge*."[30] By characterizing the facts of *Coman* as amounting to constructive discharge, the North Carolina Supreme Court indirectly asserted that constructive discharge would be a viable claim in North Carolina.

THE CASE

The plaintiff, Wendy Whitt, worked as a cashier at a Harris Teeter grocery store in Kernersville, North Carolina.[31] Beginning in July 1999, one of the plaintiff's co-employees, Randy Shultz, began to sex-

22. *Id.* at 560.
23. *Id.* (quoting E.E.O.C. v. Clay Printing Co., 955 F.2d 936, 944 (4th Cir. 1992)).
24. *Id.*
25. *Id.* at 561.
26. Garner v. Rentenbach Constructors, Inc., 515 S.E.2d 438, 439 (N.C. 1999).
27. *Id.* at 441.
28. *Id.* at 442.
29. *Id.*
30. *Id.* at 440 (emphasis added).
31. Whitt v. Harris Teeter, Inc., 598 S.E.2d 151, 153 (N.C. Ct. App. 2004).

ually harass her at work.[32] The plaintiff asked Shultz to stop and informed him that she was married.[33] The sexual harassment included sexual comments, touching without consent, sexual gestures, and threats.[34] Such comments included:

> Let's go get naked and rub down in baby oil; That bright polish you're wearing is giving me a hard-on; I bet you could f—k like hell when you're that mad; If I catch you bent over like that again I might have to come and throw my rod; and If I'm Santa Claus, I have a lifetime lollipop when you want to sit on my lap.[35]

On October 26, 1999, the plaintiff reported Shultz to Harris Teeter management.[36] The management met with the plaintiff that day to discuss the alleged harassment.[37] A few days later, Shultz was promoted to a manager-trainee and was relocated to another store.[38]

Shultz still visited the store and continued his harassment, which grew to include phone calls at her home and stalking as she left the company parking lot.[39] On November 22, 1999, the Harris Teeter field specialist "met with the plaintiff and informed her that the investigation was over, that Schultz had denied everything, and that she could not corroborate [her] allegations."[40] The specialist gave the plaintiff a copy of the Harris Teeter sexual harassment policy.[41] After that meeting, the plaintiff reported to her store manager that Shultz was still making the sexual comments, stalking her, following her home, physically touching her, and making threatening phone calls.[42] The store manager replied, "harshly and unconcerned, 'Wendy, what do you want me to do about it?'"[43]

In November of 1999, while standing at the time clock, Shultz approached the plaintiff and pressed his entire body next to hers and reached for her breasts.[44] The plaintiff "slung him off."[45] The plaintiff again contacted the field specialist, who informed her that the matter had been "thoroughly investigated" and the investigation was

32. *Id.*
33. *Id.*
34. *Id.* at 153-154.
35. *Id.* at 153.
36. *Id.* at 153-154.
37. *Id.*
38. *Id.* at 154.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*

complete.[46] As a result, the plaintiff filed a complaint with the Equal Employment Opportunity Commission.[47]

Between the third week of November 1999 and the end of December 1999, Harris Teeter reduced the plaintiff's employment hours from thirty-seven to twenty-seven hours per week. At this point, the "[p]laintiff was experiencing panic attacks, crying spells, suicidal thoughts, depression, withdrawal, insomnia, nightmares, nervousness and felt 'hopeless, helpless, and just totally degraded.'"[48] The managers started reporting that her cash registers were coming up short.[49] The plaintiff also asserted that the managers would chastise her in front of employees and customers, in violation of store policy.[50] On February 22, 2000, the plaintiff resigned.[51] Upon tendering her resignation, the assistant manager proclaimed, "Well, we figured this is [sic] going to happen."[52]

The plaintiff brought suit in Forsyth County Superior Court on November 20, 2000.[53] The complaint included intentional infliction of emotional distress claims against both Shultz and Harris Teeter and a claim of wrongful discharge in violation of public policy against Harris Teeter.[54]

Denying a motion for summary judgment, the trial court allowed the plaintiff to proceed with her wrongful discharge claim. It recognized that "if an employee is forced to quit because of emotional distress caused by unlawful conduct of which the employer is on notice, then the court discerns no reason why she should not be entitled to assert a claim of constructive wrongful discharge."[55]

The jury trial commenced on February 11, 2002.[56] At the close of all the evidence, Harris Teeter's motion for directed verdict was granted in part, dismissing the plaintiff's wrongful discharge claim.[57] On February 27, 2002, the jury returned a verdict against Shultz for intentional infliction of emotional distress and awarded damages of twenty dollars.[58] The jury did not find Harris Teeter liable. The plain-

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 158.
50. *Id.*
51. *Id.* at 161.
52. *Id.* at 154.
53. *Id.* at 153.
54. *Id.*
55. Record at 48, Whitt v. Harris Teeter, Inc., 598 S.E.2d 151 (N.C. Ct. App. 2004) (No. 03-335).
56. *Whitt*, 598 S.E.2d at 153.
57. *Id.*
58. Defendant-Appellee Harris Teeter, Inc.'s Brief at 3, Whitt v. Harris Teeter, Inc., 598 S.E.2d 151 (N.C. Ct. App. 2004) (No. 03-335).

tiff appealed the motion for directed verdict that dismissed the wrongful discharge claim against Harris Teeter.[59]

In North Carolina, termination for reporting sexual harassment contravenes public policy and may be a basis for a wrongful discharge claim.[60] In applying the facts of the case, the court of appeals found that the plaintiff had presented sufficient evidence to demonstrate her termination was based on sexual harassment:

(1) she was sexually harassed in the workplace by a fellow employee;
(2) she repeatedly reported such harassment to Defendant;
(3) Defendant promoted the employee responsible for the sexual harassment;
(4) the sexual harassment continued after Plaintiff reported the behavior to Defendant;
(5) Defendant reduced Plaintiff's employment hours by ten hours per week after she reported the harassment;
(6) Plaintiff developed depression and other psychological conditions as a result of the sexual harassment, Defendant's failure to effectively address such harassment, and Defendant's actions following the report of sexual harassment; and
(7) Plaintiff's condition ultimately forced her to resign from her employment with Defendant.[61]

The court of appeals began by considering whether constructive discharge should be recognized in cases of wrongful termination against public policy. It established that the North Carolina Supreme Court "implicitly recognized the viability" of a constructive discharge claim in *Coman*.[62] Highlighting the North Carolina Supreme Court's language that the reduction in pay was "tantamount to a discharge,"[63] the court of appeals asserted that the North Carolina Supreme Court "confirmed this interpretation" through the language in *Garner*, which described Coman's reduction in pay as "constructive discharge."[64]

The court also used the principles found in *Coman* to support the claim of wrongful discharge where termination is constructive: "A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent."[65] The court of appeals also highlighted *Coman's* recognition that "[b]ad faith conduct should not be tolerated in employment relations, just as it is not accepted in other commercial relationships."[66]

59. *Id.* at 4.
60. *Whitt*, 598 S.E.2d at 155; *See* Guthrie v. Conroy, 567 S.E.2d 403, 407 (N.C. Ct. App. 2002); *See* Phillips v. J.P. Stevens & Co., Inc., 827 F. Supp. 349, 352-353 (M.D.N.C. 1993).
61. *Whitt*, 598 S.E.2d at 156.
62. *Id.*
63. *Id.* (quoting Coman v. Thomas Mfg. Co., 381 S.E.2d 445, 446 (N.C. 1989)).
64. *Id.* (quoting Garner v. Rentenbach Constructors, Inc., 515 S.E.2d 438, 440 (N.C. 1999)).
65. *Id.* at 157 (quoting Coman, 381 S.E.2d at 447).
66. *Id.* (quoting Coman, 381 S.E.2d at 448).

The court of appeals further recognized that common law public policy-based constructive discharge claims have been recognized in several other jurisdictions across the country.[67] The court found the explanation from *Beye v. Bureau of National Affairs* persuasive:

> The law is not entirely blind, however. It is able, in most instances, to discard form for substance, to reject sham for reality. It therefore recognizes the concept of "constructive discharge;" in a proper case, it will overlook the fact that a termination was formally effected by a resignation if the record shows that the resignation was indeed an involuntary one, coerced by the employer.[68]

Due to these reasons, the court of appeals concluded, "North Carolina recognizes the claim of wrongful discharge in violation of public policy where termination is constructive."[69]

The court then evaluated whether the facts presented by the plaintiff were sufficient to support a claim of constructive discharge. Because this was an appeal of a directed verdict, the evidence was taken in the light most favorable to the plaintiff. The court of appeals followed the *Graham* court's use of the Fourth Circuit's standard: the plaintiff "must demonstrate that the employer deliberately made working conditions intolerable and thereby forced [the plaintiff] to quit."[70] Deliberateness is found only if the "actions complained of were intended by the employer as an effort to force the employee to quit."[71] Intolerability is measured "by the objective standard of whether a reasonable person in the employee's position would have felt compelled to resign."[72]

The majority found that the plaintiff was able to demonstrate that Harris Teeter's acts were deliberate for the following reasons: the ineffective handling of the sexual harassment complaints; the promotion of Schultz after being informed about his offensive behavior; the opportunities Schultz had to come back to the store despite the plaintiff's complaints; the store manager's refusal to help; the reduction of hours; and, upon tendering her resignation, the store manager saying, "We figured this would happen."[73] Upon review of these facts, the court also concluded that the plaintiff produced sufficient evidence to

67. *Id.* (quoting 1 LEX. K. LARSON, UNJUST DISMISSAL § 6.06[2] (Matthew Bender & Co., Inc. 2003) (1984)).

68. *Id.* (quoting Beye v. Bureau of Nat'l Affairs, 477 A.2d 1197, 1201 (Md. Ct. Spec. App. 1984)).

69. *Id.* at 158.

70. *Id.* (quoting Graham v. Hardee's Food Sys., Inc., 465 S.E.2d 558, 560 (N.C. Ct. App. 1996)).

71. *Id.*

72. *Id.* (quoting E.E.O.C. v. Clay Printing Co., 955 F.2d 936, 944 (4th Cir. 1992)).

73. *Id.*

show that the work conditions were intolerable.[74] Thus, the plaintiff's evidence was sufficient to present a question for the jury as to the defendant's liability for wrongful discharge under the constructive discharge doctrine.[75]

In his dissent, Judge McCullough interpreted the *Coman* decision narrowly, following the *Coman* court's presentation of the issue: "Our present task is to determine whether we should adopt a public policy exception to the employee-at-will doctrine."[76] Thus, from the dissent's point of view, the *Coman* reasoning should only be used in cases that deal directly with public policy exceptions to the employment at-will doctrine. In addition, the dissent opined that there are two different scenarios in which to apply constructive discharge. Judge McCullough asserted that the wrongful discharge in *Coman* is different from the wrongful discharge in *Graham.*[77] The wrongful discharge based on *Coman* requires some *affirmative demand* by an employer for an employee to violate public policy.[78] A claim based on *Graham*, however, is a hostile environment claim.[79] The dissent would require that constructive discharge claims only be allowed when the employer *commands* his employees to violate public policy; in contrast, when the employer creates a hostile work environment, constructive discharge would not be applied, or at least would be applied with different standards. Because the majority based its finding on *Coman*, the dissent argued that the wrongful discharge claim should not be recognized in the present case because Whitt's claim is analogous to the facts in *Graham.*

The dissent opined further that even if the claim for wrongful discharge allows for constructive discharge, the plaintiff did not offer enough evidence to survive a directed verdict.[80] The dissent raised key points in the defendant's evidence: the plaintiff did not give notice of the harassment until October 26, 1999; Harris Teeter took immediate action; Schultz was accepted into the management program before the allegations arose; the allegations were the first of their kind against Schultz; Harris Teeter offered to transfer the plaintiff; and the absence of reports of sexual harassment to Harris Teeter for January and February.[81] Judge McCullough concluded that the plaintiff could

74. *Id.*
75. *Id.* at 159.
76. *Id.* (quoting Coman v. Thomas Mfg. Co., 381 S.E.2d 445, 447 (N.C. 1989)).
77. *Id.*
78. *Id.*
79. *Id.* at 159-160.
80. *Id.* at 160-161.
81. *Id.* at 161-162.

not meet the "deliberateness" element of constructive discharge set out in *Graham*.[82]

ANALYSIS

The North Carolina judicial system has generally been wary of imposing changes that substantially affect policy, asserting that the legislature is best equipped to handle those duties.[83] Given this reluctance, it seems surprising that the court felt it was appropriate to recognize constructive discharge. However, the justification and standing for imposing the change can be found in the reasoning from *Coman*.

In *Coman*, the court reasoned that the court, and not the legislature, first adopted the employment at-will doctrine; therefore, the North Carolina Supreme Court found that it would be "entirely appropriate" for the courts to further interpret the rule.[84] The *Coman* court also emphasized that it was not creating new policy, but allowing an exception to at-will employment in light of already existing policy.[85]

The logical reaction to the *Whitt* decision is an expectation of an increased number of claims. The *Coman* court anticipated this reaction and responded:

> In reaching our decision today, we have not turned a deaf ear to the warning that we may have spawned a deluge of spurious claims. Our courts have abundant authority to protect employers from frivolous claims, particularly by imposition of sanctions against attorneys and parties pursuant to Rule 11 of the Rules of Civil Procedure.[86]

Given that these justifications and responses still ring true today with the employment at-will doctrine, the normal reluctance of the North Carolina courts is appropriately addressed by *Coman*.

In *Whitt*, the North Carolina Court of Appeals decided to use the Fourth Circuit standards for establishing constructive discharge.[87] This was foreseeable considering that the North Carolina Court of Appeals looked at the same standards in *Graham*, and the Fourth Cir-

82. *Id.* at 162.

83. North Carolina is one of the few states to recognize contributory negligence (*See* Smith v. Norfolk & S. R.R. Co., 114 N.C. 728 (1894)), alienation of affections (*See* Henson v. Thomas, 56 S.E.2d 432 (N.C. 1949) (Seawell, J., dissenting) ("We cannot, with any propriety, refer these matters to the Legislature as being the appropriate department to deal with them. This has been done so often that the formula has become a cliché. The Legislature may have sins of its own for which it must do penance, but it is not a scapegoat for the judiciary."), and has even declined to decide whether not wearing an automobile seat belt would constitute negligence (*See* Miller v. Miller, 160 S.E.2d 65 (N.C. 1968)).

84. Coman v. Thomas Mfg. Co., 381 S.E.2d 445, 448 n.3 (N.C. 1989).

85. *Id.*

86. *Id.* at 449.

87. Whitt v. Harris Teeter, Inc., 598 S.E.2d 151, 158 (N.C. Ct. App. 2004).

cuit standards have been published in the North Carolina Model Jury Instructions for Civil Cases since at least 1991.[88] Furthermore, other state courts that have considered the issue have successfully adopted the relevant circuit court standard, relying on the circuit's broad range of case law interpretations.[89] By adopting the applicable circuit standard, the state ensures uniform results regardless of the forum or the law the plaintiff chooses.

However, the choice of the standard should not necessarily be automatic. At this point, the North Carolina courts need to decide whether to adopt the Fourth Circuit's stringent standards of constructive discharge. The Fourth Circuit's standard of constructive discharge has been well established as one of the most, if not the most, stringent standards of the constructive discharge variations.[90] While this news may comfort employers, an appropriate constructive discharge doctrine must balance the interests of the accused, the accuser, and the employer:

> The victim has an interest in not having to run a daily gauntlet of unwelcome pressures and advances at work. The accused also has an interest, however, in not losing a job or reputation on the basis of an accusation which turns out to be mistaken or downright false. The rule of law must reflect some equation of interests in a controversy.[91]

In *Bristow v. Daily Press, Inc.*, a flagship case for constructive discharge in the Fourth Circuit, the court reversed the district court's denial of a motion for judgment notwithstanding the verdict stating, "While we are mindful of the deference due a jury verdict, after reviewing the evidence we are convinced that defendant's motion for judgment n.o.v should have been granted."[92] The court held that a constructive discharge occurs when the employer deliberately makes the employment conditions so intolerable that it forces the employee to quit his job.[93] Deliberateness is characterized by intentional conduct aimed at forcing that particular employee to quit.[94] It could be

88. *Id.*; Graham v. Hardee's Food Sys., Inc., 465 S.E.2d 558, 560 (N.C. Ct. App. 1996) (quoting E.E.O.C. v. Clay Printing Co., 955 F.2d 936, 944 (4th Cir. 1992)); N.C.P.I- Civil 640.02 General Civil Volume (May 1991) (The footnote in the model jury instructions states, "No reported North Carolina appellate decision appears to have dealt directly with constructive termination . . . . The most instructive source of law for the purposes of this instruction is *Bristow v. Bailey* [sic] *Press, Inc.*, ..." (citations omitted)).

89. R. Pepper Crutcher, Jr. & Phelps Dunbar, *Constructive Discharge: What it is, and What it isn't, in Mississippi Employment Law*, 21 MISS. C. L. REV. 1 (2001).

90. Cathy Shuck, *That's it, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKELEY J. EMP. & LAB. L. 401, 444 (2002); David L. Gregory & Laura Hess, *Constructive Discharge: Easier Said Than Done*, 2 EMPLOYEE RIGHTS QUARTERLY 69, 71 (2002).

91. Paroline v. Unisys Corp., 879 F.2d 100, 115 (4th Cir. 1989) (Wilkinson, J. dissenting) (2-1 decision regarding constructive discharge).

92. Bristow v. Daily Press, Inc., 770 F.2d 1251, 1252 (4th Cir. 1985).

93. *Id.* at 1255.

94. *Id.*

inferred by circumstantial evidence, including failure to act in the face of intolerable conditions.[95] Intolerability of working conditions is gauged by whether a reasonable person in the employee's situation would have felt compelled to resign.[96] The *Bristow* elements are routinely cited in other cases and are even used in the North Carolina Model Jury Instructions.[97]

The deliberateness or intent requirement of *Bristow* has been criticized as harsh.[98] The Fourth Circuit has knowingly adopted this view stating that "[t]he majority of Circuits focus almost exclusively on the effect an employer's actions have on an employee . . . . The minority view, to which we subscribe, is that a plaintiff must also prove that the actions complained of were *intended* by the employer as an effort to force the employee *to quit*."[99]

There have been several frustrations in the deliberateness requirement, not only for its high burden, but also in the difficulty in interpreting the circumstantial evidence to show subjective intent. The contentious decisions in *Paroline v. Unisys Corp.* focused on the employer's intent to cause her resignation.[100] In that case, the defendant company reprimanded the accused employee, delayed his promotion and raise, ordered him to limit his exposure to female employees, revoked his security clearance, and ordered him to get counseling.[101] The defendant also asked the victim not to quit and offered her two weeks off to recover.[102] In a 2-1 decision, a panel of the Fourth Circuit reversed the district court's entry of summary judgment in favor of the employer on the constructive discharge claim. In a 5-4 decision in banc, the Fourth Circuit reversed and affirmed the district court's summary judgment decision.[103] With each *Paroline* decision, the appellate court reversed the order of the previous court. Both appellate decisions were decided by the closest margin. Clearly, in many of the difficult cases, the standard is producing different results from learned judges.

Due to a United States Supreme Court decision and the Fourth Circuit's interpretation of it, the victim has another hurdle to pass in or-

95. *Id.*
96. *Id.*
97. N.C.P.I- Civil 640.02 General Civil Volume (May 1991).
98. Shuck, *supra* note 90, at 444; Gregory & Hess, *supra* note 90, at 71.
99. Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1354 (4th Cir. 1995) (citations omitted) (emphasis added).
100. Paroline v. Unisys Corp., 879 F.2d 100, 109-110 (4th Cir 1989) (2-1 decision regarding constructive discharge) (Wilkinson, J. dissenting); Paroline v. Unisys Corp., 900 F.2d 27, 27-8 (4th Cir. 1990) (en banc) (per curiam) (5-4 decision).
101. *Paroline*, 879 F.2d at 103.
102. *Id.* at 104.
103. *Paroline*, 900 F.2d at 27.

der to hold the employer vicariously liable for the actions of its agent.[104] In *Burlington Industries, Co. v. Ellerth*,[105] the Supreme Court enacted a seemingly fair affirmative defense for an employer who had not taken any "tangible employment action" in order to avoid vicarious liability of a supervisory employee. The Court recognized that simply because a person is a supervisor, that fact alone should not automatically impose vicarious liability on the employer: "A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct."[106] These "tangible employment actions" are powers given to the supervisor by the employer, which include hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a significant change in benefits.[107] The agency relationship of the employer and supervisor, characterized by the power to take these tangible employment actions, imposes liability on the employer when the agent *uses* those powers inappropriately.[108] This "tangible employment action" is similar to the "aided by agency" doctrine that has been used mainly for fraud cases and has only been recently adopted for sexual harassment cases.[109]

If a supervisory employee has not taken a tangible employment action with respect to an alleged victim-employee, the employer is entitled to an affirmative defense to avoid vicarious liability if harassment is found.[110] The affirmative defense consists of two necessary elements: 1) reasonable care by the employer to prevent or eliminate any harassing behavior; and 2) an unreasonable failure of the plaintiff to take advantage of preventative or corrective opportunities provided by the employer.[111] The employer needs to prove these two elements by a preponderance of the evidence.[112] While this rule seems to adequately balance the issues of protecting the employer and the accessibility of the suit for the victim, the *interpretation* of what is a tangible employment action impacts the balance of these two issues. Some federal courts, including district courts within the Fourth Circuit, have

104. Shuck, *supra* note 90, at 440-441.

105. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

106. *Id.* at 762 (1998) (citations omitted).

107. *Id.* at 761.

108. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958).

109. J. DENNIS HYNES & MARK LOEWENSTEIN, AGENCY, PARTNERSHIP AND THE LLC: THE LAW OF UNINCORPORATED BUSINESS ENTERPRISES 100 (6th ed. Abridged, Matthew Bender & Co. 2003) (1998).

110. *Ellerth*, 524 U.S. at 765.

111. *Id.*

112. *Id.*

increased the difficulty for the victim in establishing a valid claim by limiting what can be construed as a tangible employment action.

The interpretation rests on whether constructive discharge is a tangible employment action. The Second Circuit and district courts within the Fourth and Ninth Circuits have reasoned that because the employer does not endorse a constructive discharge, it does not meet the *Ellerth* definition of a tangible employment action.[113] The Third Circuit and district courts in the Fifth, Eighth and Eleventh Circuits have expressly stated that a constructive discharge amounts to a tangible employment action.[114] These courts view constructive discharge as an employer's affirmative act, which equates to a discharge.[115] Thus, in these circuits a constructive discharge is a tangible employment action.[116]

One of the most recent Fourth Circuit cases confirmed its interpretation of the *Ellerth* holding as it applies *to* hostile work environment cases.[117] It found that the employer defendant, BFI Waste Services, had not taken any tangible employment action such as reduction in pay, reassignment of tasks or demotion.[118] Thus, BFI Waste Services was allowed to raise an affirmative defense to avoid imputed liability by proving the exercise of reasonable care to correct harassing behavior and that the plaintiff did not take advantage of those corrective opportunities.[119]

Problems occur when reviewing the intent/deliberateness standard with the *Ellerth* interpretation. A situation could occur in which a victim could prove that the supervisor had actively made the victim's workplace unbearable with the intention of forcing the victim's resignation, but would not be able to prove that the *employer* was vicariously liable. Taking this scenario to the extreme, the employer could avoid liability for its supervisor's actions by turning a blind eye to the victim's situation until the victim actively used any formal processes to inform upper management. This would decrease the incentives for the employer to be truly proactive in preventing discrimination. Further, by concentrating on the intent to force the employee to quit, the

113. Shuck, *supra* note 90, at 440; Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 294 (2d Cir. 1999); Scott v. Ameritex Yarn, 72 F. Supp. 2d 587, 594 (D.S.C. 1999); Alberter v. McDonald's Corp., 70 F. Supp. 2d 1138, 1147 (D. Nev. 1999).

114. Shuck, *supra* note 90, at 442; Cardenas v. Massey, 269 F.3d 251, 263 n.10 (3d Cir. 2001); Galloway v. Matagorda Co., 35 F. Supp. 2d 952, 957 (S.D. Tex. 1999); Cherry v. Menard, Inc., 101 F. Supp. 2d 1160, 1170-71 (N.D. Iowa 2000); Jones v. USA Petroleum Corp., 20 F. Supp. 2d 1379, 1383 (S.D. Ga. 1998).

115. Shuck, *supra* note 90, at 442.

116. *Id.*

117. White v. BFI Waste Servs., LLC, 375 F.3d 288, 299 (4th Cir. 2004).

118. *Id.*

119. *Id.*

Fourth Circuit's standard is unwieldy and cumbersome when a harasser does not want the victim to quit so that the harasser can *continue* with the inappropriate behavior.[120]

When adopting the doctrine of constructive discharge, state courts are not bound by any federal circuit precedent. For instance, the California courts have established significant new interpretations on constructive discharge, rejecting the Ninth Circuit standards.[121] Creating new standards inevitably requires more judicial involvement to clarify issues than adopting the standards of a current system. However, creating the new standard allows the court to adopt precise and clear standards to avoid difficult, contradictory precedent and to fully benefit from hindsight.

CONCLUSION

The North Carolina Court of Appeals has taken a strong step towards enforcing public policy in employment law. By officially recognizing the possibilities for constructive discharge, employers are further encouraged to monitor and address the employment environment to ensure against discrimination based on age, sex or race. However, the appellate courts of North Carolina should use this opportunity to adopt a standard that adequately balances the interests of the employer, supervisor, and victim.[122] Abruptly adopting the Fourth Circuit standard, as it seems the court of appeals did in *Whitt*, is a lost opportunity to bring better clarity, vision, and justice to an often-muddled doctrine. Because this is a common law doctrine, the courts can freely make adjustments. As they face more complicated cases, the courts will hopefully develop and create a better, clearer standard for both the employers and employees of North Carolina.

120. In these cases, the Fourth Circuit adopts a reasonably foreseeable analysis to determine if the employer had the requisite intent. This analysis has also been criticized. *See* Steven D. Underwood, *Constructive Discharge and the Employer's State of Mind: A Practical Standard*, 1 U. PA. J. LAB. & EMP. L. 343, 358 (1998).

121. Brady v. Elixir Indus., 242 Cal. Rptr. 324 (Cal. Ct. App. 1987), *overruled by* Turner v. Anheuser-Busch, Inc., 876 P.2d 1022 (Cal. 1994).

122. The North Carolina Supreme Court has the opportunity to review the standard set in the court of appeals decision. On August 10th, 2004, defendant Harris Teeter, Inc. filed a notice of appeal to the North Carolina Supreme Court based on the dissenting opinion in the court of appeals case and pursuant to N.C. Gen. Stat. § 7A-30 and N.C.R. App. P. 14 (b)(1). Notice of Appeal at 1-2, Whitt v. Harris Teeter, Inc., 598 S.E.2d 151 (N.C. Ct. App. 2004) (No. 416A04).