No. 14-355

In The Supreme Court of the United States

ANGELA AMES,

Petitioner,

v.

NATIONWIDE MUTUAL INSURANCE CO., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

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I. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER CONSTRUCTIVE DISCHARGE CLAIMS REQUIRE PROOF THAT THE EMPLOYER INTENDED TO FORCE THE PLAINTIFF TO RESIGN

Nationwide does not dispute that there is an entrenched circuit conflict regarding whether a constructive discharge claim requires proof that an employer intended to force the plaintiff to resign. This case is an excellent vehicle for resolving that issue.

The court of appeals held that the plaintiff was required to demonstrate that Nationwide discriminated against her with the specific intent of getting her to quit. "To prove a constructive discharge, an employee must show that the employer deliberately created intolerable working conditions with the intention of forcing her to quit." Pet.App. 8a (quoting *Alvarez v. Des Moines Bolt Supply, Inc.,* 626 F.3d 410, 418 (8th Cir. 2010)). Nationwide asserts that the court of appeals held that a plaintiff could establish liability by proving that employer so intended "*or* 'could have reasonably foreseen that the employee would quit as a result of its actions.'" Br.Opp. 13 (quoting Pet.App. 8a) (emphasis added). But the brief in opposition omits the first part of the quoted court of appeals' sentence, which makes clear that proof of foreseeability is relevant only as a method of establishing intent, not as an alternative basis of liability. "Evidence of the employer's intent can be proven

'through direct evidence *or through* evidence that the employer could have reasonably foreseen that the employee would quit as a result of its actions.'" Pet.App. 8a (quoting *Sanders v. Lee Cnty. Sch. Dist. No. 1,* 669 F.3d 888, 893 (8th Cir. 2012) and *Fercello v. County of Ramsey,* 612 F.3d 1069, 1083 (8th Cir. 2010)) (emphasis added). The conjunction "or" does not appear in the court's statement of the governing standard.

The court of appeals below made repeated findings that Nationwide did not have (what it believed was) the requisite intent to force Ames to quit. "Nationwide's several attempts to accommodate Ames *show* its intent to maintain an employment relationship with Ames, not force her to quit." Pet.App 9a (emphasis added). "Rather than intentionally rendering Ames's work conditions intolerable, the record *shows* that Nationwide sought to accommodate Ames's needs." Pet.App. 10a (emphasis added). "That Nationwide's policies treated all nursing mothers and loss-mitigation specialists alike *demonstrates* that Nationwide did not intend to force Ames to resign...." Pet.App. 10a (emphasis added).

Nationwide contends that the court of appeals' intent requirement was irrelevant in this case because "the Eighth Circuit in this case *assumed* that any such requirement was met." Br.Opp. 2, 12 (emphasis in original). But this account leaves out the rest of the relevant passage in the court of appeals opinion. After making the detailed findings of no intent set out above, the court proceeded to explain

that it was nonetheless "[a]ssuming for the sake of analysis" that there might be sufficient evidence of intent, in order to reach a second ground for dismissing plaintiff's claim, the failure to pursue an internal complaint. Pet.App. 11a. In the context of an opinion that had already repeatedly decided that Nationwide lacked the requisite intent, the court's statement that it was assuming the contrary merely "for the sake of analysis" was simply a way of indicating that it was setting out a second, independent ground for its decision, not a way of announcing it was retracting the court's earlier determinations.

Nationwide does not deny that six circuits have squarely rejected an intent requirement. Pet. 17-23. It argues that panels in *other* Eighth Circuit cases have held that mere foreseeability could suffice. Br.Opp. 14-17.[1] But the circuit conflict does not depend on the Eighth Circuit alone; the Fourth and Sixth Circuits indisputably impose an intent requirement that conflicts with the majority rule. Pet. 13-17. Because the Eighth Circuit decision in *this* case did apply an intent requirement, the case is an excellent vehicle for resolving this issue.

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[1] Even a requirement of intent *or* foreseeability by a defendant would conflict with the standard in the six circuits which consider only whether a reasonable person in the position of the plaintiff would have felt compelled to resign. Pet. 17-23. A requirement of foreseeability would still be the minority view. Pet. 24.

II. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER CONSTRUCTIVE DISCHARGE CLAIMS REQUIRE PROOF THAT THE PLAINTIFF COMPLAINED TO HER EMPLOYER PRIOR TO RESIGNING

Nationwide does not dispute that in most circuits whether a plaintiff complained about discrimination prior to resigning would be relevant, if at all, only in connection with an analysis of the severity of the discriminatory actions, and other factors, bearing on whether a reasonable person would have found the working conditions intolerable. The Eighth Circuit, unlike any other circuit, treats the existence of such a complaint as a separate requirement in a constructive discharge case, one which must be proven regardless of how intolerable the working conditions may be.

The court of appeals applied that well-established Eighth Circuit rule requiring dismissal of a constructive discharge claim if the plaintiff failed to complain to her employer prior to resigning. First, the court below set out that rule. "[A]n employee must give her employer a reasonable opportunity to resolve a problem before quitting." Pet.App. 8a (quoting *Sanders*, 669 F.3d at 893). Then the court of appeals explained that this rule barred Ames's claim because she had not (adequately) complained to higher officials. "Ames's constructive discharge claim ... fails because she did not give Nationwide a reasonable opportunity to address and ameliorate the conditions that she claims constituted a constructive discharge. *See Sanders,* 669 F.3d at 893...." Pet.App. 11a.

The court of appeals' explanation of this basis of its decision to dismiss Ames's complaint is set out at pp. 11a-12a of the Appendix. Nationwide asserts that paragraph holds that a reasonable person in Ames's position "would not have found the working conditions so intolerable as to make quitting necessary" (Br.Opp. 8-9), "would not have felt forced to quit" (*id.,* 9), and "would [not] have felt no choice but to quit." *Id.,* 3. But those assertions are not accompanied by any quotation from that paragraph, and for good reason. The words "intolerable," "forced to," and "no choice" simply do not appear anywhere in the paragraph in question.

That pivotal paragraph consists instead of repeated statements that Ames forfeited her claim because she did not complain sufficiently to her employer prior to resigning. The paragraph begins with the sentence quoted above regarding her fatal "fail[ure to] ... give Nationwide a reasonable opportunity to address and ameliorate the conditions that she claims constituted a constructive discharge." The paragraph continues, "Ames ... failed to avail herself of the channels of communication provided by Nationwide to deal with her problem. *See Coffman* [*v. Tracker Marine, L.P.*], 141 F.3d [1241], 1247-48 [(8th Cir. 1998)] (reversing a constructive discharge judgment in part because the employee had an avenue of redress within the company and failed to use it)." Pet.App. 11a-12a. "By not attempting to return to Hallberg's office to determine the availability of a wellness room or to contact human resources, Ames acted unreasonably and failed to provide Nationwide

with the necessary opportunity to remedy the problem she was experiencing." Pet.App. 12a.

Nationwide asserts that Ames's failure to seek further help from higher level company officials was only "part of [the court of appeals'] reasonableness analysis." Br.Opp.18, 24. But in the Eighth Circuit a failure to complain to one's employer is without more *inherently* unreasonable. "To be reasonable, an employee must give her employer a reasonable opportunity to correct the problem." *Jackson v. Arkansas Dep't of Educ.,* 272 F.3d 1020, 1027 (8th Cir. 2001). That is why the Eighth Circuit opinion in this case is entirely devoid of any discussion of the considerations that would be critical in other circuits, such as the seriousness of the discriminatory conditions facing Ames – the amount of physical pain she would have experienced because she could not express her breast milk, the possible risks to her baby of doing so in a room the nurse had warned was unsanitary, the insistence that she complete eight weeks of work in two or be subject to certain discipline, and a manager pressing her to resign on the spot.

The Eighth Circuit decision in this case has been correctly understood in litigation in that circuit to reiterate the rule that constructive discharge claims are barred unless the plaintiff complained to her employer before resigning. "The Eighth Circuit recently explained ... 'an employee must give her employer a reasonable opportunity to resolve a problem before quitting.'" *Dixon v. Arkansas Dept. of Human Resources*, 2014 WL 5093833 at *3 (E.D.Ark.,

Oct. 9, 2014) (quoting *Ames*). The district court in *Dixon* dismissed the complaint for failure to state a claim because it did "not allege that [plaintiff] gave her employer a reasonable opportunity to resolve the problem before quitting." *Id.*

Nationwide asserts that in the Eighth Circuit a plaintiff's complaint to her employer is not "a threshold requirement for establishing constructive discharge." Br.Opp. 17. But in the courts below, Nationwide (correctly) described Eighth Circuit precedent in precisely the opposite manner. "Even if Plaintiff's working conditions were objectively intolerable because of sex or pregnancy discrimination and Defendants intended for her to quit or reasonably should have foreseen that she would, she cannot prevail unless she *also* can show she acted reasonably in giving Defendants time to remedy her complaints." Defendant-Appellees' Corrected Response Brief, 51 (emphasis added).[2] "[E]ven assuming [Ames] could establish that her working conditions were intolerable, Defendants would *still* be entitled to summary judgment on her claims of discrimination based on constructive discharge as the record is completely devoid of any evidence that Plaintiff gave Defendants an opportunity to address the conduct she alleges in support of her allegations of sex, pregnancy and/or nursing discrimination before tendering her resignation." Brief in Support of Nationwide Mutual Insurance Co.'s Motion for Summary Judgment, 35

[2] The brief is available at 2013 WL 1636508.

(emphasis added). "Plaintiff's undisputed failure to seek assistance through one of the several avenues Nationwide made available *independently* renders her constructive discharge claim insufficient as a matter of law." Defendant-Appellees' Corrected Response Brief, 17 (emphasis added).

Nationwide insisted in the court below that under Eighth Circuit precedents proof of intolerable conditions, and proof that a plaintiff had complained prior to resigning, are separate necessary elements of a constructive discharge claim. "Plaintiff has the burden of establishing ... three factors – (1) intolerability judged by an objective standard, (2) the intent [to force dismissal] element, and (3) that she afforded the employer a reasonable opportunity to respond." *Id.,* 27. Nationwide's appellate brief contained a four page section entitled "Plaintiff's undisputed failure to give Nationwide an opportunity to address her concerns was fatal to her constructive discharge claim." *Id.,* 50-54. That section was separate from and independent of the company's argument that the work conditions were not intolerable. *Id.,* 29-32. That distinct exhaustion requirement, Nationwide insisted, was in the Eighth Circuit a prerequisite to a constructive discharge claim. "An employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged." *Id.,* 26 (quoting *Tidwell v. Meyer's Bakeries, Inc.,* 93 F.3d 490, 494 (8th Cir. 1996)). "Our case law is unwavering in its commitment to the requirement that a plaintiff provide her employer with notice and the opportunity to remedy her complaints *before*

quitting." Brief in Support of Nationwide Mutual Insurance Co.'s Motion for Summary Judgment, 33 (emphasis in original). The prior-complaint requirement set out in and applied by the court of appeals below (Pet.App. 8a) was precisely the standard which Nationwide argued was mandated by Eighth Circuit precedent.

The description of Eighth Circuit precedent in Nationwide's court of appeals brief (unlike the very different account in the brief in opposition) is correct. The decision in the instant case was preceded by 35 earlier Eighth Circuit decisions holding that a constructive discharge claim is barred if the plaintiff has not first complained to his or her employer. We set out excerpts from each of those Eighth Circuit precedents in the Appendix. These deeply entrenched precedents emphatically insist that absence of such an internal complaint is fatal to a constructive discharge claim. "[C]onstructive discharge claims fail as a matter of law where the employee has not given the employer a reasonable opportunity to correct the intolerable condition before the employee quits." *Lisdahl v. Mayo Found.,* 633 F.3d 712, 719 (8th Cir. 2011). Many of these Eighth Circuit decisions hold that the existence of such a prior internal complaint is part of the legal definition of a constructive discharge. "An employee who quits without giving her employer a reasonable chance to work out a problem is not constructively discharged." *West v. Marion Merrell Dow, Inc.,* 54 F.3d 493, 497 (8th Cir. 1995). None of these cases suggests that the absence of such a complaint, rather than being a distinct and mandatory

ground for rejecting a constructive discharge claim, is (as Nationwide now contends) merely one factor to be considered only as part of some larger inquiry about whether the work conditions were intolerable.

The district courts in the Eighth Circuit understand the per se rule established by these decisions. In the instant case, for example, the district court explained that under controlling circuit precedent Ames was required to establish three distinct elements: that her working conditions were objectively intolerable, that Nationwide had the requisite mental state, and "that she gave Nationwide ... a reasonable chance to resolve the issues." Pet.App. 44a-45a. The district court assessed each of these elements separately, first the working conditions (*id.,* 46a-56a), then Nationwide's intent or knowledge (*id.,* 56a-57a), and finally whether Ames had afforded the defendants an "Opportunity to Respond." (*Id.,* 58a-60a). In that last section, the district judge reiterated that under Eighth Circuit precedent "[t]o prevail on her constructive discharge claim, Ames must show that she ... provided Defendants with an opportunity to address her grievances." (*Id*., 58a). The district court's understanding of Eighth Circuit precedent is consistent with that of other district courts in that circuit; we set out in the Appendix excerpts from two dozen other district court decisions in the Eighth Circuit dismissing constructive discharge claims because the plaintiff had failed to complain to his or her employer prior to resigning.

These Eighth Circuit precedents, and the decision in this case, conflict in two distinct ways with the law in other circuits. First, other circuits do precisely what the Eighth Circuit does not do (and did not do here): consider whether (or how much) a plaintiff complained to his or her employer, if at all, only together with other circumstances, particularly the nature of the discrimination and its impact on the workplace conditions. The very decisions cited by Nationwide illustrate that fundamental difference. See Br.Opp. 21. In *Clowes v. Allegheny Valley Hospital*, 991 F.2d 1159 (3d Cir. 1993), the Third Circuit took into consideration the plaintiff's failure to seek a particular type of redress from her employer only after emphasizing the minimal nature of the discrimination complained of. It noted, for example, that the plaintiff "was never threatened with discharge ... nor did her employer ever urge or suggest that she resign," 991 F.2d at 1161, two circumstances present in the instant case. The Third Circuit attached significance to the absence of an internal complaint only because "[i]n this case ... the evidence is lacking in other respects." 991 F.3d at 1162 n.6. Similarly, in *Boze v. Branstetter,* 912 F.2d 801 (5th Cir. 1990), the Fifth Circuit first emphasized the relatively inconsequential nature of the plaintiff's working conditions issues, and only then concluded that "[u]nder the prevailing circumstances" a reasonable person would not have resigned, but would instead have pursued the company's internal grievance procedure or filed a charge with EEOC. 912 F.2d at 805. In *Brown v. Ameritech Corp.*, 128 F.3d 605 (7th Cir. 1997), the Seventh Circuit explained that in a constructive

discharge case it would consider whether an employee had sought redress at the workplace only in the absence of "some kind of aggravating situation." 128 F.3d at 608.

Second, in the circuits in which the absence of an internal complaint is just one of several factors considered in determining whether a reasonable worker would have felt forced to resign, the courts generally treat that larger issue as a question for the trier of fact. Pet. 31-33. In the Eighth Circuit, however, as this case clearly illustrates, judges decide whether an employee took sufficient steps to seek redress from her employer. As Nationwide itself emphasizes, "the Eighth Circuit *concluded* that [contacting Nationwide's local HR personnel, Office of Ethics, and Office of Associates] would have been reasonable under the circumstances." Br.Opp. 20 (emphasis added and omitted).

CONCLUSION

The two questions presented are intertwined. The significance that should be attached to a plaintiff's failure to pursue an internal complaint would turn, in part, on the underlying standard of liability. If a plaintiff must prove the employer intended to force her to resign, it should ordinarily be irrelevant whether there was any such complaint. Proof of such an intent would mean the employer was trying to pressure the worker to quit – *rather than* complain –

and the success of that invidious scheme surely should not give rise to an affirmative defense that (as the employer intended) there was no internal complaint. On the other hand, if a plaintiff is required to show only that a reasonable person would have felt compelled to resign, whether a reasonable person might instead have complained to an official other than the discriminator would be a legitimate consideration.

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Eighth Circuit Decisions
Requiring Complaint To Employer
In Constructive Discharge Cases

Rester v. Stephens Media, LLC, 739 F.3d 1127, 1132 (8th Cir. 2014) ("To establish a case of constructive discharge, Rester must show [that she] grant[ed] her employer a reasonable opportunity to correct the intolerable condition before she terminates her employment.") (quoting *Wilkie v. Dep't of Health & Human Servs.,* 638 F.3d 944, 954 (8th Cir. 2011))

Sanders v. Lee County Sch. Dist. No. 1, 669 F.3d 888, 893 (8th Cir. 2012) ("an employee must give her employer a reasonable opportunity to resolve a problem before quitting.")

Wilkie v. Dep't of Health & Human Servs., 638 F.3d 944, 954 (8th Cir. 2011) ("An employee must ... grant her employer a reasonable opportunity to correct the intolerable condition before she terminates her employment.") (quoting *Anda v. Wickes Furniture Co.,* 517 F.3d 526, 534 (8th Cir. 2008))

Trierweiler v. Wells Fargo Bank, 639 F.3d 456, 460 (8th Cir. 2011) ("We have consistently recognized that an employee is not constructively discharged if she 'quits without giving [her] employer a reasonable chance to work out a problem.'") (quoting *Brenneman v. Famous Dave's of Am., Inc.,* 507 F.3d 1139, 1144 (8th Cir. 2007))

Lisdahl v. Mayo Found., 633 F.3d 712, 719 (8th Cir. 2011) ("constructive discharge claims fail as a matter

of law where the employee has not given the employer a reasonable opportunity to correct the intolerable condition before the employee quits.")

Alvarez v. Des Moines Bolt Supply, Inc., 626 F.3d 410, 418 (8th Cir. 2010) ("An employee is not constructively discharged ... if she quits 'without giving her employer a reasonable chance to work out a problem.'") (quoting *Coffman v. Tracker Marine, L.P.,* 141 F.3d 1241, 1247 (8th Cir. 1998))

Anda v. Wickes Furniture Co., 517 F.3d 526, 534 (8th Cir. 2008) ("An employee must ... grant [her] employer a reasonable opportunity to correct the intolerable conditions before [she] terminates [her] employment.") (quoting *Turner v. Honeywell Fed. Mfg. & Techs., LLC,* 336 F.3d 716, 724 (8th Cir. 2003))

Brenneman v. Famous Dave's of Am., Inc., 507 F.3d 1139, 1144 (8th Cir. 2007) ("An employee who quits without giving [her] employer a reasonable chance to work out a problem has not been constructively discharged.") (quoting *Duncan v. Gen. Motors Corp.,* 300 F.3d 928, 935 (8th Cir. 2002))

Vajdl v. Mesabi Acad. of Kidspeace, Inc., 484 F.3d 546, 552 (8th Cir. 2007) ("An employee who quits without giving her employer a reasonable chance to work out a problem is not constructively discharged.") (quoting *West v. Marion Merrell Dow, Inc.,* 54 F.3d 493, 497 (8th Cir. 1995))

Fischer v. Andersen Corp., 483 F.3d 553, 558 (8th Cir. 2007) ("[a]n employee who quits without giving [his]

employer a reasonable chance to work out a problem has not been constructively discharged.") (quoting *Phillips v. Taco Bell Corp.,* 156 F.3d 884, 890 (8th Cir. 1998))

Thompson v. Bi-State Dev. Agency, 463 F.3d 821, 825 (8th Cir. 2006) ("An employee who quits without giving her employer a reasonable chance to work out a problem is not constructively discharged.") (quoting *West*)

Davis v. KARK-TV, Inc., 421 F.3d 699, 706 (8th Cir. 2005) ("An employee who quits without giving [her] employer a reasonable chance to work out a problem has not been constructively discharged.") (quoting *Tidwell v. Meyer's Bakeries, Inc.,* 93 F.3d 490, 494 (8th Cir. 1996))

Davison v. City of Lone Jack, Mo., 121 Fed.Appx. 671, 673 (8th Cir. 2005) ("An employee who resigns without giving the employer a reasonable chance to resolve a problem has not been constructively discharged.")

Baker v. John Morrell & Co., 382 F.3d 816, 829 (8th Cir. 2004) ("[a]n employee who quits without giving her employer a reasonable chance to work out a problem is not constructively discharged.") (quoting *West*)

Pedigo v. Nat'l Cart Co., Inc., 95 Fed.Appx. 847, 849 (8th Cir. 2004) ("An employee who quits without giving his employer a reasonable chance to correct a problem has not been constructively discharged.")

Tenkku v. Normandy Bank, 348 F.3d 737, 743 (8th Cir. 2003) ("[a]n employee who quits without giving her employer a reasonable chance to work out a problem is not constructively discharged.") (quoting *West*)

Turner v. Honeywell Fed. Mfg. & Techs., LLC, 336 F.3d 716, 724 (8th Cir. 2003) ("An employee must ... grant [his] employer a reasonable opportunity to correct the intolerable conditions before [he] terminates [his] employment.") (quoting *Henderson v. Simmons Foods, Inc.,* 217 F.3d 612, 617 (8th Cir. 2000))

Duncan v. Gen. Motors Corp., 300 F.3d 928, 935 (8th Cir. 2002) ("An employee who quits without giving [her] employer a reasonable chance to work out a problem has not been constructively discharged.") (quoting *Summit v. S-B Power Tool,* 121 F.3d 416, 421 (8th Cir. 1997))

Jaros v. Lodgenet Ent. Corp., 294 F.3d 960, 964 (8th Cir. 2003) ("[For an employer] [t]o be liable ... the employee must have given it a reasonable opportunity to fix the problem.")

Campos v. City of Blue Springs, Mo., 289 F.3d 546, 550-51 (8th Cir. 2002) ("To be reasonable, an employee must give her employer a reasonable opportunity to correct the problem.") (quoting *Jackson v. Arkansas Dept. of Educ., Vocational and Technical Educ. Div.,* 272 F.3d 1020, 1026 (8th Cir. 2001))

Jackson v. Arkansas Dept. of Educ., Vocational and Tech. Educ. Div., 272 F.3d 1020, 1027 (8th Cir. 2001) ("To be reasonable, an employee must give her employer a reasonable opportunity to correct the problem.")

Willis v. Henderson, 262 F.3d 801, 810 (8th Cir. 2001) ("[a]n employee who quits without giving her employer a reasonable chance to work out a problem is not constructively discharged.") (quoting *West*)

Sowell v. Alumina Ceramics, Inc., 251 F.3d 678, 685 (8th Cir. 2001) ("Th[e] evidence is insufficient ... for two reasons.... Second, Sowell quit without giving Alumina a reasonable chance to work out the alleged problem.... Sowell complained ... on June 9 ... , but she took no further steps.")

Henderson v. Simmons Foods, Inc., 217 F.3d 612, 617 (8th Cir. 2000) ("An employee must ... grant her employer a reasonable opportunity to correct the intolerable conditions before she terminates her employment.")

Tork v. St. Luke's Hosp., 181 F.3d 918, 920 (8th Cir. 1999) ("An employee who quits without giving [the] employer a reasonable chance to work out a problem has not been constructively discharged.") (quoting *Tidwell*)

Phillips v. Taco Bell Corp., 156 F.3d 884, 890 (8th Cir. 1998) ("[a]n employee who quits without giving [her] employer a reasonable chance to work out a problem

has not been constructively discharged.") (quoting *Summit*)

Bergstrom-Ek v. Best Oil Co., 153 F.3d 851, 858 (8th Cir. 1998) ("If an employee quits without giving her employer a reasonable chance to work out the problem, the employee is not constructively discharged.")

Howard v. Burns Bros., Inc., 149 F.3d 835, 841 (8th Cir. 1998) ("If an employee quits without giving her employer a reasonable chance to work out a problem, then she has not been constructively discharged.") (quoting *Coffman*)

Knowles v. Citicorp Mortgage, Inc., 142 F.3d 1082, 1086 (8th Cir. 1998) ("[a]n employee who quits without giving [the] employer a reasonable chance to work out a problem has not been constructively discharged.") (quoting *Tidwell*)

Coffman v. Tracker Marine, L.P., 141 F.3d 1241, 1247 (8th Cir. 1998) ("If an employee quits without giving her employer a reasonable chance to work out a problem, then she has not been constructively discharged.")

Summit v. S-B Power Tool, 121 F.3d 416, 421 (8th Cir. 1997) ("An employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged.") (quoting *Tidwell*)

Hanenburg v. Principal Mut. Life Ins. Co., 118 F.3d 570, 575 (8th Cir. 1997) ("the employee must give her

employer a reasonable opportunity to work out the problems prior to resigning.")

Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 574 (8th Cir. 1997) ("An employee must give an employer a reasonable opportunity to work out a problem before quitting.")

Tidwell v. Meyer's Bakeries, Inc., 93 F.3d 490, 494 (8th Cir. 1996) ("An employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged.")

West v. Marion Merrell Dow, Inc., 54 F.3d 493, 497 (8th Cir. 1995) ("An employee who quits without giving her employer a reasonable chance to work out a problem is not constructively discharged.")

District Court Decisions In The Eighth Circuit Dismissing Constructive Discharge Claims For Failure To Complain To Employer

Dixon v. Arkansas Dept. of Human Res., 2014 WL 5093833 at *3 (E.D.Ark. Oct. 9, 2014) ("an employee must give her employer a reasonable opportunity to resolve a problem before quitting" (quoting *Ames*); dismissing complaint for failure to state a claim because it did "not allege that [plaintiff] gave her employer a reasonable opportunity to resolve the problem before quitting")

Martin v. Champion Ford, Inc., 2014 WL 4258127 at *13-14 (N.D.Iowa Aug. 28, 2014) ("'[A]n employee must give [his or] her employer a reasonable opportunity to resolve a problem before quitting'.... [Plaintiff has to prove that he gave Champion the opportunity to resolve the problem before quitting. As a matter of law, Martin has failed to make ... the[ ] required showing.... [I]t is undisputed that Martin left his employment ... without giving Champion the opportunity to address the incident.") (quoting *Sanders v. Lee Cnty. Sch. Dist. No. 1,* 669 F.3d 888, 893 (8th Cir. 2012))

EEOC v. PMT Corp., 2014 WL 4231401 at *4 (D.Minn. Aug. 27, 2014) ("'[C]onstructive discharge claims fail as a matter of law where the employee has not given the employer a reasonable opportunity to correct the intolerable condition before the employee quits'.... [T]he EEOC does not allege any facts suggesting that Lebens gave PMT an opportunity to

correct the allegedly intolerable conditions before resigning. As a result, the EEOC cannot state a claim for constructive discharge.") (quoting *Lisdahl v. Mayo Found.,* 663 F.3d 712, 719 (8th Cir. 2011))

Riley v. Outlook Nebraska, Inc., 2014 WL 4656113 at *4 (D.Neb. July 1, 2014) ("'[A]n employee must give her employer a reasonable opportunity to resolve a problem before quitting.' ... [T]he court finds that the plaintiff failed to give the defendant an opportunity to cure the [conditions complained of].") (quoting *Sanders*)

Torrence v. CMC Steel Fabricators, Inc., 2014 WL 827876 at *3 (W.D.Ark. March 4, 2014) ("[A]n employee must give his employer a reasonable opportunity to resolve a problem before quitting.... Plaintiff did not provide Defendant with an adequate opportunity to remedy any alleged intolerable working conditions.") (citing *Sanders*).

Atem v. Accurate Homecare, LLC, 2013 WL 5406687 at *6-*7 (D.Minn. Sept. 25, 2013) ("'[C]onstructive discharge claims fail as a matter of law where the employee has not given the employer a reasonable opportunity to correct the intolerable conditions before the employee quits.' ... Atem fails to allege ... any facts that support an inference that she gave Accurate an opportunity to correct the conditions she objected to prior to resigning.") (quoting *Lisdahl*)

Hopkins v. County of Douglas, Neb., 2013 WL 991555 at *7 (D.Neb. March 13, 2013) ("[']An employee must ... grant her employer a reasonable opportunity to

correct the intolerable condition before she terminates her employment.[’] ... [T]he uncontroverted evidence shows that Hopkins had many formal channels within DCDC through which she could voice her grievances and seek redress, and she chose to use none of them.”) (quoting *Anda v. Wickes Furniture Co.,* 517 F.3d 526, 534 (8th Cir. 2008))

Clay v. Lafarge North America, 985 F.Supp.2d 1009, 1038-39 (S.D.Iowa 2013) (“‘To be reasonable, an employee must give [his] employer a reasonable opportunity to correct the problem.” ... Clay largely hinders his own claim by having failed to report the incidents of harassment, thereby denying Lafarge the opportunity to remedy the situation. Even when reported, Clay omitted the names of the offenders and dates of occurrence, further preventing prompt remedial action.”) (quoting *Jackson v. Ark. Dep’t of Educ.,* 272 F.3d 1020, 1027 (8th Cir. 2001))

Boddicker v. Esurance, Inc., 758 F.Supp.2d 898, 906 (D.S.D. 2010) (“‘[A]n employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged.’ ... Because Boddicker failed to give Esurance a reasonable opportunity to address his concerns before he quit, his constructive discharge claim fails.”) (quoting *Duncan v. Gen. Motors Corp.,* 300 F.3d 928, 935 (8th Cir. 2002))

Lisdahl v. Mayo Found., 698 F.Supp.2d 1081, 1108-09 (D.Minn. 2010) (“‘An employee must ... grant [his] employer a reasonable opportunity to correct the

intolerable condition before [he] terminates [his] employment.' ... Lisdahl's constructive discharge claim is precluded by his failure to provide [his employer] with a reasonable opportunity to correct the circumstances that, Lisdahl now claims, forced him to quit his employment....") (quoting *Anda*)

Bishop v. Tyson Foods, Inc., 660 F.Supp.2d 1004, 1023-24 (W.D.Ark. 2009) ("An employee must ... allow the employer a reasonable opportunity to correct the intolerable situation before he resigns.... Bishop did not give Tyson time to correct the alleged intolerable condition.") (citing *Turner v. Honeywell Mfg. & Techs., LLC,* 336 F.3d 716, 724 (8th Cir. 2003))

Pittman v. Ripley County Memorial Hosp., 2009 WL 1738491 at *10 (E.D.Mo. June 18, 2009) ("'An employer must ... grant [her] employer a reasonable opportunity to correct the intolerable condition before [she] terminates [her] employment.' ... [P]laintiff did not give [the employer] any time to correct the allegedly intolerable condition....") (quoting *Turner*)

Tobar v. Arkansas Dep't of Educ., 2009 WL 1286298 at *3 (E.D.Ark. May 7, 2009) ("'To be reasonable, an employee must give her employer a reasonable opportunity to correct the problem.' ... Tobar ... never filed any formal complaints or grievances with her employer regarding this treatment....") (quoting *Jackson v. Arkansas Dep't of Educ.,* 272 F.3d 1020, 1026 (8th Cir. 2001))

Schaack v. ABCM Corp., 2009 WL 1269907 at *6 (N.D.Iowa May 5, 2009) ("Plaintiff did not give

Defendant an adequate opportunity to resolve Plaintiff's perceived scheduling problems.... 'An employee who quits without giving her employer a reasonable chance to work out a problem is not constructively discharged.'") (quoting *West v. Marion Merrell Dow, Inc.,* 54 F.3d 493, 498 (8th Cir. 1995))

Bush v. Penske Truck Leasing Co., 2007 WL 1321853 at *8 (D.Minn. May 4, 2007) ("'[A]n employee who quits without giving her employer a reasonable chance to work out a problem is not constructively discharged.' ... Bush's claim that she was constructively discharged fails because she did not provide Penske with a reasonable opportunity to correct the problem.") (quoting *West*)

Anda v. Wickes Furniture Co., Inc., 2007 WL 128940 at *6 (D.Minn. Jan. 16, 2007) ("Anda resigned suddenly without giving Wickes a sufficient opportunity to remedy the alleged harassment.... [A]n employee who quits without giving her employer a reasonable opportunity to work out the problem is not constructively discharged.") (citing *West*)

Vajdl v. Mesabi Acad. of Kidspeace, Inc., 2006 WL 1283894 at *11-*12 (D.Minn. May 10, 2006) ("Constructive discharge does not occur when an employee quits without giving the employer a reasonable opportunity to resolve the issue.... [T]he court finds that [plaintiff] did not give Mesabi Academy a reasonable time to investigate or respond.") (citing *West*)

Scott v. Canadian Nat'l Rwy. Co., 2006 WL 399692 at *9 (D.Minn. Feb. 17, 2006) ("An employee must

provide the employer a reasonable opportunity to resolve the 'unreasonable working condition[s]' before terminating his employment.... Scott never told [the employer] that he felt he was being harassed or threatened. Thus, Defendant did not have the opportunity to address Scott's perceived issues.") (quoting *Henderson v. Simmons Foods, Inc.,* 217 F.3d 612, 617 (8th Cir. 2000))

Nowers v. Gazette Communications, Inc., 2004 WL 42640 at *8-*9 (N.D.Iowa Jan. 8, 2004) ("'An employee must ... grant [his] employer a reasonable opportunity to correct the intolerable condition before [ ] he terminates [his] employment.' ... Nowers' constructive discharge claim must fail because Nowers failed to give the Gazette a reasonable opportunity to remedy the problems he perceived.") (quoting *Henderson*)

Josephson v. Kimco Corp., 240 F.Supp.2d 1000, 1011-12 (S.D.Iowa 2003) ("The employer is entitled to a reasonable opportunity to work out the problem.... [I]t would be difficult to sustain a finding that Josephson gave Kimco a reasonable opportunity to work out the difficulties she felt she had with [her supervisor].") (citing *Duncan*)

Wensel v. State Farm Mut. Auto. Ins. Co., 218 F.Supp.2d 1047, 1067 ("*Knowles* supports this court's conclusion that Wensel's failure to ... apprise State Farm of her concerns that she was being discriminated against deprived State Farm of any opportunity to address the alleged discrimination, and this failure precludes her from claiming that she was

constructively discharged.") (citing *Knowles v. Citicorp Mortgage, Inc.*, 142 F.3d 1082 (8th Cir. 1998)

Stice v. Dentsply Int'l, 2002 WL 273155 at *7-*8 (D.Minn. Feb. 25, 2002) ("A plaintiff must provide the employer a reasonable opportunity to resolve the 'unreasonable working condition[s]' before terminating his employment.... There is no evidence that Stice made any attempt to notify Defendant of the actions that he perceived to be in retaliation for his involvement in the investigation.") (quoting *Henderson*)

Reichensperger v. Election Sys. & Software, Inc., 2001 WL 1426702 at *6 (D.Minn. Nov. 13, 2001) ("Plaintiff quit without giving Defendant a reasonable opportunity to solve the problem.... [I]f [an] employee quits without giving [the] employer a reasonable chance to work out a problem, then [the] employee has not been constructively discharged.") (citing *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1247 (8th Cir. 1998))

Klein v. McGowan, 36 F.Supp.2d 855, 890 (D.Minn. 1999) ("Even if Plaintiff had proved that the conditions at the Division were intolerable, however, he still cannot succeed on his claim of constructive discharge. To establish constructive discharge, Plaintiff must also show that he gave his employer a reasonable opportunity to work out the problems prior to resigning.... Plaintiff has failed to come forward with any evidence that he gave his employer this opportunity.") (citing *Phillips v. Taco Bell Corp.,* 156 F.3d 884, 890 (8th Cir. 1998))