

## **Constructive Discharge: How Can We Be Sued If An Employee Quits?**

Encouraging (“forcing”) an employee to resign or retire early, rather than be fired may seem like an effective means to avoid potential problems. However, forcing a resignation by telling the employee to resign or be fired, or by making working conditions so difficult that a reasonable person would perceive the situation as intolerable, does not avoid potential legal issues, it may exacerbate them. In essence, by “pushing someone” out, an employer effectively discharges him and still remains vulnerable to potential discrimination charges.

Note that state standards differ considerably and some states address constructive discharge issues through statute.

### **Examples**

Although each case must be examined on an individual basis, constructive discharge is more likely to be found in the following situations.

- Hostile Environments “charged” with racial, sexual, age-related or other types of hostility based on protective class status (e.g., employer demoted an older worker, required him to train his younger replacement, take a pay cut, and to introduce the replacement and explain the demotion to a key client).
- Threats or Acts of Violence (e.g., black employee subject to KKK graffiti, hanging a doll in effigy, threatened with whippings and beatings).
- Dangerous Working Conditions (e.g., pregnant employee transferred from a clerical to a heavy lifting position).
- Failure to Provide a Reasonable Accommodation under the ADA.
- From the “Believe It or Not Files” - A Michigan court found that forcing an employee to sign a resignation at knife-point was indeed constructive discharge (not a good HR practice!).

Actions such as pay cuts, changes in working location, or embarrassment from a demotion or transfer generally, by themselves, are not enough to support a finding of constructive discharge unless they’re prompted by an improper motive, such as discrimination.

### **Minimizing the Risk of Constructive Discharge Claims**

- Ensure that all employment decisions are business related.
- Ensure that employee treatment is consistent across the organization.
- Avoid even the appearance of retaliation.

- Be honest. Don't "test the waters" to see if an employee will quit. If you feel you have legitimate reasons for the termination and appropriate actions have been taken, proceed.
- Obtain written resignation statements from employees.
- If a layoff is anticipated, implement a voluntary retirement or resignation program before identifying who will be terminated. Also, offer voluntary termination options to entire departments or groups, not just to those who would most likely be fired.
- Plan well and appropriately document all layoff decisions.
- Have your attorney draft appropriate releases/waivers of claims.