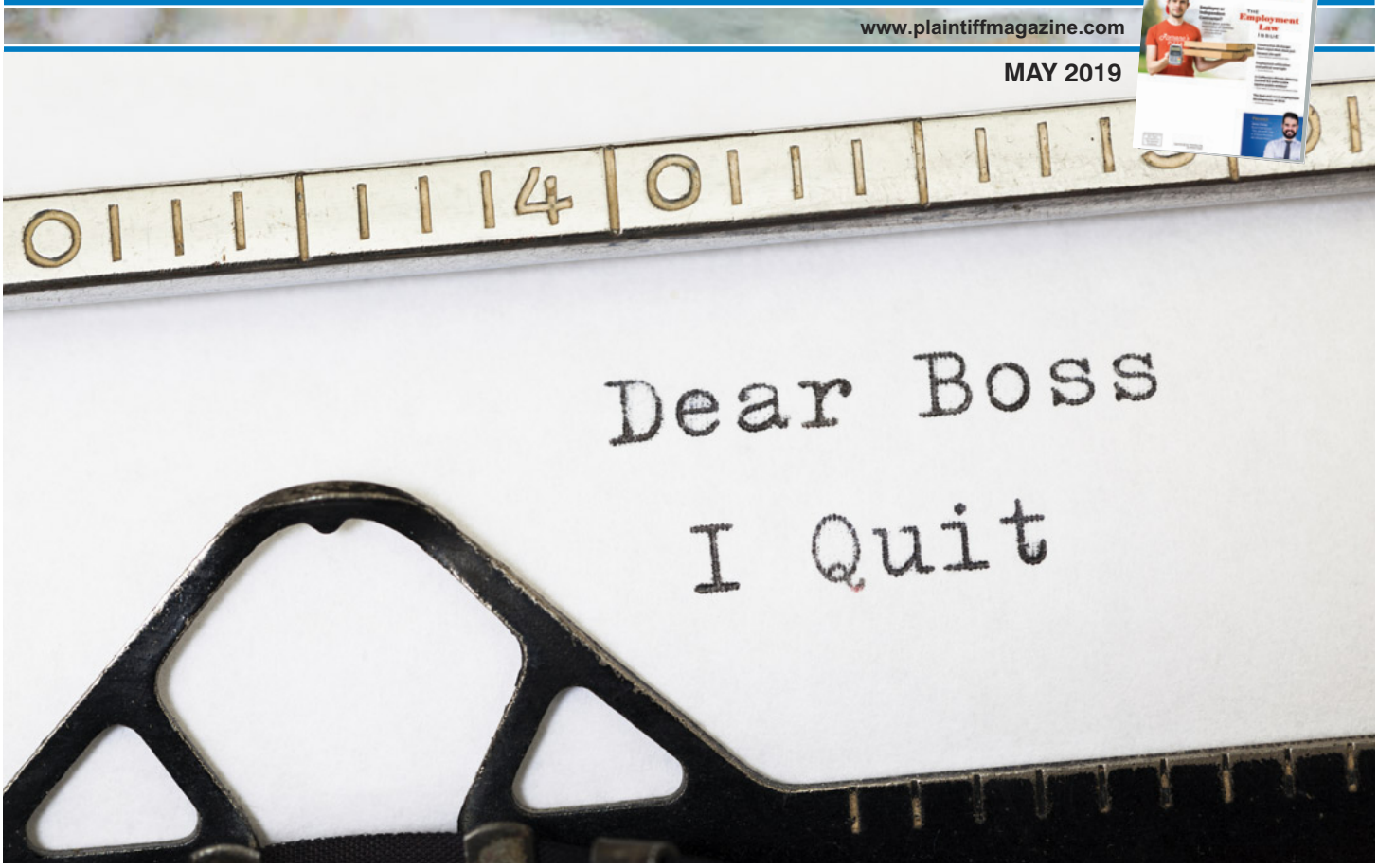

Don't reject that potential client just because she quit!

Constructive discharge owing to a hostile work environment can complicate a case, but it shouldn't make you walk away

By Karine Bohbot and Elizabeth Riles

We would all like it if all our cases had clear "adverse employment actions," namely termination; sadly, this is not always the case. There are many plaintiffs' attorneys who will not even consider cases involving current employees or employees who quit. Even though cases where the employee resigned because of a horrible work environment can add a layer of difficulty to the case, and potentially limit any claim of future wage loss, with thoughtful preparation and discovery these are winnable cases.

California, like many jurisdictions, has recognized that employees can find themselves in such hostile environments that no person would be able to continue working for the employer. This is the legal concept of constructive discharge or constructive termination, where the employer has created a situation so hostile that the employee is forced to resign.

Constructive discharge cases are similar to any other wrongful termination case. The first step is demonstrating that the discharge was wrongful. The major forms of wrongful termination in California include:

Wrongful termination in violation of an implied contract. "A constructive discharge may, in particular circumstances, amount to breach of an employer's express or implied agreement not to terminate except in accordance with specified procedures or without good cause. . . . Apart from the terms of an express or implied employment contract, an employer has no right to terminate employment for a reason that contravenes fundamental

public policy as expressed in a constitutional or statutory provision." (*Turner v. Anheuser-Busch, Inc*. (1994) 7 Cal.4th 1238, 1252; *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1094-1095.)

Wrongful termination in violation of public policy. "An actual or constructive discharge in violation of fundamental public policy gives rise to a tort action in favor of the terminated employee." (*Foley v. Interactive Data Corp*. (1988) 47 Cal.3d 654, 665-671, 254; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 178.) There are numerous fundamental public policies that could apply, including: violations of the Fair Employment and Housing Act (FEHA), violations of the California Labor Code, violations of the California Constitution or violations of other Federal statutes, among many other things.

A termination that was the result of one of these reasons could be considered as wrongful.

The next step is to demonstrate that the resignation was "forced." To establish a constructive discharge, the employee must show "adverse working conditions so intolerable that any reasonable employee would resign rather than endure such conditions." (*Turner*, *supra*, 7 Cal.4th at 1247.) "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Id*. at 1244.) The determination whether a reasonable employee would have felt compelled to leave her employment is "quintessentially a jury function," generally precluding summary judgment. (*Thompson v. Tracor Flight Sys*. (2001) 86 Cal.App.4th 1156, 1171.)

To satisfy these requirements, it is important to focus your discovery on all of the factors that led the employee to resign. California courts have found that the following situations alone do *not* result in intolerable work conditions:

- A reduction in pay.
- A demotion.
- A transfer to a different branch.
- Single incidents of mistreatment.[1]
- Reassignment to graveyard shifts.
- A former subordinate's promotion over the employee, requiring the employee to answer to a person they used to supervise.
- Unfair performance evaluations.

Ideally (for the case), when deciding whether to take on a constructive discharge case, your client will have experienced multiple incidents that led to a forced resignation. But, either way, if you are dealing with an employee who quit because of any of these reasons, it is important to demonstrate more than just a reduction in pay or demotion, for example. You will need to direct discovery at determining how that change affected other aspects of the work environment. For example, demonstrating that the demotion was not only a reduction in pay, but that it was a move to a position from which there is no more possibility of advancement, promotion or pay increases.[2]

Futility of the situation is key

The evidence about the futility of the situation will be key. This is a situation where getting comparator information could be very useful; either to show that others moved to the same position were similarly limited, to show that others who complained about similar treatment were blackballed or terminated, etc.

In one case, *Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827, the plaintiff was able to survive demurrer on his constructive discharge claim alleging that the employer's failure to reimburse him for mileage and vehicle expenses was sufficient to support a claim for constructive discharge. The key element for this was that because he had to pay so much for gas and the use of his vehicle and because the employer refused to reimburse him (as required by the Labor Code), he was ultimately working for below minimum wage, making it difficult to pay basic living expenses. (*Id.* at 827-828.) As stated above, whether your client acted "reasonably" is generally a question of fact and such, if you plan your discovery appropriately, it is an issue that should survive summary judgment.

A plaintiff alleging constructive discharge must also establish the employer's knowledge of intolerable working conditions. A plaintiff can satisfy this element by showing the requisite knowledge or intent on the part of "those persons who effectively represent the employer," including "supervisory employees." (*Turner*, *supra*, 7 Cal.4th 1250-1251.) Specifically, the court identified "*officers, directors, managing agents, or supervisory employees*." The court made it clear that "constructive knowledge" is not sufficient for this kind of claim. (*Id.* at 1251.)

Under the FEHA, a "supervisory employee" is one that (1) has the authority to hire, transfer, promote, assign, reward, discipline, or discharge or effectively to recommend any of these actions; (2) the responsibility to act on the plaintiff's grievances *or effectively to recommend action on grievances*; or (3) the responsibility to direct the plaintiff's daily work activities. The exercise of this authority or responsibility must not be merely routine or clerical but must require the use of independent judgment. (Gov. Code, § 12926(t); California Civil Jury Instructions (CACI) 2525.) This definition is echoed in the California Labor Code §1140.4 and because of the italicized language is very broad.

Here, again, it will be important to craft your discovery to demonstrate that the employer had knowledge of the conditions that led to your client's resignation. Many times it will mean demonstrating that your client complained about the circumstances and nothing was done to remedy it. This discovery can be coordinated with discovery related to proving punitive damages since discovery

of a responsible managing agent would satisfy both knowledge for constructive discharge and to show punitive damages may be appropriate.

Failure to return from medical leave

Finally, one specific area of confusion has been the impact of an employee requiring medical leave due to the intolerable working condition and ultimately not returning to the workplace. Does this support a Constructive Discharge claim? The answer is yes.

Cases under both the FEHA and its Federal counterpart, Title VII, have applied the constructive discharge doctrine in circumstances where the employee's health was impacted by intolerable workplace conditions which caused her to take a medical leave or to resign.

In *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, the plaintiff alleged that the defendants had targeted her for removal because of her involvement in uncovering unlawful activities. The plaintiff ultimately took a medical leave of absence, followed by a medical retirement, claiming that the defendants' wrongful actions had caused her to become disabled from work. She never returned to her job. The court of appeal held that her medical retirement was equivalent to a constructive discharge, stating:

> [T]he university, through its agents, allegedly made plaintiff's working conditions so intolerable that her preexisting medical condition worsened to the point where she was no longer able to function in her duties and needed to remove herself from her job, and thus was effectively constructively discharged.

(105 Cal.App.4th at 1318)

Similarly, in *White v. Honeywell, Inc.* (8th Cir. 1998) 141 F.3d 1270, the Eighth Circuit Court of Appeals held that an employee who was forced by hostile work conditions to take an unpaid medical leave of absence from which she was unable to return was entitled to a jury instruction that modified the constructive discharge doctrine to fit her circumstances. The court stated:

> We are not prepared to say that "quit" is the magic word in a constructive discharge instruction. A person who has suffered a forced unpaid medical leave of absence, from which she is unable to return and which resulted from objectively intolerable working conditions, is in no better position than one who was forced to quit as a result of objectionably intolerable conditions. In either case, the employer has, through objectively intolerable conditions, forced the employee out of active service.

(141 F.3d at 1279.)

The Court's decision in *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241 also supports such a conclusion. In that case, a young female state employee was a potential witness in a sexual harassment case against the state agency where she worked. To keep her from testifying, her superiors criticized her work performance on spurious grounds, gave her worse work hours, threatened to suspend her based on false charges, and told her that a suspension would be a huge black mark on her state service record and that she should transfer to another agency before the suspension was effective. The employee took a stress-related sick leave and then resigned. Affirming a judgment for the plaintiff, this Court declared:

> We do not have to determine whether each individual action was an intolerable condition because the actions taken together support a finding that Lisa was unlawfully coerced into resignation.

(*Id.* at 1258, citations omitted.)

Courts have made it clear that simply unpleasant working conditions are not enough to constitute a constructive discharge. On the other hand, employers who create conditions so bad that a reasonable employee would feel *compelled* to resign, and the conditions created constitute "wrongful" conduct under California law, are violating the law. With thoughtful pleading and discovery practitioners should not shy away from taking on cases where the employee has been forced out of their position.

Bohbot and Riles

Karine Bohbot and Elizabeth Riles are partners in the Law Office of Bohbot & Riles *and have been practicing employment litigation for the last 20 years. They have successfully tried numerous cases throughout the Bay Area and Southern California. If you are looking for further information on this subject, or any related employment matter, you may e-mail either Ms. Bohbot at kbohbot@strikebacklaw.com or Ms. Riles at eriles@strikebacklaw.com.*

Endnotes:

[1] Of course, this depends on the severity of the "mistreatment." Experiencing a singe incident of criminal activity could be sufficient to support a constructive discharge claim. *Turner, supra*, 7 Cal.4th at 1247, fn. 3.

[2] Definitions under federal statutes are narrower.