No. 14-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pennsylvania State Police v. Suders, 542 U.S. 129, 141 (2004), held that a plaintiff can establish a constructive discharge in violation of Title VII by showing that discrimination created "conditions ... so intolerable that a reasonable person in the employee's position would have felt compelled to resign." The circuit courts are divided as to whether a plaintiff must also establish either or both of two additional elements. The questions presented are:

(1) In a constructive discharge case, must the plaintiff also prove that the employer acted with the intent of forcing the plaintiff to resign?

(2) In a constructive discharge case, must the plaintiff also prove that before resigning he or she complained sufficiently to the employer about the discrimination?

PARTIES

The petitioner is Angela Ames. The respondents are Nationwide Mutual Insurance Co., Nationwide Advantage Mortgage Co., and Karla Neel.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	11
I. The Courts of Appeals Are Divided Regarding Whether In A Constructive Discharge Case The Plaintiff Must Prove That The Employer Intended To Force The Worker To Resign	12
A. Three Circuits Impose That Requirement	13
B. Six Circuits Have Rejected This Requirement	17
C. The Circuit Conflict Is Well Recognized	23
II. The Courts of Appeals Are Divided Regarding Whether In A Constructive Discharge Case The Worker Must Complain To Her Employer Prior To Resigning	25
A. The Eighth Circuit Imposes Such An Exhaustion Requirement	26

TABLE OF CONTENTS – Continued

Page

B. Several Circuits Have Rejected Such An Exhaustion Requirement..... 30

III. The Decision of The Court of Appeals Is Incorrect 33

Conclusion..... 38

APPENDIX

Opinion of the United States Court of Appeals, June 26, 2014 .....1a

Opinion of the District Court for the Southern District of Iowa, October 16, 2012.....17a

Order of the United States Court of Appeals, June 26, 2014 .....73a

Statutory Provisions Involved.....77a

TABLE OF AUTHORITIES

Page

CASES

Alliance Metals, Inc. v. Hinely Industries, Inc., 222 F.3d 895 (11th Cir. 2000).....20

Anda v. Wickes Furniture Co., 517 F.3d 526 (8th Cir. 2008) 15

Aubucon v. Geithner, 734 F.3d 638 (8th Cir. 2014) 15

Bourque v. Powell Electrical Mfg. Co., 617 F.2d 61 (5th Cir. 1980) 19, 20, 21, 22, 23

Boze v. Branstetter, 912 F.2d 801 (4th Cir. 1990) 20

Brady v. Elixir Industries, 196 Cal.App.3d 1299 (4th Dist. 1987) 24

Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985) 13, 22

Burlington Northern & Santa Fe Rwy. Co. v. White, 548 U.S. 53 (2006) 35

Calhoun v. Acme Cleveland Corp., 798 F.2d 559 (1st Cir. 1986).....13, 18

Clark v. Marsh, 665 F.2d 1168 (D.C.Cir. 1981)....22, 23

Clowes v. Allegheny Valley Hospital, 991 F.2d 1159 (3d Cir. 1993) 30, 31

Coffman v. Tracker Marine, L.P., 141 F.3d 1241 (8th Cir. 1998) 27

Cole v. May Dept. Stores Co., 109 Fed.Appx. 839 (8th Cir. 2004) 14

TABLE OF CONTENTS – Continued

Page

Derr v. Gulf Oil Corp., 796 F.2d 340 (10th Cir. 1986) 22

Devin v. Schwan's Home Service, Inc., 491 F.3d 778 (8th Cir. 2007) 15

EEOC v. City of Independence, 471 F.3d 891 (8th Cir. 2006) 15

EEOC v. Delight Wholesale Co., 973 F.2d 664 (8th Cir. 1992) 14

EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983), *rev'd on other grounds*, 467 U.S. 867 (1984) 15

Ejikeme v. Violet, 307 Fed.Appx. 944 (6th Cir. 2009) 16

Elnashar v. Speedway Superamerica, LLC, 484 F.3d 1046 (8th Cir. 2007) 15

Freeman v. Dal-Tile Corp., 750 F.3d 413 (4th Cir. 2014) 13, 15, 17

Goldfaden v. Wyeth Laboratories, Inc., 482 Fed.Appx. 44 (6th Cir. 2012).....16

Goss v. Exxon Office Systems Co., 747 F.2d 885 (3d Cir. 1984).....18, 19, 22, 23

Hailstone v. Veda, Inc., 1997 WL 331793 (4th Cir. June 18, 1997).....17

Harris v. Forklift Co., 510 U.S. 17 (1993).....35

Hervey v. City of Little Rock, 787 F.2d 1223 (8th Cir. 1986) 14

TABLE OF CONTENTS – Continued

Page

Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180 (4th Cir. 2004) 15

Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C.Cir. 1987).....23

Jeffries v. Kansas, 147 F.3d 1220 (10th Cir. 1998) 22

Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981) 14, 19

Johnson v. Rumsfeld, 238 Fed.Appx. 105 (6th Cir. 2007) 16

Johnson v. Shalala, 991 F.2d 126 (4th Cir. 1993) 13

Junior v. Texaco, Inc., 688 F.2d 377 (5th Cir. 1982) 20

Jurgens v. EEOC, 903 F.2d 386 (5th Cir. 1990).....20

Keller v. Crown Cork & Seal USA, Inc., 491 Fed.Appx. 908 (10th Cir. 2012).....22

Knowles v. Citicorp Mortgage, Inc., 142 F.3d 1082 (8th Cir. 1998) 27

Lamb v. City of Sweetwater Housing Authority, 1993 WL 3471999 (5th Cir. Aug. 19, 1993) 20

Lauture v. Saint Agnes Hospital, 429 Fed.Appx. 300 (4th Cir. 2011).....16

Levendos v. Stern Entertainment, Inc., 860 F.2d 1227 (3d Cir. 1988).....18, 19

Levendos v. Stern Entertainment, Inc., 909 F.3d 747 (3d Cir. 1990).....18

TABLE OF CONTENTS – Continued

Page

Lewis v. Oregon Beauty Supply Co., 714 P.2d 618 (Or. App. 1986) 24

Lindale v. Tokheim Corp., 145 F.3d 953 (7th Cir. 1998) 32

Logan v. Denny's, Inc., 259 F.3d 558 (6th Cir. 2001) 17

Lojek v. Thomas, 716 F.2d 675 (9th Cir. 1983) 13, 21

Martin v. Cavalier Hotel Corp., 48 F.3d 1343 (4th Cir. 1995) 16

Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261 (2001) 15

Meyers v. Nebraska Health and Human Services, 324 F.3d 655 (8th Cir. 2003).....14

Moisant v. Air Midwest, Inc., 291 F.3d 1028 (8th Cir. 2002) 14

Moore v. Kuka Welding Systems, 171 F.3d 1073 (6th Cir. 1999) 16

Nance v. Goodyear Tire & Rubber Co., 527 F.3d 539 (6th Cir. 2008) 13, 17

Nolan v. Cleland, 686 F.2d 806 (9th Cir. 1982) 20, 21

Pennsylvania State Police v. Suders, 542 U.S. 129 (2004) .....*passim*

Pittman v. Hattiesburg Municipal Separate School Dist., 644 F.2d 1071 (5th Cir. Unit A, 1981) 20

Poland v. Chertoff, 494 F.3d 1174 (9th Cir. 2007)..... 21

TABLE OF CONTENTS – Continued

Page

Pribil v. Archdiocese of St. Paul and Minneapolis, 533 N.W.2d 410 (Ct. App. Minn. 1995).....23

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).....23

Ramos v. Davis & Geck, 167 F.3d 759 (1st Cir. 1999).....17, 18

Satterwhite v. Smith, 744 F.2d 1380 (9th Cir. 1984).....13, 21

Savage v. Gee, 665 F.3d 732 (6th Cir. 2012).....13, 16

Schwago v. Spradlin, 701 F.2d 470 (5th Cir. 1983).....20

Simpson v. Federal Mine Safety and Health Review Commission, 842 F.2d 453 (D.C.Cir. 1988).....13, 23

Smith v. Goodyear Tire & Rubber Co., 895 F.2d 467 (8th Cir. 1990).....14

Sowell v. Alumina Ceramics, Inc., 251 F.3d 678 (8th Cir. 2001).....28, 29

Spears v. Missouri Dept. of Corrections and Human Resources, 210 F.3d 850 (8th Cir. 2000).....14

Suders v. Easton, 325 F.3d 432 (3d Cir. 2003).....18, 30, 31

Tatum v. City of Berkeley, 408 F.3d 543 (8th Cir. 2005).....14

Taylor v. Cheney, 1990 WL 1112830 (Office of Fed. Ops.).....12

Taylor v. Virginia Union University, 193 F.3d 219 (4th Cir. 1999).....13, 15

TABLE OF CONTENTS – Continued

Page

Tepper v. Potter, 505 F.3d 508 (6th Cir. 2007) 16

Tidwell v. Meyer's Bakeries, Inc., 93 F.3d 490 (8th Cir. 1996) 26, 27

Tork v. St. Luke's Hospital, 181 F.3d 918 (8th Cir. 1999) 28

Tran v. Trustees of the State Colleges of Colorado, 355 F.3d 1263 (10th Cir. 2004) 22

Trierweiler v. Wells Fargo Bank, 639 F.3d 456 (8th Cir. 2011) 29

Turnwall v. Trust Co. of America, 146 Fed.Appx. 983 (10th Cir. 2005) 13

Vallecillo v. U.S. Dep't of Housing and Urban Dev., 154 Fed.Appx. 764 (5th Cir. 2005) 20

Watson v. City of Cleveland, 220 Fed.Appx. 844 (6th Cir. 2006) 16

Watson v. Nationwide Ins. Co., 823 F.2d 360 (9th Cir. 1987) 21

Wilkie v. Dept. of Health and Human Servs., 638 F.3d 944 (8th Cir. 2011) 15

Young v. Southwestern Savings and Loan Ass'n, 509 F.2d 140 (5th Cir. 1975) 32, 33

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. I 13

U.S. Const., amend. XIV 13

TABLE OF CONTENTS – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 1
42 U.S.C. § 1981 13
42 U.S.C. § 1981a(b)(1) 34
42 U.S.C. § 1981a(b)(3) 35
42 U.S.C. § 2000e 34
42 U.S.C. § 2000e-2(a)(1) 34
42 U.S.C. § 2000e-5(b) 36
42 U.S.C. § 2000e-5(c) 36
42 U.S.C. § 2000e-5(c)(1) 36
Age Discrimination in Employment Act 13
Americans with Disabilities Act 13
Employee Retirement Income Security Act 13
Family and Medical Leave Act 3, 13
Federal Mine Safety and Health Act 13
Rehabilitation Act 13
Section 701, Civil Rights Act of 1964 34
Section 703(a), Civil Rights Act of 1964 34
Section 706(c), Civil Rights Act of 1964 36
Title VI, Civil Rights Act of 1964 13
Title VII, Civil Rights Act of 1964 ..... 13, 17, 34, 35

TABLE OF CONTENTS – Continued

Page

OTHER AUTHORITIES

Cathy Shuck, Comment, *"That's It, I Quit" Returning to First Principles in Constructive Discharge Doctrine*, 23 Berkeley J.Emp.&Lab.L. 401 (2002) 25

EEOC Commission, Decision No. 84-1, 33 FED Cas. (BNA) 1887 (E.E.O.C.), 1983 WL 22487 17

Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S.Cal.L.Rev. 307 (2004) 25

Sheila Finnegan, Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U.Chi.L.Rev. 561 (1986) 25

Petitioner Angela Ames respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on June 26, 2014.

OPINIONS BELOW

The June 26, 2014 opinion of the court of appeals, which is unofficially reported at 2014 WL 2884081 (8th Cir. June 26, 2014), is set out at pp. 1a-16a of the Appendix.[1] The June 26, 2014 order of the court of appeals, regarding Ames' petition for rehearing en banc of the March 13 opinion, is set out at pp. 17a-72a of the Appendix. The October 16, 2012 opinion of the district court, which is not officially reported, is set out at pp. 73a-76a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on June 26, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] An opinion of the court of appeals issued on March 13, 2014, but subsequently withdrawn, is reported at 747 F.3d 509 (8th Cir. 2014).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set out at p. 77a of the Appendix.

STATEMENT OF THE CASE

Pennsylvania State Police v. Suders, 542 U.S. 129, 141 (2004), held that discrimination that is sufficiently serious can give rise to a claim for constructive discharge. This case presents two important legal issues – and circuit conflicts – about such claims.

(1) Angela Ames worked for several years as a loss mitigation specialist for Nationwide Insurance. On July 19, 2010, following the birth of her second child, Ames returned to work. Within three hours of her return, she resigned. Ames contends that the actions of Nationwide officials amounted to a constructive discharge. There is sharply conflicting testimony about what occurred during that three hour period. App. 20a. Applying well-established Eighth Circuit precedents, however, both the district court and the court of appeals concluded that Nationwide was entitled to summary judgment. The questions presented concern the correctness of those Eighth Circuit precedents.

During Ames' pregnancy, she had medical complications and was ordered to bed rest. "When Ames discussed her bed rest with [Vice President] Neel [, the manager of her unit], Neel rolled her eyes and

said that she never had to go on bed rest when she was pregnant and that she never had complications with her pregnancies." *Id.*[2] Ames' direct supervisor, Brian Brincks,[3] "remarked to others in the office about Ames's impending 2010 maternity leave, stating, 'Oh, yeah, I'm teasing her about only taking a week's worth of maternity leave. We're too busy for her to take off that much work.'" *Id*.

Ames delivered her second child prematurely in May 2010. Nationwide initially told her that she could remain on leave until August. In June, however, Neel called Ames to tell her that Ames was entitled to remain on leave under the Family and Medical Leave Act only until mid-July. Neel suggested that Ames might be able to remain on leave longer, but warned her against doing so. "Neel ... told Ames that ... doing so would 'cause[ ] red flags,' that she '[didn't] want there to be any problems like that,' and that she '[didn't] want there to be any issues down the road.'" *Id.*

While Ames was still home recovering from childbirth, she was assigned a Nationwide disability case manager to provide her with needed information.

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[2] "Ames testified that Neel also commented regarding Ames's pregnancy ... '"I never had this many problems when I was pregnant. All I needed was a pocketful of Tums, and I was good to go."'" App. 48a.

[3] The lower court opinions mistakenly spell his name "Brinks." We use the correct spelling in quotations from the opinions below.

Because Ames was nursing her baby, she "asked [the] Nationwide disability case manager where she could express milk when she returned to work and was told that she could use a lactation room." App. 4a.

> Ames returned to work on July 19, 2010, when her son was ... breastfeeding every three hours. By the time Ames arrived at work that morning, more than three hours had passed since her son had last nursed. Ames asked Neel about using a lactation room. Neel replied that it was not her responsibility to provide Ames with a lactation room. Ames then went to the security desk to inquire about lactation rooms and was directed to see Sara Hallberg, the company nurse.

App. 4a.

Ames and Hallberg gave sharply conflicting accounts of their meeting. According to Ames, Hallberg told her that in order to use a lactation room Ames had to complete certain "paperwork" and then "that there was a three-day waiting period while the paperwork was processed." CA App. 467. Hallberg, on the other hand, insisted she could have arranged for Ames to pump in a lactation room, but that all those rooms were occupied and in use at the time.[4]

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[4] Hallberg explained:

> I would have asked her if she had access to the Lotus notes scheduler, it's the e-mail system they use, or if she had badge access, to which she replied no.... I explained to her that those two things were necessary.... So I sent an e-mail to security asking for her badge access, and I believe I called them as well, ... and

(Continued on following page)

The documentary evidence supported Hallberg's statement that Ames – with Hallberg's assistance – could have had access to any vacant lactation room.[5] The lactation room calendars, however, indicated that a lactation room was in fact vacant at the time.[6]

Ames and Hallberg also discussed the possibility of Ames using a company "wellness room," which is available to any company employee. "Ames asserts that Hallberg advised her not to express milk in a

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> then I offered her – then I looked at the [Lotus Notes] scheduler because I have access to that to see if there was any open rooms, lactation rooms, and there was not....

CA App. 141.

[5] The "Des Moines Lactation Program" explained that use of a lactation room involved two issues.

To obtain access to the locked lactation rooms, an employee needs to email or telephone Corporate Security, which could then validate their badge for the lock on the door. CA App. 231. A worker without such a badge could "request a temporary badge from Security." A badge would open a lactation room any time someone else was not using it. CA App. 58, 170.

To reserve one of the lactation rooms at a specific time, a worker needed to use Lotus Notes, an on-line scheduling program. To do that, a worker had to provide her name and ID number to a designated official; the processing of the request for access to the on-line scheduler "usually takes three business days." CA App. 231. The delay described in the Program was only in getting access to the on-line scheduler – to which Hallberg herself already had access – not in getting a validated or temporary badge.

[6] While (or after) meeting with Ames, Hallberg sent two emails, at 10:16 a.m. and 10:17 a.m. CA App. 230 and 175. One lactation room was available from 10:00 to 10:30 a.m. and another from 10:30 to 11:00 a.m. CA App. 245 and 247.

wellness room because her milk may be exposed to germs." App. 21a n.13.[7] "Ames alleges that Hallberg told her ... 'the lock ... was broken, so if [Ames] wanted any semblance of privacy, [she] would need to put a chair against the door and sit in it while [she] pumped, so that anyone trying to come in would strike [her] chair with the door and hopefully be discouraged from entering.'" App. 21a n.15. Hallberg denied having warned Ames about using the wellness room. App. 21a nn.13 and 15. According to Ames, Hallberg stated that the wellness room could not be used anyway, because a sick employee was already there, although it "might" be available later.[8] Hallberg insisted, to the contrary, that she personally escorted Ames to the wellness room, which was unoccupied.[9] The parties agree only that Ames did not use the wellness room.[10]

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[7] "[Hallberg] told me that they normally don't want nursing mothers to use the wellness rooms because 'they're for sick people and the milk could be exposed to illnesses and we can't promise your milk will be safe.'" CA App. 467. "Hallberg warned Ames that lactating in a wellness room might expose her breast milk to germs." App. 5a.

[8] "Mrs. Sagers told me that I might be able to use the wellness room if I returned in 15 to 20 minutes because a sick person was currently using the room...." CA App. 156.

[9] CA App. 142.

[10] Hallberg stated that she offered to let Ames pump in the clinic office. CA App. 142-44. Ames denied that Hallberg had made that offer. "Ms. Hallberg never offered to let me pump in her office...." CA App. 516.

With the lactation problem still unresolved, and in increasing pain, Ames returned to her work area, where she met with her supervisor. Ames and Brincks disagree about what Brincks said. "Ames alleges that, during that meeting, Brin[c]ks told her that none of her work had been done while she was on maternity leave, that she had two weeks to catch up, and that she had to work overtime to do so.... Also, Brin[c]ks allegedly told Ames that she would be formally disciplined unless she was completely caught up on her work in two week's time." App. 55a-56a (footnote omitted); *see* App. 5a. It would presumably have been extremely difficult if not impossible for Ames to do in two weeks all the work that had come in during her eight week pregnancy leave. But Brincks denied having said that her work had not been done, and insisted he would never order an employee to work overtime.[11]

"After meeting with Brin[c]ks, Ames returned to Neel's office to see if Neel could help her find a place to lactate. Neel again told Ames that she was unable to help. Neel testified that Ames was visibly upset and in tears. Neel then handed Ames a piece of paper and a pen and told Ames, 'You know, I think it's best that you go home to be with your babies.' Neel dictated to Ames what to write on the piece of paper to effectuate her resignation." App. 5a. Ames offered evidence that by this point in time she was in serious pain because she still had been unable to express her

[11] CA App. 123.

milk.[12] Neel assertedly told Ames, "Just write 'As of July 19th, I, Angela Ames, give my resignation to Nationwide' and then sign and date it."[13] Neel, on the other hand, denied having suggested to Ames that she resign.[14]

(2) After filing a charge with the EEOC, Ames commenced this action, asserting *inter alia* that discrimination on the basis of gender and pregnancy had resulted in a constructive discharge. The complaint alleged in part that "[t]he unavailability of a lactation room, her urgent need to express milk, and Nationwide's 'unrealistic and unreasonable expectations about her work production' caused Ames to resign from her position because she 'felt like she had no other choice.' *See* Am. Compl. ¶ 44." App. 22a.

The district court concluded that, under Eighth Circuit precedent, Nationwide was entitled to summary judgment despite these factual disputes.[15] First, the district court held that there was no "evidence ... that the Nationwide Defendants intended for [Ames] to resign...." App. 56a. Eighth Circuit precedent requires a plaintiff asserting a constructive discharge

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[12] CA App. 428, 436-37, 496-97.

[13] CA App. 437.

[14] CA App. 91.

[15] The district court granted summary judgment on a number of grounds which the court of appeals did not consider. If this Court were to grant review and overturn the decision of the court of appeals, Nationwide would be free on remand to ask that court to uphold summary judgment on those other grounds.

claim to prove that her employer intended to force her to resign. *See* p. 14, *infra*. Second, the district court held that Ames could not maintain a constructive discharge claim because she had not taken sufficient steps to utilize Nationwide's various internal complaint processes. App. 58a-60a. Controlling Eighth Circuit precedent requires a plaintiff asserting a constructive discharge claim, prior to resigning, to give an employer a "reasonable opportunity" to correct the discrimination. *See* pp. 26-29, *infra*. Merely complaining to Vice President Neel, the district court held, was insufficient "as a matter of law." App. 58a. "It is undisputed that Ames did not lodge a complaint with Nationwide's Human Resources department, the Office of Ethics, or the Office of Associate Relations." App. 60a (footnote omitted). Third, the district court held that a reasonable person in Ames' position would not have found the conditions so intolerable that she would have resigned. App. 46a-55a.

The court of appeals affirmed on the first two grounds, and did not reach the third. The Eighth Circuit noted that under its precedents, "[t]o prove a constructive discharge, an employee must show that the employer deliberately created intolerable working conditions with the intention of forcing her to quit." App. 8a (quoting *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 418 (8th Cir. 2010)). The appellate court found that neither Hallberg nor Brincks had intended to force Ames to resign. App. 9a-10a. It "[a]ssum[ed] for the sake of analysis, however, that Neel's comment that it was best that Ames go home

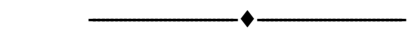
with her babies could support a finding of intent to force Ames to resign." App. 11a.

The court of appeals held that any constructive discharge claim was barred by Eighth Circuit precedent under which "an employee must give her employer a reasonable opportunity to resolve a problem before quitting." App. 8a (quoting *Sanders v. Lee Cnty. Sch. Dist. No. 1*, 669 F.3d 888, 893 (8th Cir. 2012)). The appellate court concluded that Ames had failed to sufficiently pursue her grievances because, after Neel urged her to resign, Ames had neither contacted Nationwide's human resources officials nor "return[ed] to Hallberg's office to determine the availability of a wellness room." App. 12a.

The panel initially issued its opinion on March 13, 2014. 747 F.3d 509 (8th Cir. 2014). Ames petitioned for rehearing en banc, asking the Eighth Circuit en banc to reconsider the longstanding circuit precedent requiring an employee in a constructive discharge case to pursue internal complaints before resigning. The petition acknowledged that both the district court and the panel "were bound by prior decisions of this court" imposing that requirement.[16] Nationwide defended the panel's reliance on those controlling Eighth Circuit precedents as "a routine application of the Circuit's long-settled law on

[16] Plaintiff/Appellant's Petition for Rehearing En Banc, 5.

constructive discharge."[17] Although Ames had sought only rehearing en banc, the panel treated her petition instead as one for panel rehearing, and denied it in relevant part because Ames had not asked the panel itself to disregard those Eighth Circuit precedents. App. 74a-75a. The panel for other reasons withdrew its March 13, 2014 opinion, and issued a modified opinion on June 26, 2014; that rendered moot Ames' petition for en banc rehearing of the March panel opinion. Ames did not file a second petition for rehearing en banc.



REASONS FOR GRANTING THE WRIT

Pennsylvania State Police v. Suders, 542 U.S. 129, 141 (2004), held that a plaintiff can establish a constructive discharge in violation of Title VII by showing that discrimination created "conditions ... so intolerable that a reasonable person in the employee's position would have felt compelled to resign." The courts of appeals are divided as to whether a plaintiff must also establish either or both of two additional elements: (1) that the employer acted with the intent of forcing the plaintiff to resign, and/or (2) that before resigning the plaintiff complained sufficiently to the employer about the discrimination. The Eighth

[17] Defendants-Appellees' Response to Plaintiff-Appellant's Petition for Rehearing En Banc, 1.

Circuit imposes both of those requirements, and this case presents both of those issues.

I. THE COURTS OF APPEALS ARE DIVIDED REGARDING WHETHER IN A CONSTRUCTIVE DISCHARGES CASE THE PLAINTIFF MUST PROVE THAT THE EMPLOYER INTENDED TO FORCE THE WORKER TO RESIGN

There is a deeply entrenched and longstanding circuit conflict regarding whether the plaintiff in a constructive discharge case must prove that the employer specifically intended that its discriminatory actions would force the worker to resign. Three circuits, including in this case the Eighth Circuit, hold that such intent is a necessary element of a constructive discharge case; six circuits reject that requirement. The United States noted in its brief in *Suders* that "[t]he courts of appeals are divided on whether an employee must make an additional showing that the employer intended to cause the employee to resign." Brief for the United States as Amicus Curiae, 14. The EEOC recognizes the existence of this circuit split. *Taylor v. Cheney*, 1990 WL 1112830 (Office of Fed. Ops.) (contrasting "majority view" and "minority viewpoint"; citing Eighth Circuit precedent). In *Suders* Justice Thomas observed that "a majority of Courts of Appeals have declined to impose a specific intent or reasonable foreseeability requirement." *Suders*, 542 U.S. at 153 (Thomas, J., dissenting).

This issue has arisen most frequently, as in this instance, in Title VII cases. But the same issue has also arisen under the Age Discrimination in Employment Act,[18] the Americans with Disabilities Act,[19] the Family and Medical Leave Act,[20] the Federal Mine Safety and Health Act,[21] the Rehabilitation Act,[22] the Employee Retirement Income Security Act,[23] Title VI,[24] 42 U.S.C. § 1981,[25] the First Amendment,[26] and the Equal Protection Clause of the Fourteenth Amendment.[27]

A. Three Circuits Impose That Requirement

The Fourth, Sixth and Eighth Circuits hold that in a constructive discharge case the plaintiff must

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[18] *Calhoun v. Acme Cleveland Corp.*, 798 F.2d 559 (1st Cir. 1986); *Bristow v. Daily Press, Inc.*, 770 F.2d 1251 (4th Cir. 1985).

[19] *Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539 (6th Cir. 2008).

[20] *Turnwall v. Trust Co. of America*, 146 Fed.Appx. 983 (10th Cir. 2005).

[21] *Simpson v. Federal Mine Safety and Health Review Commission*, 842 F.2d 453 (D.C.Cir. 1988).

[22] *Johnson v. Shalala*, 991 F.2d 126 (4th Cir. 1993).

[23] *Lojek v. Thomas*, 716 F.2d 675 (9th Cir. 1983).

[24] *Taylor v. Virginia Union University*, 193 F.3d 219 (4th Cir. 1999) (en banc).

[25] *Freeman v. Dal-Tile Corp.*, 750 F.3d 413 (4th Cir. 2014).

[26] *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012).

[27] *Satterwhite v. Smith*, 744 F.2d 1380 (9th Cir. 1984).

prove that the employer intended to force the worker to resign.

In rejecting most of Ames' claim, the court of appeals relied on longstanding Eighth Circuit precedent requiring that, "[t]o prove a constructive discharge, an employee must show that the employer deliberately created intolerable working conditions with the intention of forcing her to quit." App. 8a (quoting *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 418 (8th Cir. 2010)). That Eighth Circuit requirement derives from that Circuit's seminal holding in *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981), that "[t]o constitute a constructive discharge, the employer's actions must have been taken with the intention of forcing the employee to quit." The Eighth Circuit has repeatedly applied that specific intent requirement over the decades since *Bunny Bread*.[28]

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[28] *E.g.*, *Hervey v. City of Little Rock*, 787 F.2d 1223, 1331 (8th Cir. 1986); *Smith v. Goodyear Tire & Rubber Co*., 895 F.2d 467, 472 (8th Cir. 1990); *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 669 (8th Cir. 1992); *Spears v. Missouri Dept. of Corrections and Human Resources*, 210 F.3d 850, 854 (8th Cir. 2000); *Meyers v. Nebraska Health and Human Services*, 324 F.3d 655, 660 (8th Cir. 2003); *Moisant v. Air Midwest, Inc.*, 291 F.3d 1028, 1031 (8th Cir. 2002); *Cole v. May Dept. Stores Co.*, 109 Fed.Appx. 839, 841-42 (8th Cir. 2004) ("[t]o prevail on her constructive discharge claim, Cole had to show that May deliberately created intolerable working conditions with the intention of forcing her to quit...."); *Tatum v. City of Berkeley*, 408 F.3d 543, 552 (8th Cir. 2005) (plaintiff required to adduce evidence that the City took action "with the intent to create an intolerable working

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For more than thirty years, the Fourth Circuit has also required a plaintiff in a constructive discharge case to show the actions complained of "were intended by the employer as an effort to force the employee to quit." *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 672 (4th Cir. 1983), *rev'd on other grounds*, 467 U.S. 867 (1984). The Fourth Circuit applied the standard most recently in *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 425 (4th Cir. 2014).[29]

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environment, in order to compel[plaintiff] to resign"); *EEOC v. City of Independence*, 471 F.3d 891, 896 (8th Cir. 2006) (" 'The employer's actions must have been intended to force the employee to quit' ") (quoting *Tatom v. Georgia-Pacific Corp.*, 228 F.3d 926, 932 (8th Cir. 2000)); *Elnashar v. Speedway Superamerica, LLC*, 484 F.3d 1046, 1058 (8th Cir. 2007) ("[c]onstructive discharge occurs when an employer deliberately creates 'intolerable working conditions with the intention of forcing the employee to quit' ") (quoting *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1159 (8th Cir. 1999)); *Devin v. Schwan's Home Service, Inc.*, 491 F.3d 778, 790 (8th Cir. 2007) (plaintiff must show that "her employer intended to force her to quit"); *Anda v. Wickes Furniture Co.*, 517 F.3d 526, 534 (8th Cir. 2008) ("Anda's constructive discharge claim fails because Anda provided no evidence that Wickes intended to force Anda to quit"); *Wilkie v. Dept. of Health and Human Servs.*, 638 F.3d 944, 954 (8th Cir. 2011) (quoting *Anda*); *Aubucon v. Geithner*, 734 F.3d 638, 645 (8th Cir. 2014) (quoting *Sanders v. Lee Cnty. Sch. Dist.*, 669 F.3d 888, 893 (8th Cir. 2012)).

[29] *See Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 186-97 (4th Cir. 2004); *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 272 (2001); *Taylor v. Virginia Union University*, 193 F.3d 219, 237 (4th Cir. 1999) (en banc) ("Deliberateness exists only if the actions complained of were intended by the employer as an effort to force the plaintiff to quit.").

The Fourth Circuit candidly acknowledged that most circuits have rejected this requirement:

> The circuits are divided as to what a plaintiff must show.... The majority of the circuits ... rely on an objective standard of whether a "reasonable person" in the employee's position would have felt compelled to resign. 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."

Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1354 (4th Cir. 1995) (quoting *Paroline v. Unisys Corp.*, 879 F.2d 100, 114 (4th Cir. 1989) (Wilkinson, J., dissenting)). Justice O'Connor, sitting on a case in the Fourth Circuit, was constrained to apply that minority standard in her opinion for the court in *Lauture v. Saint Agnes Hospital*, 429 Fed.Appx. 300, 307 (4th Cir. 2011).

Since 1999 the Sixth Circuit rule has been that a constructive discharge claim requires proof that the employer acted "with the intention of forcing the employee to quit." *Moore v. Kuka Welding Systems*, 171 F.3d 1073, 1080 (6th Cir. 1999); *see Goldfaden v. Wyeth Laboratories, Inc.*, 482 Fed.Appx. 44, 48 (6th Cir. 2012); *Savage v. Gee*, 665 F.3d 732, 739 (6th Cir. 2012); *Ejikeme v. Violet*, 307 Fed.Appx. 944, 950 (6th Cir. 2009); *Tepper v. Potter*, 505 F.3d 508, 514-15 (6th Cir. 2007); *Johnson v. Rumsfeld*, 238 Fed.Appx. 105, 109 (6th Cir. 2007); *Watson v. City of Cleveland*, 220

Fed.Appx. 844, 856 (6th Cir. 2006); *Logan v. Denny's, Inc.*, 259 F.3d 558, 568-69 (6th Cir. 2001).

Decisions in these circuits vary as to whether the existence of the required intent is an issue for the court or for the trier of fact.[30] Some but not all of these decisions hold that evidence that the employer could have foreseen the resignation of a worker could support a finding that the employer intended to bring about that result.[31]

B. Six Circuits Have Rejected This Requirement

Six circuits reject this specific intent requirement. Justices Kennedy, Breyer and Ginsburg, while serving on a court of appeals, wrote or participated in one of those decisions.[32]

The First Circuit rejected this requirement in *Ramos v. Davis & Geck*, 167 F.3d 759, 732 (1st Cir. 1999). "[Defendant] argues that the imposition of

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[30] *Compare Hailstone v. Veda, Inc.*, 1997 WL 331793 at *1 (4th Cir. June 18, 1997) *with Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 425 (4th Cir. 2014).

[31] *E.g.*, *Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539, 555 (6th Cir. 2008).

[32] In 1983, when Justice Thomas was the Chair of the EEOC, the Commission noted the existence of this circuit conflict and rejected an intent requirement for Title VII constructive discharge cases. Decision No. 84-1, 33 FED Cas. (BNA) 1887 (E.E.O.C.), 1983 WL 22487 at *6-*7.

objectively oppressive work conditions should not suffice to establish a constructive discharge without proof that the employer created the intolerable work conditions with the specific intent of forcing the employee to resign. Such a requirement of proof of employer intent would plainly be at odds with our settled precedent...." *Ramos* explained that this intent requirement had originally been disapproved in *Calhoun v. Acme Cleveland Corp.*, 798 F.2d 559 (1st Cir. 1986). "The test is whether '*a reasonable person* in the employee's shoes would have felt compelled to resign,' *Calhoun*, 798 F.2d at 561 (emphasis added), irrespective of employer intent." *Ramos*, 167 F.3d at 732 (footnote omitted). Then-Judge Breyer joined the decision in *Calhoun*. *Ramos* recognized that the courts of appeals are divided about this issue. "Most circuits employ an objective standard for constructive discharge.... A minority requires proof of the employer's subjective intent to establish constructive discharge." *Id.* at 732 n.4.

The Third Circuit long ago held "that no finding of a specific intent on the part of the employer to bring about a discharge is required for the application of the constructive discharge doctrine." *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir. 1984). *See Suders v. Easton*, 325 F.3d 432, 444 (3d Cir. 2003) (quoting *Goss*), *vacated on other grounds sub nom. Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004); *Levendos v. Stern Entertainment, Inc.*, 909 F.3d 747, 753 (3d Cir. 1990) (quoting *Goss*); *Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227, 1230 (3d

Cir. 1988) (quoting *Goss*). *Goss* acknowledged that "there is a divergence of opinion as to whether ... to ... require[ ] a finding that the discrimination complained of amounted to an intentional course of conduct calculated to force the victim's resignation." 747 F.2d at 887. And *Levendos* recognized that "at least two ... different legal standards have emerged.... Some courts have adopted a test based on an inquiry into the motive of the employer, holding, for example, that 'the employer's actions must have been taken with the intention of forcing the employee to quit.' *Johnson v. Bunny Bread, Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981).... Other courts, such as ours, have adopted a reasonable person test, which is focused on the impact of an employer's actions, whether deliberate or not, upon a 'reasonable' employee." 860 F.2d at 1230.

One of the earliest decisions rejecting the special intent requirement is in the Fifth Circuit.

> Defendant urges, with some supporting authority, that in order to constitute a constructive discharge, the imposition of intolerable working conditions must be with the purpose of forcing the employee to resign.... [S]uch a rule is inconsistent with authority in this Circuit and, we believe, with the realities of modern employment.

Bourque v. Powell Electrical Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980). That circuit in subsequent cases has

consistently rejected that special intent standard.[33] The Fifth Circuit has repeatedly acknowledged that other circuits do apply that standard. "[S]ome other circuits have endorsed such a strict standard." *Boze v. Branstetter*, 912 F.2d 801, 804 (4th Cir. 1990); *see Jurgens v. EEOC*, 903 F.2d 386, 390 (5th Cir. 1990) ("a number of other circuits have endorsed such a strict standard"). The Eleventh Circuit, which follows Fifth Circuit precedents established prior to the creation of the Eleventh Circuit, applies the rule in *Bourque*. *See Alliance Metals, Inc. v. Hinely Industries, Inc.*, 222 F.3d 895, 902-03 (11th Cir. 2000).

In *Nolan v. Cleland*, 686 F.2d 806 (9th Cir. 1982), in an opinion joined by then-Judge Kennedy, the Ninth Circuit adopted the Fifth Circuit rule in *Bourque*, "reject[ing] arguments that an employee has to prove it was the employer's intent to force the

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[33] *See Vallecillo v. U.S. Dep't of Housing and Urban Dev.*, 154 Fed.Appx. 764, 768 (5th Cir. 2005) ("proof that the employer imposed the intolerable conditions with the specific intent to force the employee is not required"); *Lamb v. City of Sweetwater Housing Authority*, 1993 WL 3471999 at *6 (5th Cir. Aug. 19, 1993); *Schwago v. Spradlin*, 701 F.2d 470, 481 n.12 (5th Cir. 1983) ("the employee need *not* prove it was the employer's purpose to force the employee to resign, but rather only that the employer made conditions intolerable") (emphasis in original); *Junior v. Texaco, Inc.*, 688 F.2d 377, 379 (5th Cir. 1982) ("it is not necessary to show that the employer subjectively intended to force a resignation"); *Pittman v. Hattiesburg Municipal Separate School Dist.*, 644 F.2d 1071, 1077 (5th Cir. Unit A, 1981) ("[t]he employee ... does not have to prove it was the employer's purpose to force the employee to resign").

employee to resign." 686 F.3d at 813. "In *Nolan* ... we adopted the Fifth Circuit's formulation of constructive discharge [as] later clarified in *Bourque*...." *Lojek v. Thomas*, 716 F.2d 675, 681 (9th Cir. 1983). "The test establishes an objective standard: the plaintiff need not show that the employer subjectively intended to force the employee to resign. *See* ... *Nolan*, 686 F.2d at 814 n.17." *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987). *Satterwhite v. Smith*, 744 F.2d 1380, 1383 (9th Cir. 1984), rejected cases from another circuit that "use language that focuses on the employer's subjective intent, rather than on the reasonable employee's perspective.... This view is out of step with both the weight of authority and the law of our Circuit. *See Nolan*, 686 F.2d at 814 n.17." Most recently in *Poland v. Chertoff*, 494 F.3d 1174, 1184 n.7 (9th Cir. 2007), the Ninth Circuit reiterated its rejection of the specific intent requirement, and again recognized the circuit conflict on this issue. "Unlike some of our sister circuits, we do not require that, in addition to proving that working conditions were intolerable, a plaintiff must establish that this employer created the intolerable conditions with the intent to cause the employee to resign." *Poland* noted that the requirement had also been rejected by the First, Third, Fifth and Tenth Circuits, but was applied by the Fourth, Sixth and Eighth Circuits. *Id.*

The Tenth Circuit also rejected long ago a requirement of proof that an employer intended to force a worker to resign, expressly noting the circuit conflict on that issue.

> There is ... a divergence of opinion among the circuits as to the findings necessary to apply the [constructive discharge] doctrine. While some court required the employee to prove the employer's specific intent to force him to leave, *Bristow v. Daily Press, Inc.*, ... , others have a adopted a less stringent objective standard requiring the employee to prove that the employer has made working conditions so difficult that a reasonable person in the employee's shoes would feel forced to resign. *Goss v. Exxon Office Systems Co.*... In ... our most recent pronouncement in this ware, we ... adopt[ed] the standard set out in [the Fifth Circuit decision in] *Bourque*.... "[A]n employer's subjective intent is irrelevant...."

Derr v. Gulf Oil Corp., 796 F.2d 340, 343-44 (10th Cir. 1986) (quoting *Clark v. Marsh*, 665 F.2d 1168, 1175 n.8 (D.C.Cir. 1981). The Tenth Circuit has consistently applied that rule for more than three decades. *E.g.*, *Jeffries v. Kansas*, 147 F.3d 1220, 1233 (10th Cir. 1998) ("the employer's subjective intent ... [is] irrelevant"); *Tran v. Trustees of the State Colleges of Colorado*, 355 F.3d 1263, 1270 (10th Cir. 2004) ("we apply an objective test under which neither the employee's subjective views of the situation, nor her employer's subjective intent with regard to discharging her, are relevant"); *Keller v. Crown Cork & Seal USA, Inc.*, 491 Fed.Appx. 908, 915 (10th Cir. 2012) (quoting *Tran*).

In the District of Columbia Circuit, *Clark v. Marsh*, 665 F.2d 1168, 1175 n.8 (D.C.Cir. 1981), held

that in a constructive discharge case "an employer's subjective intent is irrelevant...." In *Hopkins v. Price Waterhouse*, 825 F.2d 458 (D.C.Cir. 1987), *rev'd on other grounds sub nom. Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the District of Columbia Circuit overturned a district court opinion that had required proof an employer subjectively intended to force a worker to resign. 825 F.2d at 427 (citing *Bourque* and *Goss*). *Simpson v. Federal Mine Safety and Health Review Commission*, 842 F.2d 453, 462 (D.C.Cir. 1988), in an opinion for the court by then-Judge Ginsburg, noted that "*Clark* ... rejected a motivation test...." *Simpson* noted that "the predominan[t] ... standard" disapprove such a requirement, citing decisions in the First, Second, Third, Fifth, Ninth and Tenth Circuits. 842 F.3d at 462 n.8. Then-Judge Ginsburg acknowledged, however, the existence of the contrary rule in several "federal circuits in which the subjective constructive discharge analysis persist[s]," 842 F.3d at 462 and n.8, citing decisions in the Sixth and Eighth Circuits.

C. The Circuit Conflict Is Well Recognized

The existence of this circuit split has thus been recognized by the First, Third, Fourth, Fifth, Seventh, Ninth and District of Columbia Circuits. Several state courts have also recognized the division among the federal appellate courts. *Pribil v. Archdiocese of St. Paul and Minneapolis*, 533 N.W.2d 410, 413 (Ct. App. Minn. 1995) ("[T]he [Fifth Circuit] states that the employer's intent on creating the intolerable

conditions is irrelevant to a constructive discharge analysis.... Other federal courts have taken a similar position.... There is, however, a split of authority among the federal courts regarding this issue.... [T]he Eighth Circuit ... requires an employee to show that the employer intended to force an employee to resign."); *Brady v. Elixir Industries*, 196 Cal.App.3d 1299, 1305 (4th Dist. 1987) ("federal ... case ... law ha[s] taken divergent views as to whether a third element concerning the mental state of the employer must be proved by an employee to establish constructive discharge. The majority does not require a third element, while the minority has required proof of intent, knowledge, or foreseeability on the employer's part that the employee would resign because of those circumstances."); *Lewis v. Oregon Beauty Supply Co.*, 714 P.2d 618, 621 (Or. App. 1986) ("Jurisdictions that recognize the concept of constructive discharge have established different elements that the plaintiff must prove. Some hold that the employee must show that the employer's actions were ... taken with the intention of forcing a resignation.... Others require only that the employee show that a reasonable person in the employe[e]'s position would [have] fe[lt] compelled to resign." (citing federal appellate decisions)). Commentators have repeatedly described this circuit conflict.[34]

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[34] "Most circuits ... do not require the plaintiff to show [that] the employer specifically intended to force her to quit ... [but] a minority of circuits ... require that the plaintiff show that the

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II. THE COURTS OF APPEALS ARE DIVIDED REGARDING WHETHER IN A CONSTRUCTIVE DISCHARGE CASE THE WORKER MUST COMPLAIN TO HER EMPLOYER PRIOR TO RESIGNING

The circuit courts are also divided as to whether in a constructive discharge case a worker must pursue an internal complaint – or, perhaps, several such complaints – before resigning. "[W]hether the employee's duty to report ought to be extended to cover cases of constructive discharge is the most critical policy question that the courts must confront.... [T]he current debate over the proper classification of constructive discharge masks an important difference of opinion over the legal significance of a plaintiff's use, or failure to use, an employer's internal grievance procedure." Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S.Cal.L.Rev. 307, 373 (2004).

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employer subjectively intended to force [the plaintiff] to quit." Cathy Shuck, Comment, "*That's It, I Quit*" *Returning to First Principles in Constructive Discharge Doctrine*, 23 Berkeley J.Emp.&Lab.L. 401, 413, 415 (2002); *see* Sheila Finnegan, Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U.Chi.L.Rev. 561, 562 (1986) ("The circuit courts split over whether (and to what degree) specific employer intent is a required element of constructive discharge[.] Most circuits ... do not require the plaintiff to show the employer specifically intended to force her to quit.... Under the minority view, the plaintiff must show not only that conditions were intolerable, but also that the employer created those conditions with the specific intent of forcing her to resign") (emphasis and capitalization omitted).

The Eighth Circuit has held repeatedly that the absence of a sufficient number of internal complaints bars a constructive discharge claim. As Nationwide pointed out in the litigation below, "[o]ur 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."[35] Other circuits have rejected such an internal exhaustion requirement for constructive discharge cases.

A. The Eighth Circuit Imposes Such An Exhaustion Requirement

The Eighth Circuit first applied its internal-complaint requirement in *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490 (8th Cir. 1996). The plaintiff

> had made earlier complaints about Meyers' racially discriminatory scheduling practices to the ... production manager and the assistant production superintendent.... Tidwell and four other African-American [employees had earlier] filed a race discrimination charge against Meyer's with the Equal Employment Opportunity Commission, claiming that the ... shift assignments were determined in a racially discriminatory manner.

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[35] Brief in Support of Nationwide Mutual's Motion for Summary Judgment, 3 (emphasis in original).

93 F.3d at 493 n.4. When the company again gave a favored shift assignment to a less experienced white worker, Tidwell resigned. The Eighth Circuit dismissed his constructive discharge claim on the ground that – despite the prior complaints and EEOC charge – he had failed to "give [the employer] an opportunity to explain the situation or remedy it." 93 F.3d at 496.

Knowles v. Citicorp Mortgage, Inc., 142 F.3d 1082, 1086 (8th Cir. 1998), rejected the plaintiff's constructive discharge claim because "[a]lthough Knowles argued that he exhausted *all* avenues of relief in seeking a solution to his problems at Citicorp, the record reveals that, *aside from* discussing [his supervisor's biased] comments with [the supervisor's superior], he took few, if any, steps toward this end. Knowles neglected to so much as mention his concerns to anyone in Citicorp's human resources department or to any of his co-workers. Furthermore, he made no attempt to utilize Citicorp's internal grievance procedures or even to inquire about the possibility of doing so." (Emphasis added). Similarly, in *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241 (8th Cir. 1998), the plaintiff had complained about retaliation both to the plant personnel representative and to a manager; the court of appeals dismissed her constructive discharge claim because she had failed to also pursue those allegations "up the chain of command to [the vice-president for human resources]." 141 F.3d at 1247.

Repeated internal complaints were also deemed insufficient in *Tork v. St. Luke's Hospital*, 181 F.3d 918 (8th Cir. 1999).

> [The worker] attempted to protest the first [disputed action] by speaking with someone in the ... human resources department, but was denied the opportunity to do so, and ... intended to exercise her right to file a formal complaint with the employee assistance program, but was told by her supervisor that it was too late to do so. With respect to the second [disputed action] ... she tried to speak to her supervisor about it, but was ignored.

181 F.3d at 919-20. The Eighth Circuit rejected the plaintiff's constructive discharge claim on the ground that she should have done even more. "Ms. Tork sought review beyond her direct supervisor ... for only one incident.... She failed to seek review of her supervisor's action through either the human resources department or the employee assistance program...." 181 F.3d at 920. *Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678 (8th Cir. 2001), held that it is not sufficient that a worker complained about a discriminatory practice to his or her supervisor; if the supervisor is unresponsive, the worker must then appeal that supervisor's decision to higher officials or forfeit his or her constructive discharge claim. In *Sowell* the plaintiff had earlier complained about a discriminatory manager "to officials from [the company's] local and Colorado human resources offices," 251 F.3d at 681, and again complained to her direct supervisor when that official adopted a disputed policy. The

court rejected her constructive discharge claim because she had not complained enough. "Sowell complained to [her supervisor] regarding the policy, but she took no *further* steps to exempt herself from its requirements, such as ... approaching human resources about the policy itself...." 251 F.3d at 685 (emphasis added).

In *Trierweiler v. Wells Fargo Bank*, 639 F.3d 456 (8th Cir. 2011), after the plaintiff took a day off to stay home with a sick child, her supervisor told her that "if she missed one more day of work before the end of the year, she 'would be done working there.'" 639 F.3d at 459. "Trierweiler replied that she would call HR about the matter, and [her boss] responded that she was acting on directions from HR." *Id.* The supervisor insisted that HR had expressly approved that threat. The next day, Trierweiler was out sick; she left a phone message saying she had a doctor's note for a pregnancy related medical absence. The supervisor responded with a phone message that said "This isn't going to work, you taking time off." *Id.* Trierweiler understood that to mean she no longer had a job, and dropped off her keys at the office. The Eighth Circuit rejected her constructive discharge claim because "[s]he never spoke with HR or utilized any of the resource numbers provided in the employee handbook...." 639 F.3d at 461.

Applying this well established body of Eighth Circuit precedent, the court of appeals in the instant case rejected Ames' claim because she had "only"

complained three times, twice to Neel and once to Hallberg. App. 11a.

B. Several Circuits Have Rejected Such An Exhaustion Requirement

Other circuits have rejected this Eighth Circuit requirement.

In the Third Circuit, whether a worker complained to other officials is just one of several factors that bear on whether a reasonable person would have resigned when the plaintiff did. The Third Circuit subsequently reiterated that there is no "*quasi* exhaustion requirement" that plaintiffs in constructive discharge cases must file some sort of internal complaint or protest before resigning. *Suders v. Easton*, 325 F.3d 432, 445 (3d Cir. 2003), *vacated on other grounds sub nom. Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). Whether a worker first pursued such an internal complaint is only

> another important consideration ... that relates to the inquiry of whether a reasonable person would have felt compelled to resign.... [I]t is relevant to a claim of constructive discharge whether a plaintiff explored alternative avenues to resolve the alleged discrimination, but the plaintiff's actions must be considered in light of the totality of circumstances. *Clowes* simply recognizes that, in many cases, a reasonable person will not react to minor harassment or workplace disturbances by heading straight for the

> exit and that, in others, the harassment or discrimination may be so severe that any reasonable person would feel compelled to walk out immediately.... [A] failure to [explore alternative avenues] will not defeat a claim of constructive discharge where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign.

325 F.3d at 445-46. "We do not require that such steps be taken in all cases. An employee may be able to show working conditions were so intolerable that a reasonable employee would feel forced to resign without remaining on the job for the period necessary to take those steps." *Clowes v. Allegheny Valley Hospital*, 991 F.2d 1159, 1162 n.6 (3d Cir. 1993) (opinion by Alito, J.). The Third Circuit rule differs from the Eighth Circuit requirement in two fundamental ways. First, the Third Circuit does not require a worker to pursue one or more internal complaints; rather, the existence of possible internal remedies is simply one of several factors that would affect how a reasonable employee would act. Thus, in the Third Circuit – but not the Eighth – the fact that a worker was in increasing physical pain could outweigh the possibility that an internal complaint might eventually succeed. Second, in the Third Circuit it would be for a jury or other trier of fact to assess the evidentiary significance of internal remedies; in the Eighth Circuit the court determines (as it did in this case) which internal remedies an employee was required to exhaust.

The Seventh Circuit takes a quite different approach. In that circuit there is no requirement that workers utilize internal complaint processes in every constructive discharge case; rather, a failure to complain may be evidence that the discriminatory conditions were not that serious.

> In some situations, the standard of reasonableness will require the employee who wants to make a successful claim of constructive discharge to do something before walking off the job. The reason is not that there is a doctrine of exhaustion of remedies.... The reason, rather, is that passivity in the face of working conditions alleged to be intolerable is often inconsistent with the allegation.... The significance of passivity is thus evidentiary.

Lindale v. Tokheim Corp., 145 F.3d 953, 955 (7th Cir. 1998). Here, as in the Third but not the Eighth Circuit, a jury would assess the significance of a failure to complain, weighing it against other evidence. But the absence of a complaint is relevant in the Seventh Circuit for a reason and in a way entirely different than in the Third or Eighth Circuit. The failure to complain, if coupled with a delay in resigning, would in the Seventh Circuit be evidence that the working conditions were not really all that bad; but if the worker resigned promptly, the failure to complain would not affect the plaintiff's claim.

Young v. Southwestern Savings and Loan Ass'n, 509 F.2d 140 (5th Cir. 1975) rejected the type of

exhaustion requirement imposed by the Eighth Circuit. In *Young* the plaintiff was told by the manager of the office where she worked that she was required to attend morning meetings that were commenced with a prayer and religious talk by a local minister, despite her religious objections. She resigned the same day without attempting to complain about that directive to higher ranking officials. 509 F.3d at 142. The court rejected that defendant's argument that it was not liable because "the manner of Mrs. Young's leaving was so precipitous as to give Southwestern no opportunity to accommodate her beliefs.... Southwestern urges that if only plaintiff had contacted a high-ranking officer before leaving, the entire matter would have been quickly resolved in a mutually agreeable fashion." 509 F.2d at 144-45. The majority rejected the suggestion of a dissenter that it allow "an employee to claim constructive discharge only after requesting an authoritative ruling from the company management [in order to] encourage private settlement of employment disputes." 509 F.2d at 146 (Thornberry, J., dissenting).

III. THE DECISION OF THE COURT OF APPEALS IS INCORRECT

In *Suders* this Court set out a single, straightforward standard for determining when discrimination (or retaliation) would give rise to a constructive discharge claim. "The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt

compelled to resign?" 542 U.S. at 141. The Eighth Circuit standard mandates two additional inquiries. Neither of those additional inquiries is consistent with the more limited showing required by *Suders*, or with Title VII.

(1) The *Suders* standard is expressly "objective"; neither the subjective state of mind of the employee nor that of the employer (other than an intent to discriminate or retaliate) is relevant.

The specific intent requirement utilized by the Fourth, Sixth and Eighth Circuits engrafts onto Title VII an additional motivation element that goes beyond the very specific language of the statute. The general anti-discrimination in section 703(a) forbids without limitations actions taken "because of such individual's ... sex." 42 U.S.C. § 2000e-2(a)(1). Similarly, section 701 provides that the discrimination forbidden by Title VII includes adverse action taken "because of or on the basis of pregnancy, childbirth or related medical conditions." 42 U.S.C. § 2000e. An adverse action taken for any of these forbidden purposes is unlawful, regardless of what consequences the discriminatory employer might have hoped would ensue. Section 1981a establishes an additional mental state requirement for punitive damages, requiring proof that an employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). Even punitive damages can be awarded without the need for proof that an employer intended any specific harm, or any harm at all.

Constructive discharge is not a different kind of Title VII violation; rather, it is a particular type of injury that may ensue as the result of a violation. An act of discrimination may cause any number of different kinds of harms: lost wages, "emotional pain, suffering, inconvenience, mental anguish, [or] loss of enjoyment of life...." 42 U.S.C. § 1981a(b)(3). An employer is liable for those injuries without regard to whether it specifically intended or foresaw them. In the case of constructive discharge, the violation causes injury because of the manner in which the victim responds to the employer's unlawful action. But that would be equally true if the victim responded to a retaliatory change in schedule by spending more on child care, *see Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 69 (2006), or responded to abusive discrimination by seeking psychological counseling. *See Harris v. Forklift Co.*, 510 U.S. 17, 22 (1993). No court has ever suggested that liability in such circumstances would require proof that the employer specifically intended to force the victim to spend money on child care or medical treatment.

(2) The Eighth Circuit requirement that a discrimination victim afford to a discriminatory employer a "reasonable opportunity" to correct its violation is, as the Third Circuit recognized, a judicially created exhaustion requirement.

But the exhaustion requirements in Title VII itself are quite specific and limited, and the courts have no authority to require more than Congress saw

fit to mandate. Under section 706(c), the entity to which a discrimination victim must complain is the EEOC or a state or local anti-discrimination agency, not the victim's employer. 42 U.S.C. § 2000e-5(c). Congress contemplated that under the statutory exhaustion scheme, employers would learn of discrimination charges through the EEOC, which is directed to notify the employer within 10 days of the receipt of a charge. 42 U.S.C. § 2000e-5(b). The statutory deadline for complaints by private employees is 180 or 300 days, not prior to resigning. 42 U.S.C. § 2000e-5(c)(1). The Eighth Circuit may believe it would be better if employees complained to their employers directly, rather than through the EEOC, or if managers did not have to wait 190 to 310 days to learn about discriminatory practices by other company officials. But that is not the exhaustion scheme which Congress chose to enact.

The circumstances of this case illustrate one of the undesirable consequences of permitting courts to fashion additional exhaustion requirements on an employer-by-employer basis. In this case, the district court held that Ames forfeited her constructive discharge claim because she failed to complain to the company's Office of Ethics or Office of Associate Relations. App. 58a. The court of appeals, on the other hand, did not suggest Ames was required to complain to those units, but insisted instead that she forfeited her claim when she failed to seek assistance for a second time from Hallberg. App. 12a. But the district court did not suggest Ames had to do that. The

earlier Eighth Circuit decisions describe any number of different company officials and offices to whom a particular discrimination victim ought to have complained. Where, as *Suders* requires, the discrimination is necessarily so serious "that a reasonable person in the employee's position would [feel] compelled to resign," discrimination victims cannot be expected to take their complaints from one company official to another until they are certain that there is no other internal avenue of redress which a court might after-the-fact insist should have been tried.

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CONCLUSION

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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United States Court of Appeals
for the Eighth Circuit

No. 12-3780

Angela Ames

Plaintiff-Appellant

v.

Nationwide Mutual Insurance Company;
Nationwide Advantage Mortgage Company;
Karla Neel

Defendants-Appellees

Equal Employment Opportunity Commission;
American Civil Liberties Union Foundation;
American Civil Liberties Union of Iowa

Amici on Behalf of *Appellant*

Appeal from the United States District Court
for the Southern District of Iowa – Des Moines

Submitted: May 13, 2014
Filed: June 26, 2014

Before WOLLMAN, COLLOTON, and GRUENDER, Circuit Judges.

WOLLMAN, Circuit Judge.

Angela Ames appeals from the district court's[1] grant of summary judgment to Nationwide Mutual Insurance Company, Nationwide Advantage Mortgage Company, and Karla Neel (collectively, Nationwide) on her sex- and pregnancy-based employment discrimination claims brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.,* and the Iowa Civil Rights Act (ICRA), Iowa Code § 216.6. We affirm.

I.

Ames was hired as a loss-mitigation specialist at Nationwide Mutual Insurance in October 2008. Timely completion of work is central to this position and "a high priority" for the loss-mitigation department as a whole. Brian Brinks was Ames's immediate supervisor, and Neel was the head of her department, as well as an associate vice president.

Ames gave birth to her first child on May 2, 2009, and took eight weeks of maternity leave following his birth. In October 2009, Ames discovered that she was

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[1] The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa.

pregnant with her second child. Ames suffered pregnancy complications, and her doctor ordered her on bed rest in April 2010.

When Ames discussed her bed rest with Neel, Neel rolled her eyes and said that she never had to go on bed rest when she was pregnant and that she never had complications with her pregnancies. Neel had previously expressed to Ames her belief that a woman should not have a baby shower while she is pregnant because the baby could die in utero. According to Ames, Brinks remarked to others in the office about Ames's maternity leave, stating, "Oh, yeah, I'm teasing her about only taking a week's worth of maternity leave. We're too busy for her to take off that much work." Nationwide trained Angie Ebensberger, who was a temporary employee at Nationwide Mutual Insurance, to fill Ames's position during her maternity leave.

Ames gave birth to her second child prematurely on May 18, 2010. Nationwide thereafter informed Ames that her Family Medical Leave Act (FMLA) maternity leave would expire, on August 2, 2010. On June 16, 2010, Neel called Ames to inform her that there had been a mistake in calculating her FMLA maternity leave and that her maternity leave would expire on July 12, 2010. Neel also told Ames that she could take additional unpaid leave until August 2010, but that doing so would "cause[ ] red flags," that she "[didn't] want there to be any problems like that," and that she "[didn't] want there to be any issues down the road." Neel told Ames that she wanted to find a

mutually agreeable date of return and offered to extend Ames's maternity leave an additional week.

Prior to returning to work, Ames asked a Nationwide disability case manager where she could express milk when she returned to work and was told that she could use a lactation room. Ames returned to work on July 19, 2010, when her son was two months old and breastfeeding every three hours. By the time Ames had arrived at work that morning, more than three hours had passed since her son had last nursed. Ames asked Neel about using a lactation room. Neel replied that it was not her responsibility to provide Ames with a lactation room. Ames then went to the security desk to inquire about the lactation rooms and was directed to see Sara Hallberg, the company nurse.

Hallberg informed Ames of Nationwide's lactation policy, which allowed employees to gain badge access to the company's lactation rooms after completing certain paperwork that required three days to be processed. The lactation policy was available to Nationwide's employees on the company's intranet, and Nationwide provided information regarding the policy at its quarterly maternity meetings. Ames's conversation with Hallberg was the first time that Ames had heard of the policy. Hallberg sent a copy of the lactation policy to Ames via email. Hallberg also requested that security "grant Angela Ames access to the lactation rooms as soon as possible." When Ames told Hallberg that she needed to express milk immediately, Hallberg suggested that Ames use a wellness

room. Because the wellness room was occupied, Hallberg told Ames to return in fifteen or twenty minutes. Hallberg warned Ames that lactating in a wellness room might expose her breast milk to germs.

While waiting for the wellness room, Ames met with Brinks to discuss the status of her work. Brinks told Ames that none of her work had been completed while she was on maternity leave, that she had two weeks to complete that work, that she would have to work overtime to accomplish this, and that if she failed to catch up, she would be disciplined. After the meeting with Brinks, Ames returned to Neel's office to see if Neel could help her find a place to lactate. Neel again told Ames that she was unable to help. Neel testified that Ames was visibly upset and in tears. Neel then handed Ames a piece of paper and a pen and told Ames, "You know, I think it's best that you go home to be with your babies."[2] Neel dictated to Ames what to write on the piece of paper to effectuate her resignation.

Ames sued Nationwide, alleging sex and pregnancy discrimination. Her complaint asserted that the unavailability of a lactation room, "her urgent need to express milk," and Nationwide's "unrealistic and unreasonable expectations about her work production"

[2] At other places in Ames's deposition and in her brief opposing Nationwide's motion for summary judgment, Ames attributes to Neel different versions of this statement, such as "[m]aybe you should just stay home" and "[m]aybe you should just go home with your babies."

forced her to resign from her position. Nationwide moved for summary judgment, arguing that there was no genuine dispute of material fact that Nationwide discriminated against Ames. Specifically, Nationwide argued that Ames had not shown constructive discharge. Ames countered that she had set forth direct and indirect evidence of discrimination and that she had shown constructive discharge. Ames did not argue that Nationwide had actually discharged her. The district court granted Nationwide's motion, and this appeal followed.

II.

"We review the district court's grant of summary judgment de novo, applying the same standards as the district court and viewing the evidence in the light most favorable to the nonmoving party." *McDonald v. City of Saint Paul,* 679 F.3d 698, 703 (8th Cir. 2012) (quoting *Zike v. Advance Am., Cash Advance Ctrs. of Mo., Inc.,* 646 F.3d 504, 509 (8th Cir. 2011)). Summary judgment shall be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Title VII prohibits employment discrimination on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). As amended by the Pregnancy Discrimination Act of 1978, sex-based discrimination under Title VII includes discrimination based on "pregnancy, childbirth, or related medical conditions." *Id.* § 2000e(k).

The ICRA provides the same prohibitions. *See* Iowa Code § 216.6. Because Ames presents no separate arguments under the ICRA, we analyze her ICRA claims together with her Title VII claims under the same analytical framework used for Title VII claims. *See Gilbert v. Des Moines Area Cmty. Coll.,* 495 F.3d 906, 913 n.5 (8th Cir. 2007); *see also Falczynski v. Amoco Oil Co.,* 533 N.W.2d 226, 230 n.2 (Iowa 1995).

An employee's Title VII claim for sex discrimination can survive summary judgment in one of two ways. First, the employee may produce direct evidence of discrimination – that is, "evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." *Elam v. Regions Fin. Corp.,* 601 F.3d 873, 878 (8th Cir. 2010) (quoting *McCullough v. Univ. of Ark. for Med. Scis.,* 559 F.3d 855, 860 (8th Cir. 2009)). Alternatively, the employee may create an inference of discrimination under the burden-shifting framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), by showing that: (1) she is a member of a protected group; (2) she was qualified for her position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Elam,* 601 F.3d at 878-79. Ames purports to have demonstrated both direct evidence of sex discrimination and an inference of unlawful discrimination based on her pregnancy under *McDonnell*

Douglas. Because in either case Ames must demonstrate that she suffered an adverse employment action, we focus on that question in resolving this appeal.

Ames contends that she has presented sufficient evidence to demonstrate that Nationwide constructively discharged her or, in the alternative, actually discharged her. We discuss each theory of discharge in turn.

A.

"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." *Alvarez v. Des Moines Bolt Supply, Inc.,* 626 F.3d 410, 418 (8th Cir. 2010). "In addition, an employee must give her employer a reasonable opportunity to resolve a problem before quitting." *Sanders v. Lee Cnty. Sch. Dist. No. 1,* 669 F.3d 888, 893 (8th Cir. 2012). "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.'" *Id.* (quoting *Fercello v. County of Ramsey,* 612 F.3d 1069, 1083 (8th Cir. 2010)).

Ames argues that Nationwide treated her in a manner that would have caused any reasonable person to resign. Rather than presenting one event as the defining moment, Ames points to a number of incidents and circumstances that she claims collectively

constitute constructive discharge. First, Neel and Brinks made negative statements regarding Ames's pregnancies. Second, Nationwide miscalculated the length of Ames's maternity leave, and Neel insisted that she return to work early or risk raising red flags. Third, Nationwide trained Angie Ebensberger to fill Ames's position during Ames's maternity leave. Fourth, Ames was not given immediate access to a lactation room and was told that she had to wait three days for badge access. Fifth, Brinks told Ames that none of her work had been completed while she was on maternity leave, that she had to work overtime to get caught up, and that if she did not catch up, she would be disciplined. Sixth, Neel did nothing to assist Ames in finding a place to lactate and instead told Ames, "I think it's best that you go home to be with your babies." And seventh, at the time Ames resigned, it had been more than five hours since she had last expressed milk and she was in considerable physical pain.

Nationwide's several attempts to accommodate Ames show its intent to maintain an employment relationship with Ames, not force her to quit. *See Fercello,* 612 F.3d at 1083 (holding that the employer's willingness to accommodate the employee undercut the employee's claim of constructive discharge). Although Nationwide incorrectly calculated Ames's FMLA leave, it made efforts to ameliorate the impact of its mistake. Neel did not discourage Ames from taking the FMLA leave to which Ames was entitled. Furthermore, even though Neel discouraged Ames

from taking unpaid leave up to August, Neel gave Ames an extra week of maternity leave, which gave Ames more than thirty days to prepare for her return to work. Rather than intentionally rendering Ames's work conditions intolerable, the record shows that Nationwide sought to accommodate Ames's needs.

Moreover, Ames was denied immediate access to a lactation room only because she had not completed the paperwork to gain badge access. Every nursing mother was required to complete the same paperwork and was subjected to the same three-day waiting period. Further, Hallberg tried to accommodate Ames by allowing her to use a wellness room as soon as it was available and by requesting that Ames receive expedited access to the lactation rooms. During Ames's meeting with Brinks, Brinks relayed his expectations of her in the upcoming weeks and the consequences of failing to meet those expectations. Brinks's expectations of Ames were not unreasonable, for he expected all of his employees to keep their work current, given the high priority that timely work-completion is accorded within the loss-mitigation department. That Nationwide's policies treated all nursing mothers and loss-mitigation specialists alike demonstrates that Nationwide did not intend to force Ames to resign when it sought to enforce its policies. *See Allen v. Bridgestone/Firestone, Inc.,* 81 F.3d 793, 797 (8th Cir. 1996) ("Where, as here, employees are treated alike, 'no particular employee can claim that difficult working conditions signify the employer's intent to force that individual to resign.'" (quoting

Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985))).

Assuming for the sake of analysis, however, that Neel's comment that it was best that Ames go home with her babies could support a finding of intent to force Ames to resign, Ames's constructive discharge claim still fails because she did not give Nationwide a reasonable opportunity to address and ameliorate the conditions that she claims constituted a constructive discharge. *See, e.g., Sanders,* 669 F.3d at 893; *Alvarez,* 626 F.3d at 418; *Coffman v. Tracker Marine, L.P.,* 141 F.3d 1241, 1247-48 (8th Cir. 1998). The only way in which Ames attempted to alert Nationwide to the problem was by asking Neel twice about obtaining a lactation room and by approaching Hallberg about the same problem, all on the morning that Ames resigned. Moreover, when Ames approached Hallberg about the problem, Hallberg suggested to Ames a temporary solution. Although this solution may not have been immediately available or ideal, Ames had an obligation not to jump to the conclusion that the attempt would not work and that her only reasonable option was to resign. *See Trierweiler v. Wells Fargo Bank,* 639 F.3d 456, 461 (8th Cir. 2011) ("Part of an employee's obligation to be reasonable is an obligation not to assume the worst, and not to jump to conclusions too fast." (quoting *Smith v. Goodyear Tire & Rubber Co.,* 895 F.2d 467, 473 (8th Cir. 1990))). Ames also failed to avail herself of the channels of communication provided by Nationwide to deal with her problem. *See Coffman,* 141 F.3d at 1247-48 (reversing

a constructive-discharge judgment in part because the employee had an avenue of redress within the company and failed to use it). Nationwide's Compliance Statement, of which Ames was aware, provides: "If you have reason to believe that Nationwide is not in compliance with the law, contact your local HR professional, the Office of Ethics, or the Office of Associate Relations to report the circumstances immediately." 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. We thus conclude that Ames has not met her burden of demonstrating constructive discharge.

Ames argues that we should apply the alternative constructive discharge analysis employed by the Seventh Circuit in non-hostile work environment cases. *See EEOC v. Univ. of Chi. Hosps.,* 276 F.3d 326 (7th Cir. 2002). In *University of Chicago Hospitals,* the Seventh Circuit said that there are two ways for an employee to prove constructive discharge. One is proof of unbearable working conditions. The other is that "[w]hen an employer acts in a manner so as to have communicated to a reasonable employee that she will be terminated, and the plaintiff employee resigns, the employer's conduct may amount to constructive discharge." *Id.* at 332.

This court has not recognized the second form of constructive discharge in our non-hostile work

environment cases, *see, e.g., Trierweiler,* 639 F.3d at 459-61; *Tidwell v. Meyer's Bakeries, Inc.,* 93 F.3d 490, 494-97 (8th Cir. 1996); *Johnson v. Bunny Bread Co.,* 646 F.2d 1250, 1256-57 (8th Cir. 1981), but Ames could not prevail under the alternative theory in any event. The second theory still requires the employee to demonstrate that working conditions had become intolerable. *Chapin v. Fort-Rohr Motors, Inc.,* 621 F.3d 673, 679 (7th Cir. 2010). In addition, the employee must show that if she had not resigned, then she would have been mmediately fired. *Id.* at 680. Assuming that Neel's statement to Ames evinced a desire by Neel to encourage resignation, it does not support a reasonable belief that Ames would have been fired immediately if she opted to continue her employment.

B.

On appeal, Ames argues that a genuine issue of material fact exists as to whether she was actually discharged. Nationwide argues that Ames has waived this argument because she did not raise it in the district court. We agree.

"As a general rule, we do not consider arguments or theories on appeal that were not advanced in the proceedings below." *Wright v. Newman,* 735 F.2d 1073, 1076 (8th Cir. 1984); *see also Singleton v. Wulff,* 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Seniority*

Research Grp. v. Chrysler Motor Corp., 976 F.2d 1185, 1187 (8th Cir. 1992) ("Normally, a party may not raise an issue for the first time on appeal as a basis for reversal."). The general rule against consideration of an issue not passed upon below, however, is not absolute. As the Supreme Court has stated:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. . . . Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt or where injustice might otherwise result.

Singleton, 428 U.S. at 121 (internal quotation marks and citations omitted); *see also Seniority Research Grp.,* 976 F.2d at 1187 ("There are exceptions, as where the obvious result of following the rule would be a plain miscarriage of justice or would be inconsistent with substantial justice."). Ames does not argue that this is a case where either "the proper resolution is beyond any doubt" or "where injustice might otherwise result." *Singleton,* 428 U.S. at 121. We thus decline to consider Ames's argument that she was actually discharged.

Ames relies on our decision in *Schneider v. Jax Shack, Inc.,* 794 F.2d 383 (8th Cir. 1986), to argue that she did not waive her actual discharge argument. She contends that, under *Schneider,* "the district court should have focused first on the antecedent question

of whether there had been an actual discharge[,]" *id.* at 384, before it decided whether she was constructively discharged, because her complaint and brief in opposition to Nationwide's summary judgment motion set forth facts suggesting that an actual discharge had occurred. *Schneider,* however, is procedurally distinguishable. In *Schneider,* the parties did not submit briefing in support of their respective positions to the district court. *Id.*; *see also Schneider v. Jax Shack, Inc.,* No. CV84-L-303, 1985 WL 570618, at *1 (D. Neb. May 10, 1985). The district court was asked to render a decision on the merits without trial based on stipulated evidence. *Schneider,* 1985 WL 570618, at *1. On appeal, we held that the district court should have addressed whether there had been actual discharge because its findings of fact suggested that an actual discharge had occurred. *Schneider,* 794 F.2d at 384.

A motion for summary judgment presents different opportunities and imposes different responsibilities on the parties. *See Rodgers v. City of Des Moines,* 435 F.3d 904, 908 (8th Cir. 2006) ("Without some guidance, we will not mine a summary judgment record searching for nuggets of factual disputes to gild a party's arguments."); *see also Satcher v. Univ. of Ark. at Pine Bluff Bd. of Trs.,* 558 F.3d 731, 735 (8th Cir. 2009) (holding that the "failure to oppose a basis for summary judgment constitutes waiver of that argument" on appeal). Thus, unlike the plaintiff in *Schneider,* who did not submit briefing in support of her arguments, Ames had the opportunity to oppose Nationwide's motion and was responsible for

presenting any argument that might have precluded summary judgment in favor of Nationwide. *See Satcher,* 558 F.3d at 735 ("It was [the plaintiff's] responsibility to show that there were genuine issues of material fact in the record that precluded the summary judgment Appellees sought below."); *see also Grenier v. Cyanamid Plastics, Inc.,* 70 F.3d 667, 678 (1st Cir. 1995) ("If a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived and cannot be considered or raised on appeal." (quoting *Vaughner v. Pulito,* 804 F.2d 873, 877 n.2 (5th Cir. 1986))); *Liberles v. County of Cook,* 709 F.2d 1122, 1126 (7th Cir. 1983) ("It is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal."); *Frank C. Bailey Enters., Inc. v. Cargill, Inc.,* 582 F.2d 333, 334 (5th Cir. 1978) (per curiam) ("[A]n appellate court, in reviewing a summary judgment order, can only consider those matters presented to the district court."). Because Ames failed to present her actual discharge argument to the district court in opposition to Nationwide's summary judgment motion, we conclude that she has waived that argument on appeal.

III.

The judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ANGELA AMES, Plaintiff, v. NATIONWIDE MUTUAL INSURANCE CO., NATIONWIDE ADVANTAGE MORTGAGE CO., and KARLA NEEL, Defendants.	*	4:11-cv-00359 RP-RAW MEMORANDUM OPINION AND ORDER (Filed Oct. 16, 2012)

Before the Court is Nationwide Mutual Insurance Company's, Nationwide Advantage Mortgage Company's (collectively "Nationwide"), and Karla Neel's ("Neel") (collectively the "Nationwide Defendants" or "Defendants") Amended Motion for Summary Judgement and Request for Oral Argument ("MSJ"), filed July 24, 2012.[1] Clerk's No. 46. On August 20, 2012, Plaintiff Angela Ames ("Ames") timely resisted the Motion. Clerk's No. 62. Defendants

[1] On July 23, 2012, Defendants filed an MSJ that did not request oral argument. *See* Clerk's No. 44. The next day, on July 24, 2012, Defendants amended the Motion by including such a request. *See* Clerk's No. 46.

replied on August 30, 2012. Clerk's No. 70. This matter is fully submitted.[2]

I. FACTUAL BACKGROUND

Ames's at-will employment as a loss mitigation specialist at Nationwide lasted from October 2008[3] to July 19, 2010. Nationwide's Statement of Undisputed Facts in Supp. of MSJ ("Nationwide's Facts") ¶¶ 1-3, 43; Pl.'s Resp. to Nationwide's Facts ("Ames's Facts") ¶¶ 1-4. Following the birth of her first child on May 2, 2009, Ames took eight weeks of maternity leave. *See* Nationwide's Facts ¶ 52; Ames's Facts ¶ 52; Ames's Statement of Add'l Material Facts ("Ames's Add'l Facts") ¶ 2. In October 2009, Ames found out that she was pregnant again. *See* Ames's Add'l Facts ¶ 3. Due to pregnancy complications, she began her maternity leave on April 11, 2010 prior to giving birth to her second child. *See id.* ¶¶ 5-6. Initially, Nationwide advised Ames that her maternity leave would expire

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[2] On August 30, 2012, Ames requested an oral argument on the pending MSJ. Clerk's No. 69. The Court, however, does not believe that an oral argument would substantially aid it in ruling on the motion. *See* LR 7(c). Accordingly, Ames's Motion for Hearing/Oral Argument (Clerk's No. 69) is denied.

[3] The parties report different employment start dates. Ames states that she began work at Nationwide on or about October 1, 2008. *See* Pl.'s Resp. to Nationwide's Facts ("Ames's Facts") ¶ 1. Nationwide, on the other hand, states that Ames's employment began on October 20, 2008. *See* Nationwide's Statement of Undisputed Facts in Supp. of MSJ ¶ 1.

on August 2, 2010.[4] *See id.* ¶¶ 16-17; Nationwide's Facts ¶ 52. In a June 16, 2010[5] telephone call between Neel[6] and Ames, however, Neel advised Ames that there had been a mistake in calculating her maternity leave and that Ames's leave would expire on July 12, 2010 rather than on August 2, 2010.[7] *See* Ames's Add'l Facts ¶ 16; Nationwide's Facts ¶¶ 51-52; App. to Nationwide's MSJ ("Nationwide's App.") at 204. As agreed during this telephone call, Ames returned to work on July 19, 2010 at approximately 10:00 a.m.[8] *See* Ames's Add'l Facts ¶ 22. She resigned from her position three hours later. *See* Nationwide's

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[4] Due to what the Court perceives to be a typographical error, Nationwide reports that Ames's maternity leave was to end on August 2, 2012. *See* Nationwide's Facts ¶ 52.

[5] In her Complaint, Ames alleges that the telephone call took place on June 21, 2010. *See* Am. Compl. ¶ 20.

[6] At all relevant times, Neel was an Associate Vice President, who was in charge of overseeing the Loss Mitigation Department. *See* Nationwide's Facts ¶ 5; App. to Nationwide's MSJ ("Nationwide's App.") at 54, p. 10:13-25.

[7] The parties disagree as to whether Nationwide allowed Ames to return to work on August 2, 2010. *Compare* Ames's Statement of Add'l Material Facts ¶ 20 (stating that, during the June 16, 2010 telephone call, "Neel[ ] insinuat[ed] that [Ames] would be disciplined (if not fired) if she did not return to work on July 19, 2010") *with* Nationwide's Facts ¶ 53 (stating that Nationwide allowed Ames to take until August 2, 2010 before returning to work).

[8] Ames reported to work around 10:00 a.m. because she had to take her newborn son to a routine doctor's appointment. *See* Ames's Add'l Facts ¶ 22.

Facts ¶¶ 43, 70. The parties disagree on what exactly transpired over those three hours.

Shortly after reporting to work on July 19, 2010, Ames needed to express milk.[9] *See* Pl.'s App. in Supp. of Her Resistance to Nationwide's MSJ ("Ames's App.") at 4-5. When Ames told Sara Sagers, presently Sara Hallberg ("Hallberg"),[10] that she had to express milk immediately, Hallberg responded that Ames had to fill out paperwork[11] before being able to use one of

[9] Ames states that, at the time, she was nursing her baby every three hours. *See* Pl.'s App. in Supp. of Her Resistance to Nationwide's MSJ at 4, p. 68:21-5, p. 69:2. On July 19, 2010, her first day following her maternity leave, Ames expressed milk around 6:30 a.m. *See id.* at 4, p. 68:16-20. Therefore, more than three hours had gone by when Ames reported to work.

[10] Hallberg was employed by Nationwide as a nurse. *See* Ames's App. at 30:9-11.

[11] There was a three-day waiting period before the paperwork could be processed and Ames given access to a lactation room. *See* Ames's App. at 7, p. 81:16-19; Nationwide's App. at 150-51. Ames claims that no one had ever advised her of this waiting period. *See* Ames's App. at 7, p. 82:20-24. Nationwide disagrees and points out that its lactation policy was available to Ames online, that Ames did not ask any questions regarding the lactation policy, and that she did not attend any of the quarterly maternity meetings although she knew about them. *See* App. Nationwide's App. at 84:14-85:16; 93:14-23; 81:5-14.

When, on July 19, 2010, it became clear that Ames had not filled out the paperwork requesting access to a lactation room, Hallberg sent two emails. The first one was addressed to Ames and contained Nationwide's lactation policy, which consists of approximately three pages. *See* Nationwide's App. at 148-51. With her second email, Hallberg requested expedited processing of Ames's application for access to a lactation room. *See id.* at 152.

the lactation rooms.[12] *See id.* at 7, p. 82:13-19. To accommodate Ames's need to immediately express milk, Hallberg suggested that she use one of the wellness rooms[13] or Hallberg's office.[14] *See* Nationwide's App. at 72:5-21; 73:4-8. Ames chose a wellness room that was going to become available shortly.[15] *See id.* at 73:21-25; Ames's App. at 91 ¶ 9.

While waiting on the wellness room, Ames met with Brian Brinks[16] ("Brinks") "to catch up on the status of [her] work." Ames's App. at 91 ¶ 11. Ames asserts that Brinks had promised to take over her work while she was on maternity leave, but that nothing had been done. *See id.* at 43. Ames also claims that, during the meeting, Brinks told her that

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[12] Nationwide had three lactation rooms at that time. *See* Nationwide's Facts ¶ 65.

[13] Ames asserts that Hallberg advised her not to express milk in a wellness room because her milk may be exposed to germs. *See* Ames's App. at 7, p. 81:19-23. Nationwide denies this allegation. *See id.* at 31:1-13.

[14] Ames disputes that Hallberg ever suggested that Ames could use her office to pump milk. *See* Ames's App. at 91 ¶ 15.

[15] Ames alleges that Hallberg told her that the available wellness room was currently occupied by a sick person and "the lock . . . was broken, so if [Ames] wanted any semblance of privacy, [she] would need to put a chair against the door and sit in it while [she] pumped, so that anyone trying to come in would strike [her] chair with the door and hopefully be discouraged from entering." *See* Ames's App. at 91 ¶¶ 9-10. Nationwide denies these allegations. *See id.* at 31:14-20.

[16] Brian Brinks was Ames's immediate supervisor. *See* Nationwide's App. at 47, p. 10:16-19.

she had two weeks to catch up, that she had to work overtime to accomplish that, and that if she failed to catch up within two weeks, she would be disciplined. *See id.*; *see also id.* at 91 ¶ 12; Nationwide's App. at 52, pp. 80:15-82:25. Nationwide agrees that such a meeting took place, but disagrees with Ames's account of the conversation between her and Brinks. Specifically, Nationwide asserts that Ames's "work queue was up to date" when she came back to work on July 19, 2010.[17] *See* Nationwide's App. at 52, p. 79:5-11. Furthermore, Brinks testified that "[o]vertime was voluntary," and that Ames was not required to work overtime. *See id.* at 52, p. 79:12-21. Finally, Brinks denies telling Ames that he would start writing her up if she did not get caught up on her work within two weeks. *See id.* at 52, pp. 80:15-81:5.

The unavailability of a lactation room, her urgent need to express milk, and Nationwide's "unrealistic and unreasonable expectations about her work production" caused Ames to resign from her position because she "felt like she had no other choice." *See* Am. Compl. ¶ 44. Ames sued the Nationwide Defendants alleging: (1) sex and pregnancy discrimination under the Iowa Civil Rights Act ("ICRA"), *see* Am. Compl. ¶¶ 51-54; (2) pregnancy and sex discrimination under Title VII of the Civil Rights Act of 1964

[17] Actually, Nationwide states that Ames's "queue" was in much better condition when she returned to work as compared to when she went on maternity leave. *See* Nationwide's Facts ¶ 74; Nationwide's App. at 52, p. 79:10-11; 213-58.

("Title VII"), *see* Am. Compl. ¶¶ 55-58; and (3) violation of § 207 of the Fair Labor Standards Act ("FLSA"),[18] *see* Am. Compl. ¶¶ 59-64. Ames contends that Hallberg, Neel, Brinks, and Somphong Baccam ("Baccam")[19] discriminated against her on the basis of sex, pregnancy, and nursing. *See* Nationwide's App. at 86-93.

Specifically, Ames states that Hallberg discriminated against her by "providing a letter . . . stat[ing] there was a three-day waiting period . . . to access a lactation room," by offering her a wellness room, and by advising Ames that her "milk could not be guaranteed" if she used a wellness room. *See id.* at 87:11-23. Neel subjected Ames to discrimination by "eye-rolling," by telling Ames that Neel did not have to go on bed rest during her pregnancy,[20] by stating that Neel would never have a baby shower before her baby is born because the baby could die, and because "[t]here was always a negative innuendo from [Neel] to [Ames.]" *See id.* at 88:17-89:16. With respect to Brinks, Ames complains that he viewed her pregnancy

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[18] Ames calls this alleged violation of section 207 of the FLSA "nursing discrimination." *See* Am. Compl. ¶ 1.

[19] Baccam was the Nationwide disability case nurse assigned to Ames's case. *See* Nationwide's Facts ¶ 61.

[20] Ames testified that Neel made the following comments regarding Ames's pregnancy: " 'I never had this many problems when I was pregnant. All I needed was a pocketful of Tums, and I was good to go.' " Nationwide's App. at 92:15-17. Ames also claims that Neel "comment[ed] on [her] size, about [her] carrying more than one baby because [she] was so big." *Id.* at 92:17-19.

as an inconvenience, refused to help her lift a filing cabinet on one occasion, and made certain comments concerning Ames's maternity leave.[21] *See id.* at 89:17-90:20. Lastly, Ames contends that Baccam discriminated against her because Baccam had more information about Nationwide's lactation policy but did not share her knowledge with Ames, nor did she advise Ames to review the lactation policy on her own. *See id.* at 93:14-23.

II. STANDARD FOR SUMMARY JUDGMENT

The term "summary judgment" is something of a misnomer. *See* D. Brock Hornby, *Summary Judgment Without Illusions*, 13 Green Bag 2d 273 (Spring 2010). It "suggests a judicial process that is simple, abbreviated, and inexpensive," while in reality, the process is complicated, time-consuming, and expensive.[22] *Id*. at 273, 281. The complexity of the process, however,

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[21] With respect to Brinks's alleged comments, Ames testified as follows:

> "Oh, yeah, I'm teasing her about only taking a week's worth of maternity leave. We're too busy for her to take off that much work." And everyone would chime in with "Oh, yeah," you know, "she can only be gone for a week. She already took her eight weeks with Henry."

Nationwide's App. at 90:13-18.

[22] Indeed, Judge Hornby, a District Court judge for the District of Maine, convincingly suggests that the name "summary judgment" should be changed to "motion for judgment without trial." 13 Green Bag 2d at 284.

reflects the "complexity of law and life." *Id*. at 281. "Since the constitutional right to jury trial is at stake," judges must engage in a "paper-intensive and often tedious" process to "assiduously avoid deciding disputed facts or inferences" in a quest to determine whether a record contains genuine factual disputes that necessitate a trial. *Id*. at 281-82. Despite the seeming inaptness of the name, and the desire for some in the plaintiffs' bar to be rid of it, the summary judgment process is well-accepted and appears "here to stay."[23] *Id*. at 281. Indeed, "judges are duty-bound to resolve legal disputes, no matter how close the call." *Id*. at 287.

Federal Rule of Civil Procedure 56(a) provides that "[a] party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought." "[S]ummary judgment is an extreme remedy, and one which is not to be granted unless the movant has established his right to a judgment with such

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[23] Judge Hornby notes that over seventy years of Supreme Court jurisprudence gives no hint that the summary judgment process is unconstitutional under the Seventh Amendment. *Id*. at 281 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979) and *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944)). While he recognizes that not much can be done to reduce the complexity of the summary judgment process, he nonetheless makes a strong case for improvements in it, including, amongst other things, improved terminology and expectations and increased pre-summary judgment court involvement. *See id*. at 283-88.

clarity as to leave no room for controversy and that the other party is not entitled to recover under any discernible circumstances." *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d 207, 209 (8th Cir. 1976) (citing *Windsor v. Bethesda Gen. Hosp.*, 523 F.2d 891, 893 n.5 (8th Cir. 1975)). The purpose of summary judgment is not "to cut litigants off from their right of trial by jury if they really have issues to try." *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962) (quoting *Sartor v. Ark. Natural Gas Corp.*, 321 U.S. 620, 627 (1944)). Rather, it is designed to avoid "useless, expensive and time-consuming trials where there is actually no genuine, factual issue remaining to be tried." *Anderson v. Viking Pump Div., Houdaille Indus., Inc.*, 545 F.2d 1127, 1129 (8th Cir. 1976) (citing *Lyons v. Bd. of Educ.*, 523 F.2d 340, 347 (8th Cir. 1975)). Summary judgment can be entered against a party if that party fails to make a showing sufficient to establish the existence of an element essential to its case, and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Federal Rule of Civil Procedure 56 mandates the entry of summary judgment upon motion after there has been adequate time for discovery. Summary judgment is appropriately granted when the record, viewed in the light most favorable to the nonmoving party and giving that party the benefit of all reasonable inferences, shows that there is no genuine issue of material fact, and that the moving party is therefore entitled to judgment as a matter of law. *See* Fed. R.

Civ. P. 56(a); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994). The Court does not weigh the evidence, nor does it make credibility determinations. The Court only determines whether there are any disputed issues and, if so, whether those issues are both genuine and material. *See Anderson v. Liberty Lobby*, *Inc.*, 477 U.S. 242, 252 (1986); *Wilson v. Myers*, 823 F.2d 253, 256 (8th Cir. 1987) ("Summary judgment is not designed to weed out dubious claims, but to eliminate those claims with no basis in material fact.") (citing *Weightwatchers of Quebec*, *Ltd. v. Weightwatchers Int'l*, *Inc.*, 398 F. Supp. 1047, 1055 (E.D.N.Y. 1975)).

In a summary judgment motion, the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact based on the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. *See Celotex*, 477 U.S. at 323; *Anderson*, 477 U.S. at 248. If the moving party has carried its burden, the nonmoving party must then go beyond its original pleadings and designate specific facts showing that there remains a genuine issue of material fact that needs to be resolved by a trial. *See* Fed. R. Civ. P. 56(c). This additional showing can be by affidavits, depositions, answers to interrogatories, or the admissions on file. *Id.*; *Celotex*, 477 U.S. at 322-23; *Anderson*, 477 U.S. at 257. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat a motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477

U.S. at 247-48. An issue is "genuine" if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *See id.* at 248. "As to materiality, the substantive law will identify which facts are material. . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id*.

Courts do not treat summary judgment as if it were a paper trial. Therefore, a "district court's role in deciding the motion is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe." *Waldridge v. Am. Hoechst Corp*., 24 F.3d 918, 920 (7th Cir. 1994). In a motion for summary judgment, the Court's job is only to decide, based on the evidentiary record that accompanies the moving and resistance filings of the parties, whether there really is any material dispute of fact that still requires a trial. *See id.* (citing *Anderson*, 477 U.S. at 249 and 10 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2712 (3d ed. 1998)).

III. LAW AND ANALYSIS

Defendants move for summary judgment on all three counts of Ames's Amended Complaint: (1) sex and pregnancy discrimination in violation of the ICRA, *see* Am. Compl. ¶¶ 51-54; (2) sex and pregnancy discrimination in violation of Title VII, *see* Am. Compl. ¶¶ 55-58; and (3) violation of 29 U.S.C. § 207, *see* Am. Compl. ¶¶ 59-64. *See* Br. in Supp. of Defs.' MSJ ("Nationwide's Br.") at 8-35.

A. *29 U.S.C. § 207(r)*

Returning to work promptly after childbirth, coupled with the desire to continue breast-feeding, exposes women to a unique and often challenging set of circumstances. To many, expressing breast milk in the workplace is incompatible with the desire to pursue a successful career. With respect to these challenges and the resulting social response, the Honorable Lewis A. Kaplan commented as follows:

> The transformation in the role of women in our culture and workplace in recent decades and the civil rights movement perhaps will be viewed as the defining social changes in American society in this century. Both have resulted in important federal, state and local legislation protecting those previously excluded from important roles from discrimination in pursuit of the goal of equality. Nevertheless, few would deny that the problems facing women who wish to bear children while pursuing challenging careers at the same time remain substantial.

Martinez v. MSNBC, 49 F. Supp. 2d 305, 306 (S.D.N.Y. 1999). In *Martinez*, the plaintiff sued her employer for being "insufficiently accommodating of [her] desire to pump breast milk in the workplace so that she could breast[-]feed her child while also returning to work promptly after childbirth." *Id.*

In the present case, Ames makes similar allegations. Specifically, she claims that the Nationwide Defendants violated 29 U.S.C. § 207(r) by failing to

provide her, on July 19, 2010, "with reasonable time to express breast milk in a private location, free from intrusion and shielded from the view of the public or other employees, at the time necessary to express breast milk." Am. Compl. ¶ 60. Defendants respond by arguing that the FLSA does not provide a private cause of action to redress alleged violations of 29 U.S.C. § 207(r).[24] *See* Nationwide's Br. at 9. The Court agrees.

Although § 207(r) is relatively new,[25] at least one court has wrestled with the issue presently before the Court – whether the FLSA provides a private cause of action for violations of § 207(r). *See Salz v. Casey's Mktg. Co.*, No. 11-cv-3055, 2012 U.S. Dist. LEXIS 100399, at *6-7 (N.D. Iowa July 19, 2012). In holding that the FLSA does not provide a private cause of action, the Honorable Donald E. O'Brien reasoned as follows:

> The express breast milk provisions are codified at 29 U.S.C. § 207(r). 29 U.S.C. § 207(r) provides:
>
> > (r)(1) An employer shall provide –
> >
> > (A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's

[24] Even if there was a private cause of action, the Nationwide Defendants maintain that they complied with 29 U.S.C. § 207(r). *See* Nationwide's Br. at 9.

[25] 29 U.S.C. § 207(r) was enacted on March 23, 2010.

> birth each time such employee has need to express the milk; and
>
> (B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.
>
> (2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

The enforcement [provision] for violations of 29 U.S.C. § 207 [is] 29 U.S.C. § 216(b). In pertinent part, 29 U.S.C. § 216(b) provides,

> Any employer who violates the provisions of section . . . 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

Since Section 207(r)(2) provides that employers are not required to compensate employees for time spent express milking [*sic*], and Section 216(b) provides that enforcement of Section 207 is limited to unpaid wages, there does not appear to be a manner of enforcing the express breast milk provisions. A recent notice from the Department of Labor corroborates Defendant's interpretation and limits

> an employee to filing claims directly with the Department [of] Labor. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80078 (Dec. 21, 2010). The Department of Labor may then "seek injunctive relief in federal district court. . . ."

Id. Although *Salz* does not constitute binding authority, the Court finds its logic irrefutable and, accordingly, adopts its holding.[26] Therefore, since Ames cannot bring a claim for any alleged violation of 29 U.S.C. § 207(r), the Court grants summary judgment for Defendants.

B. *Sex, Pregnancy,*[27] *and Nursing*[28] *Discrimination*

Ames argues that the record in this case contains direct and circumstantial evidence that the Nationwide

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[26] Since the Court holds that the FLSA does not provide a private cause of action to remedy alleged violations of § 207(r), the Court need not decide whether, on July 19, 2010, the Nationwide Defendants complied with this provision.

[27] Under the Pregnancy Discrimination Act ("PDA"), pregnancy discrimination falls within the scope of, and is a type of, gender discrimination. *See Falk v. City of Glendale*, No. 12-cv-00925, 2012 U.S. Dist. LEXIS 87278, at *8 n.5 (D. Colo. June 25, 2012). Therefore, the Court will analyze Ames's claims for pregnancy and gender discrimination as a single claim. *See id.*

[28] Ames argues that she is a member of a protected class – that of lactating mothers. *See* Pl.'s Resistance Br. at 17-23. In support, Ames argues that lactation is a medical condition related to her pregnancy. *See id.* at 17-18 (citing 42 U.S.C.

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§ 2000e(k)). Several courts, however, have considered and rejected the argument that terminating an employee due to lactation is gender or pregnancy discrimination. *See EEOC v. Houston Funding II, Ltd., et al.*, No. H-11-2442, 2012 U.S. Dist. LEXIS 13644, at *3-4 (S.D. Tex. Feb. 2, 2012) ("Firing someone because of lactation or breast-pumping is not sex discrimination.") (collecting cases).

In disputing the soundness of these cases' legal analyses, Ames relies primarily on *Falk*. *See* Pl.'s Resistance Br. at 19–20. After providing an overview of existing case law surrounding lactation, the *Falk* court summarized:

> As it stands, no existing case law correctly excludes lactation or other conditions experienced by the mother as a result of breast-feeding from Title VII protection under the PDA. *A plaintiff could potentially succeed on a claim if she alleged and was able to prove that lactation was a medical condition related to pregnancy, and that this condition, and not a desire to breastfeed, was the reason for the discriminatory action(s) that she suffered*.

Falk, 2012 U.S. Dist. LEXIS 87278, at *13 n.7 (emphasis added). Ames has not presented sufficient evidence that lactation is a medical condition related to pregnancy. Indeed, as the Nationwide Defendants point out, "lactation can be induced by stimulating the body to produce milk even though the person has not experienced a recent birth or pregnancy." Defs.' Reply Br. in Supp. of MSJ ("Nationwide's Reply Br.") at 12 n.9. Additionally, the Court takes judicial notice of the fact that adoptive mothers can also breast-feed their adoptive babies. *See* Defs.' App. at 323-25 (stating that adoptive mothers can breast-feed their adoptive babies and describing what adoptive mothers should do to stimulate milk production). Furthermore, it is a scientific fact that even men have milk ducts and the hormones responsible for milk production. *See* Nikhil Swaminathan, *Strange but True: Males Can Lactate*, SCI. AM., Sept. 6, 2007, *available at* http://www.scientificamerican.com/article.cfm?id=strange-but-true-males-can-lactate&sc=rss. Accordingly, lactation is not a physiological

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Defendants illegally discriminated against her in violation of Title VII and the ICRA. *See* Pl.'s Br. in Supp. of Resistance to Defs.' MSJ ("Pl.'s Resistance Br.") at 14-30. Defendants disagree and assert that, on the present record, summary judgment is appropriate because: (1) Ames has not presented direct evidence of sex, pregnancy, or nursing discrimination; and (2) Ames has not presented sufficient circumstantial evidence to establish a prima facie case of sex, pregnancy, or nursing discrimination. *See generally* Nationwide's Br. at 13-35; Defs.' Reply Br. in Supp. of MSJ ("Nationwide's Reply Br.") at 7-19.

Federal case law supplies the basic framework for deciding cases under the ICRA. *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1380 (8th Cir. 1996) (citing *Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n*, 322 N.W.2d 293, 296 (1982)). Iowa courts "traditionally turn to federal law for guidance on evaluating the ICRA, but federal law . . . is not

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condition experienced exclusively by women who have recently given birth.

Assuming, *arguendo*, that Ames had presented sufficient evidence that lactation was a medical condition related to pregnancy, the Court is doubtful that she has presented enough facts to establish that her alleged constructive discharge was due to her medical condition (lactation) rather than due to her desire to breast-feed. *See Falk*, 2012 U.S. Dist. LEXIS 87278, at *13 n.7. Indeed, Ames's Amended Complaint contains several references to her desire to pump milk as a form of nutrition for her newborn son. *See* Am. Compl. ¶¶ 22-23, 32, 42, 45. As Falk held, however, "Title VII does not extend to breast-feeding as a child care concern." *Falk*, 2012 U.S. Dist. LEXIS 87278, at *10.

controlling." *Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999) (citations omitted). Neither party posits any separate legal arguments regarding Ames's ICRA claim. The Court, therefore, will address Ames's federal and state law claims of sex, pregnancy, and nursing discrimination together.

The analytical framework for discrimination claims under Title VII uses two separate frameworks to determine whether a plaintiff was subject to discrimination. The choice between the two analyses depends on whether a plaintiff presents direct evidence of the alleged discrimination, thereby warranting a "mixed motive" theory of analysis as explained in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), or indirect or circumstantial evidence of the alleged discrimination which requires a "burden-shifting" framework of analysis under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

1. *Direct evidence.*

If a plaintiff produces direct evidence of the alleged discrimination, the plaintiff must persuade the fact-finder under the "mixed motive" theory of analysis. The plaintiff must persuade the fact-finder that, more likely than not, discrimination was "a motivating part in an employment decision." *Price Waterhouse*, 490 U.S. at 254. The burden then "shifts to the employer to prove that the employment decision would nevertheless have been made for legitimate, nondiscriminatory reasons." *Yates v. McDonnell-Douglas*, 255 F.3d 546, 548 (8th Cir. 2001). Direct

evidence of discrimination has been defined by the Eighth Circuit as "evidence or conduct or statements by persons involved in the decision-making process that is sufficient for the fact-finder to find that a discriminatory attitude was more likely than not a motivating factor in the employers' decision." *Kerns v. Capital Graphics, Inc*., 178 F.3d 1011, 1017 (8th Cir. 1999). The Eighth Circuit goes on to state that "such evidence might include proof of an admission that gender was the reason for an action, discriminatory references to the particular employee in a work context, or stated hostility to women being in the workplace at all." *Id*.; *see also Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991) ("[D]irect evidence may include evidence of actions or remarks of the employer that reflect a discriminatory attitude[,] . . . [c]omments which demonstrate a 'discriminatory animus in the decisional process[,]' . . . or those uttered by individuals closely involved in employment decisions." (citations omitted)). "[S]tray remarks in the workplace, statements by nondecisionmakers, [and] statements by decisionmakers unrelated to the decisional process itself are not, however, direct evidence of discrimination." *See Beshears*, 930 F.2d at 1354 (citing *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring)) (internal quotation marks omitted).

In 1976, the U.S. Supreme Court held that pregnancy discrimination was not gender discrimination. *See Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). In response to *Gilbert*, in 1978, Congress passed the Pregnancy Discrimination Act ("PDA").

See Falk, 2012 U.S. Dist. LEXIS 87278, at *9. The PDA amended Title VII by extending gender discrimination to include discrimination on the basis of pregnancy, childbirth, or related medical conditions. *See id.* at *10 (citing 42 U.S.C. § 2000e(k)); *see also Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 341 (8th Cir. 1997). Currently, the relevant section reads, in part, as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

42 U.S.C. § 2000e(k).

Ames argues that she has direct evidence of gender discrimination. *See* Pl.'s Resistance Br. at 14-17. This direct evidence is the following comment that Neel allegedly made to Ames "at the exact same time she was handing [Ames] a piece of paper and telling her what she needed to write down in order to resign": "'Maybe you should just stay home with your babies.'" *See id.* at 15. Neel denies making this comment. *See* App. to Defs.' MSJ ("Nationwide's App.") at 287, pp. 87:25-88:12. Assuming, *arguendo*, that Neel did indeed make this comment, the Court finds that,

under Eighth Circuit law, it does not constitute direct evidence of discrimination.

In arguing to the contrary, Ames relies primarily on *Sheehan v. Donlen Corp.*, 173 F.3d 1039 (7th Cir. 1999). *See* Pl.'s Resistance Br. at 16. In *Sheehan*, contemporaneously with telling the plaintiff that she was terminated, her supervisor added: "Hopefully this will give you some time to spend at home with your children." *See Sheehan*, 173 F.3d at 1043. The next day, the supervisor also told the plaintiff's co-workers that she had been terminated because "'we felt that this would be a good time for [Sheehan] to spend some time with her family.'" *Id.* The *Sheehan* court held that a reasonable jury could conclude that these comments were direct evidence of pregnancy discrimination. *See id.* at 1044.

Sheehan does not automatically compel the conclusion that Ames has mounted direct evidence of discrimination, however. To determine whether the comment at issue in this case constitutes direct evidence of sex discrimination, under Eighth Circuit law, the Court must analyze the speaker, the comment's content, and the causal connection between the comment and the adverse employment action. *See Wensel v. State Farm Mut. Auto. Ins. Co.*, 218 F. Supp. 2d 1047, 1059 (N.D. Iowa 2002) (citing *Bauer v. Metz Baking Co.*, 59 F. Supp. 2d 896, 901-06 (N.D. Iowa 1999)).

a. *The speaker.*

To constitute direct evidence of prohibited discrimination, the comment must be made by someone "involved in the decisionmaking process" and must concern the adverse employment action. *See Wensel*, 218 F. Supp. 2d at 1059 (internal citations and quotation marks omitted). It is not necessary, however, that the speaker be the "final decisionmaker." *See id.* At all relevant times, Neel was the Associate Vice President, who oversaw the Loss Mitigation Department, where Ames worked. *See* Nationwide's Facts ¶ 5; Nationwide's App. at 54, p. 10:13-25. Therefore, a reasonable fact-finder could infer that Neel was certainly involved in the alleged decision to force Ames into resigning from her position.

b. *The content of the comment.*

Only comments by decision-makers that are "*sufficient for a fact[-]finder to find that a discriminatory attitude was more likely than not a motivating factor in the employer's deicion* [sic]" would rise to the level of direct evidence of discrimination. *See Wensel*, 218 F. Supp. 2d at 1059-60 (citing *Metz Baking Co.*, 59 F. Supp. 2d at 904) (internal quotation marks omitted) (emphasis in original).

The Court finds that, under Eighth Circuit law, "Maybe you should just stay home with your babies" does not constitute direct evidence of sex discrimination. Rather, this comment is based on Ames's gender-neutral status as a new parent. *See Piantanida*, 116

F.3d at 342. "[D]iscrimination based on one's status as a new parent is not prohibited by the PDA." *Id.* at 341. In *Piantanida*, the court held, in the context of demoting the plaintiff, that the employer's statement that "she was being given a position 'for a new mom to handle'" was not direct evidence of gender discrimination.[29] *Id.* Similarly, in *Wensel*, the court held that

[29] During her deposition, the *Piantanida* plaintiff conceded that her demotion was not related to her pregnancy or maternity. *See Piantanida*, 116 F.3d at 341. Thus, the district court analyzed her Title VII claim as a gender discrimination claim "on the basis of her status as a 'new mother.'" *See Piantanida*, 927 F. Supp. at 1230 n.1. Although it is axiomatic that only women can be "new mom[s]," the Eighth Circuit nevertheless held that the comment at issue was gender-neutral. *See Piantanida*, 116 F.3d at 342.

Ames, however, argues that "Maybe you should just stay home with your babies" is not a gender-neutral comment, but rather one that "invoke[s] widely understood stereotypes the meaning of which is hard to mistake." *See* Pl.'s Resistance Br. at 16 (citing *Sheehan*, 173 F.3d at 1044-45 (internal quotation marks omitted)). The *Sheehan* court held that the following two comments constituted direct evidence of gender discrimination because they invoked "widely understood stereotypes" regarding women's ability to balance work and child-rearing: (1) "Hopefully this will give you some time to spend at home with your children"; and (2) "we felt that this would be a good time for [the plaintiff] to spend some time with her family." *See Sheehan*, 173 F.3d at 1043. Indeed, on the authority of *Sheehan*, one would be hard-pressed to argue that either the comment in *Piantanida* or Neel's alleged comment in this case do not invoke such stereotypes. *Sheehan*, however, is not binding on the Court while *Piantanida* is. Accordingly, the Court is compelled to follow *Piantanida* and hereby holds that "Maybe you should just stay home with your babies" is a gender-neutral comment that does not support Ames's claim for gender discrimination.

the defendant's statements[30] regarding the effect of child-rearing on insurance agents' productivity were gender-neutral and, therefore, not direct evidence of gender discrimination. *See Wensel*, 218 F. Supp. 2d at 1061-62.

In light of *Piantanida* and *Wensel*, the Court must conclude that "Maybe you should stay home with your babies" is, at best, evidence of discrimination on the basis of Ames's status as a new parent. Being a parent is not gender-specific as this class also includes men and women who will never become pregnant. *See Piantanida*, 116 F.3d at 342. Accordingly, since discriminating against Ames on account of her status as a parent would not be discrimination "because of or on the basis of [her] pregnancy, childbirth, or related medical conditions," the Court finds that no reasonable fact-finder could conclude that the alleged comment constitutes direct evidence of gender discrimination.

c. *Causal connection.*

Since the Court has determined that no reasonable jury could conclude that the comment Ames cites is direct evidence of sex discrimination, the Court

[30] There were two statements at issue in *Wensel*: "(1) that Wensel should wait at least five years before starting a family; and (2) that pregnancy and child-rearing harm an agent's ability to meet his or her productivity goals." *Wensel*, 218 F. Supp. 2d at 1060.

need not decide whether there was causation between the alleged comment and Ames's alleged constructive discharge.

Accordingly, since no reasonable fact-finder could conclude that the comment at issue, assuming it was uttered by Neel, constitutes direct evidence of sex discrimination, the Court now turns to the *McDonnell Douglas* framework to analyze any purported circumstantial evidence of sex discrimination.

2. *Circumstantial evidence.*

Where a plaintiff relies on circumstantial, rather than direct, evidence of intentional discrimination, the court applies the three-stage burden shifting approach developed by the Supreme Court in *McDonnell-Douglas*, and later refined in *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993); *Dammen v. UniMed Med. Ctr.*, 236 F.3d 978, 980 (8th Cir. 2001).

Under the *McDonnell Douglas* framework, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. *See McDonnell Douglas*, 411 U.S. at 802. If the plaintiff establishes a prima facie case, the burden of production shifts at the second stage to the defendant, who must articulate some legitimate, nondiscriminatory reason for the adverse employment action. *See Burdine*, 450 U.S. at 253. If the defendant carries this burden of production, the presumption raised by the prima facie

case is rebutted and "drops from the case." *Id*. at 255 n.10. The burden then shifts back at the third and final stage to the plaintiff, who is given the opportunity to show that the employer's proffered reason was merely a pretext for discrimination. *Id*. at 253. The ultimate burden remains with the plaintiff at all times to persuade the trier of fact that the adverse employment action was motivated by intentional discrimination. *Id*.

To establish a prima facie case of sex discrimination, Ames must show that: (1) she is a member of a protected class;[31] (2) she met applicable job qualifications; (3) despite her qualifications, she suffered an adverse employment action; and (4) the circumstances permit

[31] Defendants dispute that Ames is a member of a protected class. *See* Nationwide's Br. at 16-18. Although this Order does not specifically address this prong of Ames's prima facie case, the Court finds Defendants' argument persuasive. Ames appears to assert a protected status on the basis of her pregnancy and lactation. *See* Pl.'s Resistance Br. at 17-23. To the extent that Ames asserts a protected status on the basis of lactation, the Court finds she has failed to show that she belongs to a protected class because lactation is not pregnancy, childbirth, or a related medical condition. *See supra* n. 28; *see also* 42 U.S.C. § 2000e(k). To the extent that she claims a protected status on the basis of her pregnancy, the Court notes that Ames has not put forth sufficient evidence that there was a connection between Defendants' alleged discriminatory comments and conduct and Ames's alleged constructive discharge. *See Neesen v. Arona Corp.*, 708 F. Supp. 2d 841, 850 (N.D. Iowa 2010) (stating that the PDA does not apply "exclusively to women who are pregnant or suffer from a pregnancy-related disability" but that the alleged discrimination must be "because of or on the basis of pregnancy").

an inference of discrimination. *See Lewis v. Heartland Inns of Am., LLC*, 591 F.3d 1033, 1038 (8th Cir. 2010). "The burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253. The *McDonnell Douglas* framework for establishing a prima facie case of illegal discrimination "was never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). This framework's central focus is to determine whether the employer has treated some employees less favorably than others for an impermissible reason. *See id.*

The Nationwide Defendants concede, for purposes of summary judgment, that Ames was qualified for her position as a loss mitigation specialist. *See* Nationwide's Br. at 15. They dispute, however, that Ames suffered an adverse employment action under circumstances permitting an inference of discrimination.

a. *Adverse employment action.*

Constructive discharge is a type of an adverse employment action. *See Smith v. Lake Ozark Fire Dist.*, No. 10-cv-4100, 2011 U.S. Dist. LEXIS 64722, at *22-23 (W.D. Mo. June 13, 2011) (citing *Farcello v. County of Ramsey*, 612 F.3d 1069, 1083 (8th Cir. 2010)). "The bar to relief [in constructive discharge cases], however, is high." *Farcello*, 612 F.3d at 1083 (citing *O'Brien v. Dep't of Agric.*, 532 F.3d 805, 810-11 (8th Cir. 2008)). To prevail on her constructive discharge claim, Ames must establish that: (1) a reasonable

person would find her working conditions at Nationwide intolerable; and (2) Nationwide intended to force her to resign from her employment or could have "reasonably foreseen" that she would resign. *See id.* (internal citation omitted). Ames must also establish that she gave the Nationwide Defendants a reasonable chance to resolve the issues. *See West v. Marion Merrell Dow, Inc.*, 54 F.3d 493, 498 (8th Cir. 1995) ("Part of an employee's obligation to be *reasonable* is an obligation not to assume the worst and not to jump to conclusions too fast. . . . An employee who quits without giving her employer a reasonable chance to work out a problem is not constructively discharged.") (emphasis in original) (internal quotation marks omitted)).

Whether an employee has been constructively discharged is judged by an objective standard. *See Buboltz v. Residential Advantages, Inc.*, 523 F.3d 864, 869 (8th Cir. 2008) ("[A] constructive discharge takes place only when a reasonable person would find [the] working conditions intolerable."). "Unpleasant [or] unprofessional [work] environment" is insufficient to establish a constructive discharge. *Jones v. Fitzgerald*, 285 F.3d 705, 716 (8th Cir. 2002) (declining to find that the plaintiff had been constructively discharged even though two of her co-workers had called her a "skank," made harsh comments concerning her cohabitation with a man to whom she was not married, exhibited hostile attitudes, stuck their tongues out at her, "whisper[ed] in hushed voices in her presence, abruptly ceas[ed] conversations in her

presence," and socially isolated her). Work atmosphere that is less than ideal will not, by itself, support a successful constructive discharge claim because such atmosphere would not compel a reasonable person to resign. *See Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1160 (8th Cir. 1999).

i. *Intolerableness of working conditions.*

At trial, Ames would bear the burden of showing that a reasonable person[32] would have found her working condition intolerable, thus leaving her no choice but to quit. *See Wensel*, 218 F. Supp. 2d at 1064 (internal citations omitted). In support of her claim of intolerable conditions, Ames relies on the following

[32] Ames urges that the reasonable person standard applicable to her constructive discharge claim must account for the following factors: (1) the day she resigned was her first day back to work following the birth of her second child; (2) "she [was] battling the array of hormones common in a woman eight weeks post-partum"; (3) she was lactating and her breasts were engorged "from not being allowed to express milk"; and (4) she was excited to return to work but also sad to leave her newborn in somebody else's care. *See* Pl.'s Resistance Br. at 24. The Court disagrees with Ames's contention as adopting it would effectively transform the objective test into a subjective one. *See Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985) ("[T]he law does not permit an employee's subjective perceptions to govern a claim of constructive discharge."); *Angier v. Henderson*, No. 00-215, 2001 U.S. Dist. LEXIS 15310, at *18 n.3 (D. Minn. Aug. 3, 2010) ("[W]hen analyzing the merits of a constructive discharge claim, the fact[-]finder does not evaluate the workplace from the subjective viewpoint of the plaintiff.").

factors: (1) she was not given *immediate* access to a lactation room on July 19, 2010; (2) at the time she resigned, "it had been over *five hours* since she had last expressed milk and [she] was in considerable physical pain"; and (3) during her meeting with Brinks, he allegedly told her that none of her work had been done during her maternity leave, that she had to work overtime to get caught up, and that if Ames did not catch up within two weeks, she would be disciplined. *See* Pl.'s Resistance Br. at 24-27. Although not specifically set forth in her resistance brief, in arguing that she was constructively discharged, Ames seems to also rely on the following allegations: (4) Neel asked her to return to work on July 19, 2010 rather than the originally provided date of August 2, 2010; (5) Defendants did not provide her with information regarding Nationwide's lactation policy; and (6) Neel, Brinks, Baccam, and Hallberg discriminated against her during and after her pregnancy. *See* Nationwide's Br. at 16.

After analyzing the substance of these factors, the Court finds that they revolve around four common themes: (1) the alleged discrimination; (2) the revised return-to-work date; (3) Nationwide's lactation policy; and (4) the job expectations following Ames's return from maternity leave. Even if all of these factors were present, as Ames insists, the Court finds that they would still be insufficient to induce a reasonable fact-finder to conclude that Ames's working conditions were intolerable.

a) *Alleged discrimination.*

Ames maintains that Neel, Brinks, Hallberg, and Baccam subjected her to discrimination. Neel allegedly discriminated against Ames by "eye-rolling," by telling Ames that she did not have to go on bed rest during her pregnancy, by stating that she would never have a baby shower before her baby is born because the baby could die, and because "[t]here was always a negative innuendo from her to [Ames.]" *See* Nationwide's App. at 88:17-89:16. Ames testified that Neel also commented regarding Ames's pregnancy as follows: "'I never had this many problems when I was pregnant. All I needed was a pocketful of Tums, and I was good to go.'" *Id.* at 92:15-17. Furthermore, Neel allegedly "comment[ed] on [Ames's] size, about [Ames's] carrying more than one baby because [she] was so big." *Id.* at 92:17-19.

With respect to Brinks, Ames complains that he viewed her pregnancy as an inconvenience, refused to help her lift a filing cabinet on one occasion, and made certain comments concerning her maternity leave. *See id.* at 89:17-90:20. Specifically, at her deposition, Ames testified as follows regarding Brinks's alleged comments:

> "Oh, yeah, I'm teasing her about only taking a week's worth of maternity leave. We're too busy for her to take off that much work." And everyone would chime in with "Oh, yeah," you know, "she can only be gone for a week. She already took her eight weeks with Henry."

Id. at 90:13-18.

Next, Ames alleges that Hallberg discriminated against her by "providing a letter . . . stat[ing] there was a three-day waiting period . . . to access a lactation room," by offering her a wellness room to pump milk, and by advising Ames that her "milk could not be guaranteed" if she uses a wellness room. *See id.* at 87:11-23. Lastly, Ames contends that Baccam discriminated against her because Baccam had more information about Nationwide's lactation policy, but did not share her knowledge with Ames and did not advise Ames to review the lactation policy on her own. *See id.* at 93:14-23.

The Court finds that a reasonable fact-finder would conclude that, objectively, these instances of alleged discrimination would not cause a reasonable person in Ames's position to believe that she had no choice but to resign. Applying the reasonable person standard, the Court concludes that, at most, the comments and conduct at issue created a less than ideal and, arguably, unpleasant work environment for Ames. As held by the *Jones* and *Breeding* courts, however, this is insufficient to cause a reasonable person to believe that she has no choice but to resign. Furthermore, the Court notes that the facts of the present case paint a picture far less reprehensible than the one in *Jones*, where the Court declined to find that the plaintiff had been constructively discharged.

Although a reasonable fact-finder would conclude that Neel's and Brinks's comments were insufficient for a successful constructive discharge claim, the

Court believes that these comments at least allow Ames to raise a colorable constructive discharge claim. The same cannot be said for Hallberg's and Baccam's alleged discriminatory conduct. Ames complains that Hallberg discriminated against her by providing her with a letter stating that there was a three-day waiting period before obtaining access to a lactation room and by offering Ames use of a wellness room in the meantime. What Ames finds objectionable and discriminatory in Baccam's conduct is her failure to voluntarily and on her own initiative inform Ames of the contents of Nationwide's lactation policy. A reasonable fact-finder would not conclude that this constitutes culpable conduct. Therefore, the Court holds, as a matter of law, that neither Hallberg nor Baccam contributed to the alleged intolerable working conditions.

b) *Revised return-to-work date.*

Ames contends that having to report back to work two weeks prior to the originally scheduled return date of August 2, 2010 created or at least contributed to creating intolerable work conditions. The Court disagrees. It is undisputed that Ames was originally told that she could remain on maternity leave[33] until August 2, 2010. *See* Nationwide's App. at 204. On June 16, 2010, however, Neel informed her in

[33] The Court refers to the leave provided to new mothers by the Family Medical Leave Act ("FMLA") as maternity leave.

a telephone call that the August 2, 2010 date had been incorrectly calculated.[34] *See id.* Before ending the phone call, Ames and Neel agreed that Ames would return to work on July 19, 2010. *See id.* Notably, Ames acknowledged that returning to work on July 19, 2010 would be "fine."[35] *See id.*

There is no doubt that reporting back to work sooner than expected came as a shock to Ames. *See id.* The Nationwide Defendants, however, had a legitimate reason for requiring Ames to do so – the length of her maternity leave had been miscalculated. *See id.* Defendants did not deprive Ames of her rights under the Family Medical Leave Act (the "FMLA"). To the contrary, they extended Ames's maternity leave by one week. *See id.* In light of this extension, the fact that Defendants did not prejudice Ames's rights under the FMLA, and the fact that Ames had more than thirty days to prepare for returning to work on July 19, 2010, the Court concludes that, in the eyes of a reasonable fact-finder, the June 16, 2010 telephone call would not lead a reasonable person in Ames's

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[34] Neel explained that the maternity leave authorized by the FMLA is calculated on a rolling twelve-month basis. *See* Nationwide's App. at 204. Ames was not entitled to the full FMLA leave following the birth of her second child because she had already used some FMLA leave during the preceding twelve months due to the birth of her first child. *See id.*

[35] The Court notes that Ames agreed to return to work on July 19, 2010 before Neel stated that remaining on maternity leave until August 2, 2010 would "cause[ ] red flags . . . and problems like that." *See* Nationwide's App. at 204.

position to believe that she had no choice but to resign.

c) *Lactation policy and lactation room access.*

It is undisputed that Ames could not have been given access to a lactation room on July 19, 2010 because she had not filled out the required paperwork beforehand. *See supra* n.11. It is also undisputed, however, that Ames was able to use one of the wellness rooms to pump milk that day.[36] *See* Nationwide's App. at 73:4-8. Even if Ames did not consider the wellness rooms a satisfactory accommodation, using a wellness room was only a temporary solution until she was granted access to a lactation room. *See* Ames's App. at 7, p. 81:16-19 ("[T]here was a three-day waiting period for [Ames] to access a lactation room.").

Furthermore, although Ames refuses to accept any blame for not familiarizing herself with Nationwide's lactation policy, the fact remains that the policy was readily available to her. *Compare* Nationwide's App. at 87, p. 93:11-23 (Ames stating that Baccam discriminated against her by not explaining Nationwide's lactation program) *with* Nationwide's App. at 81:5-14; 84:14-85:16; 93:14-23 (Ames admitting

[36] Prior to creating the three lactation rooms, nursing mothers used the wellness rooms to express milk. *See* Ames's App. at 31:1-4.

that Nationwide's lactation policy was available on the company intranet, that she could have obtained information regarding the lactation policy during one of the quarterly maternity meetings but never attended any of those meetings because of her workload, and that she could have asked Baccam how to arrange for a [sic] lactation room access before returning to work). Even if Ames's workload was indeed so heavy that she could not attend any of the quarterly maternity meetings, she certainly could have reviewed Nationwide's lactation policy at some time during her pregnancy or during her maternity leave following the birth of her second child.[37] Similarly, prior to returning to work, Ames could have asked Baccam any questions concerning Nationwide's lactation policy, including how to obtain access to a lactation room, but did not do so.

A reasonable person in Ames's position would have done what is necessary to familiarize herself with Nationwide's lactation policy before returning to work. After all, going back to work did not come as a surprise to Ames; she knew on June 16, 2010 that she had to report back to work on July 19, 2010. Thus, she had over a month to prepare. The Court is not insensitive to the burdens and stresses associated with parenthood, particularly those experienced by new mothers. Being under stress, however, does not

[37] The Court notes that Nationwide's lactation policy is approximately three pages long. *See* Nationwide's App. at 148, 150-51.

excuse Ames from doing what any reasonable person in her position would have done. Therefore, the Court concludes that no reasonable fact-finder would determine that the unavailability of a lactation room on July 19, 2010 would lead a reasonable employee in Ames's position to believe that her only option was to resign. *See Jerkovich v. Freson-Madera of Am. Red Cross*, No. CV-F-04-5811, 2005 U.S. Dist. LEXIS 44827, at *52 (E.D. Cal. Aug. 23, 2005) ("Plaintiff was provided a secure and private place for her lactation needs[, albeit an unsanitary computer room]; even if less than ideal, this accommodation would not prompt a reasonable employee to believe that her only option was to quit.").

d) *Job expectations.*

Similarly, regardless of the contents of the July 19, 2010 conversation between Ames and Brinks, no reasonable jury would find that a reasonable employee in Ames's position would believe that her only option was to resign. Ames alleges that, during that meeting, Brinks told her that none of her work had been done while she was on maternity leave,[38] that

[38] Ames asserts that Brinks told her that none of her work had been done while she was on maternity leave and that she had two weeks to catch up on all the work that had been piling up. *See* Ames's App. at 43. Brinks disputes that none of Ames's work had been done. *See* Ames's App. at 27, pp. 79:22-80:10. Ames's assertion is also contradicted by Nationwide's reports showing that, as of July 19, 2010, Ames's work queue was in a better condition than when she took her maternity leave. *See*

(Continued on following page)

she had two weeks to catch up, and that she had to work overtime to do so. *See* Ames's App. at 91 ¶¶ 11-12. Also, Brinks allegedly told Ames that she would be formally disciplined unless she was completely caught up on her work in two week's time. *See id.* ¶ 12. Even assuming that Brinks indeed made these statements, the Court determines that no reasonable jury would conclude that these job expectations created intolerable working conditions, such that a reasonable person in Ames's position would believe that she had no option but to quit. Completing work assignments in a timely manner is not an [sic] unique job requirement; rather, it is central to the proper functioning of any business, including Nationwide's. *See* Nationwide's App. at 48, p. 15:11-19. Indeed, timely completion of the work tasks was a key characteristic of the position of loss mitigation specialist, and was "a high priority" within the entire Loss Mitigation Department. *See id.* at 48, p. 15:11-19. Thus, the mere expectation that Ames must timely perform her job duties, without more, cannot convince a reasonable

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Nationwide's App. at 213-58. The parties' disagreement on this issue does not create a genuine dispute. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (stating that a "metaphysical doubt" does not create a genuine dispute); *see also Middleton v. Am. Standard Cos.*, No. 06-2205, 2007 U.S. Dist. LEXIS 69733, at *28 (W.D. Ark. Sept. 20, 2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

fact-finder that Ames endured intolerable work conditions forcing her to resign.

ii. *Foreseeability of Ames's resignation.*

Ames has not put forth any evidence, other than her self-serving and unsupported assertion, that the Nationwide Defendants intended for her to resign on July 19, 2010. *See* Pl.'s Resistance Br. at 27 ("[The Nationwide Defendants *intended* for [Ames] to resign on July 19, 2010." (emphasis in original)). Accordingly, on this record, the Court must conclude that no reasonable fact-finder would determine that Defendants intended for Ames to quit. Thus, the relevant inquiry becomes whether it was reasonably foreseeable to Defendants that Ames would resign. The Court must answer this question in the negative.

No reasonable jury would agree that it was reasonably foreseeable to Defendants that the alleged discriminatory comments and conduct of Neel, Brinks, Hallberg, and Baccam would cause Ames to resign. As articulated in § III.B.2.a.i.a), the Court has determined that no reasonable jury would find Hallberg's and Baccam's conduct even remotely objectionable. Furthermore, for the reasons stated in that section, the Court finds that, although a reasonable fact-finder may conclude that Neel's and Brinks's comments were distasteful and inappropriate, it was nevertheless not reasonably foreseeable that those comments would force Ames to resign.

Similarly, no reasonable jury would find it reasonably foreseeable that changing Ames's return-to-work date would promote her ultimate resignation. Defendants asked Ames to report back to work earlier than expected because they had miscalculated the length of the maternity leave to which she was entitled. Therefore, all that they expected of Ames was to comply with the applicable FMLA provisions.

With respect to Ames's assertion that she was not given access to a lactation room, the Court notes that she had not filled out the required paperwork prior to reporting back to work on July 19, 2010. Her failure to do so is the *sole* reason for not getting access to a lactation room on that day. By not requesting such access, Ames failed to notify the Nationwide Defendants of her intentions to continue breast-feeding past the expiration of her maternity leave. Accordingly, it was not reasonably foreseeable that Ames would resign simply because she could not have access to a lactation room on July 19, 2010, or because she had to wait three days before getting access to such a room. The Court also finds that it was similarly not reasonably foreseeable that Ames would resign because she had to use a wellness room to express milk until obtaining access to a lactation room. Finally, for the reasons articulated in § III.B.2.a.i.d), a reasonable jury would not find that it was reasonably foreseeable that Ames would resign because of the expectation that she needed to maintain her work queue current.

iii. *Opportunity to respond.*

To prevail on her constructive discharge claim, Ames must show that she refrained from "assum[ing] the worst" and provided Defendants with an opportunity to address her grievances. *See West*, 54 F.3d at 498; *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1247 (8th Cir. 1998). Ames argues, and the Court will assume for purposes of this Order, that she did so when she "tried to discuss her feelings of despair with Ms. Neel and explore any options that might be available to her to accommodate her need to provide breast milk for her son." *See* Am. Compl. ¶ 45; *see also* Pl.'s Resistance Br. at 29. It is undisputed that Ames did not lodge a complaint with Nationwide's Human Resources department, the Office of Ethics, or the Office of Associate Relations.[39] *See* Nationwide's App. at 96:2-18. For this reason, the Court concludes, as a matter of law, that Ames did not give Defendants an opportunity to respond to her grievances.

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[39] Nationwide's Compliance Statement reads as follows:

> If you have reason to believe that Nationwide is not in compliance with the law, contact your local HR professional, the Office of Ethics, or the Office of Associate Relations to report the circumstances immediately. All complaints will be investigated and handled in as confidential a manner as possible. You are assured that there will be no retaliation against you for participating in an investigation or making a complaint with the reasonable belief that non-compliance with the law has occurred.

Nationwide's App. at 105. Ames was undoubtedly aware of this policy. *See id.* at 195.

Sowell v. Alumina Ceramics, Inc. presents a similar [sic] to this case's fact pattern. *See* 251 F.3d 678 (8th Cir. 2001). The plaintiff in *Sowell*, who had recently given birth to her child, complained to her supervisor regarding the newly-instituted pager policy but "failed to avail herself of the channels of communication provided by [the employer] to deal with such complaints." *See Sowell*, 251 F.3d at 385-86 (internal citation omitted). The Eighth Circuit affirmed the district court's grant of summary judgment for the employer, in part, due to Sowell's failure to utilize the grievance process established by the employer. *See id.*

Using similar reasoning, in *Coffman*, the Eighth Circuit reversed the jury's finding that the plaintiff had been constructively discharged. *See Coffman*, 141 F.3d at 1247-48. In concluding that there was insufficient evidence to support such a finding, the court took into account the fact that the plaintiff had available avenues for redress within the company but failed to use them. *See id.* The court explained that the rationale behind requiring an employee to attempt to resolve her grievances internally is that "society and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships." *Id.* at 1247 (internal citations and quotation marks omitted).

The Court sees no reason to depart from *Sowell*'s and *Coffman*'s analyses. To the contrary, the Court believes that *Sowell* and *Coffman* control the present

case. It is undisputed that Ames knew about Nationwide's internal processes allowing any employee to launch a complaint with the Human Resources department, the Office of Ethics, or the Office of Associate Relations. It is also undisputed that she did not do so. Rather, similar to the *Sowell* plaintiff, Ames only complained to Neel about not having immediate access to a lactation room, but did not avail herself of the established channels of communication within Nationwide. Dissatisfied with Neel's alleged indifference, Ames felt that she had no alternative but to resign.

Relying on *Sowell* and *Coffman*, the Court holds that Ames's claim of constructive discharge must fail. Ames did not follow known internal grievance procedures to lodge her complaint. Indeed, she did not even attempt to do so. Instead, she assumed the worst and surmised that her only reasonable option was to tender her resignation. Under existing law, Ames cannot prevail on her constructive discharge claim. Therefore, on this record, no reasonable jury could conclude that Ames has presented sufficient evidence to establish the existence of a genuine issue of material fact precluding summary judgment for Defendants on her constructive discharge claim.

b. *Inference of discrimination.*[40]

Ames argues that "a reasonable jury could find that the circumstances surrounding [Ames's] constructive discharge permit an inference of discrimination." Pl.'s Resistance Br. at 30. In support, Ames asserts that Neel's and Brinks's "barrage of comments . . . about her pregnancy and upcoming maternity leave" made it clear to her that her pregnancy was viewed as an inconvenience. *Id.* "[F]orcing [Ames] to come back to work earlier than she had expected" was yet another attempt "to get her to quit." *Id.* When Ames did not resign, Defendants made sure that she would "resign *the same morning she returned from maternity leave*." *Id.* (emphasis in original). For reasons that follow, the Court finds that Ames has not established the existence of circumstances surrounding her alleged constructive discharge, such that,

[40] "[T]he most straight-forward manner to give rise to an inference of sex discrimination" is for Ames to compare her treatment to that of other similarly-situated employees outside the protected class, or "comparators." *See Lewis v. Heartland Inns of Am., L.L.C.*, 585 F. Supp. 2d 1046, 1064 (S.D. Iowa 2008), *rev'd on other grounds*, 591 F.3d 1033 (8th Cir. 2010). In this case, such "comparators" would be men with children, not women without children. *See Johnston v. U.S. Bank Nat'l Ass'n*, No. 08-CV-0296, 2009 U.S. Dist. LEXIS 79125, at *31, 32 n.13 (D. Minn. Sept. 2, 2009). Since Ames has presented no evidence showing that Defendants treated her comparators more favorably, "the Court will appl[y] the slightly more expansive standard which allows [Ames] to meet the fourth prima facie element if she demonstrates that the [constructive] discharge occurred under circumstances giving rise to an inference of discrimination." *See Lewis*, 585 F. Supp. 2d at 1063.

when considered together or in isolation, they warrant an inference of discrimination.

i. *Alleged discrimination.*

The Court has already detailed and will not recount Defendants' alleged discriminatory comments and conduct. *See supra* § III.B.2.a.i.a. Rather, the Court finds it helpful to compare the facts of the present case to previous cases where the facts were found sufficient to support a discrimination claim.

In *Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150, 1160 (8th Cir. 2003), the plaintiff sued her employer alleging gender discrimination on the basis of pregnancy. She claimed that she had been discriminated against "not because she was a new parent, but because she [was] a woman who had been pregnant [and] had taken a maternity leave."[41] *Id.* In concluding that there was ample support for the jury's finding that the plaintiff had been discriminated against on the basis of her pregnancy, the *Walsh* court relied primarily on the following factors: (1) the plaintiff was required to provide advance notice and documentation

[41] Walsh also claimed that she had been discriminated against because she "might become pregnant again." *See Walsh*, 332 F.3d at 1160 (citing *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) (holding that potential pregnancy was a sex-related medical condition)). Ames has not presented any evidence that she had been discriminated against because of her potential to become pregnant again. Accordingly, the Court will not examine this issue.

of her doctor's appointments while she was pregnant, and her co-workers did not have to do that, *see id.*; (2) the plaintiff was denied the opportunity to change her schedule by leaving at 4:30 p.m., instead of 5:00 p.m., so that she could pick up her son from daycare, even though some of her co-workers left work at 3:45 p.m., and her supervisor told her that she should probably look for another job, *see id.* at 1155; (3) the plaintiff's supervisor placed signs saying "Out – Sick Child" outside the plaintiff's cubicle whenever she was caring for her sick son when such signs were not placed outside absent co-workers' cubicles, *see id.*; and (4) the plaintiff was required to make up "every minute" that she was absent due to doctor's appointments for herself or her son when no other employees were required to do so, *see id.*

Although the Court does not condone the discriminatory treatment that the *Walsh* plaintiff had to endure, it did not rise to the level of the disparate treatment accorded the plaintiff in *Snyder v. Yellow Transportation, Inc.*, 321 F. Supp. 2d 1127 (E.D. Mo. 2004). While on maternity leave, Snyder's employment as a sales representative was terminated as a part of an announced reduction in force. *See id.* The court denied the employer's summary judgment motion, holding that there was sufficient evidence in the record to support a finding that the plaintiff's "sex and recent pregnancy were factors considered in the decision to terminate her employment." *Id.* For instance, while she was on maternity leave, her employer permanently realigned the territory lines

assigning Snyder to an undesirable territory. *See id.* Furthermore, one of Snyder's managers had made derogatory remarks about female sales representatives calling them "a pain in the ass." *See id.* Another manager had stated that male account managers were more capable than their female counterparts because women took time off to care for children. *See id.* at 1132. These comments, however, were not the most egregious conduct that Snyder's superiors engaged in. Following her discharge, one of her former managers asked a colleague of hers to fabricate a letter "for her file" outlining alleged customer complaints regarding Snyder's job performance. *See Snyder*, 321 F. Supp. 2d at 1132.

A "milder" case of pregnancy discrimination is *Vosdingh v. Qwest Dex, Inc.*, No. 03-4884, 2005 U.S. Dist. LEXIS 6866 (D. Minn. Apr. 21, 2005). Although the comments directed at the plaintiff were not as harsh as those in *Snyder*, the court found that they were nevertheless sufficient to give rise to an inference of discrimination. *See Vosdingh*, 2005 U.S. Dist. LEXIS 6866, at *60. When Nicholls, one of the *Vosdingh* plaintiffs, informed her manager that she was pregnant for the second time, the manager asked her what she was going to do about her job. *See id.* at *59. The manager also added that it was hard to come back to work after having a child and that it was hard to keep "this job with two kids." *See id.* When Vosdingh returned to work and told her manager about her need to express milk, he made derogatory comments concerning her decision to come back

to work and to continue breast-feeding. *See id.* The manager also told Vosdingh that he knew it was hard for her to come back to work and asked if there was any way she could stay home. *See id.*

The Court finds that *Dams v. City of Waverly*, No. C04-2077, 2006 U.S. Dist. LEXIS 19237 (N.D. Iowa Mar. 2, 2006) is also useful in deciding whether Ames has presented evidence sufficient to give rise to an inference of discrimination. After Dams became pregnant, she and her supervisor, Buls, had several discussions regarding the length of her upcoming FMLA leave. *See Dams*, 2006 U.S. Dist. LEXIS 19237, at *2. Buls took the position that eight, rather than ten, weeks of maternity leave would be more appropriate. *See id.* at *2-3. The court held that the inquiries as to the length of the leave and the statement that eight weeks of leave would be preferable were "perfectly appropriate." *See id.* at *14. Buls's "attempt[ ] to condition granting Dams'[s] unrelated vacation time on [her] taking only eight weeks of leave" was, however, inappropriate and illegal. *See id.*

The inquiry into whether a plaintiff has presented evidence sufficient to give rise to an inference of discrimination is case-specific. *See McDonnell Douglas*, 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations."). Thus, there are no particular comments or conduct that have to be present in a given case to permit an inference of discrimination.

See id. With this in mind, the Court views *Walsh*'s, *Snyder*'s, *Vosdingh*'s, and *Dams*'s analyses as relevant and instructive, but in no way dispositive to the present case. After analyzing the record, the Court does not agree that the evidence in this case permits an inference of sex discrimination.

Assuming, *arguendo*, that Neel and Brinks made the comments at issue, the Court must still conclude that they are insufficient to warrant an inference of discrimination.[42] Unlike the employer's statements and actions in *Walsh*, *Snyder*, *Vosdingh*, and *Dams*, none of the comments or conduct at issue here indicates Defendants' negative attitude towards pregnancy or the likelihood that Ames would suffer an adverse employment action as a result of her pregnancy

[42] The Court notes that all of the comments at issue occurred prior to Ames taking her maternity leave, which began on April 12, 2010. *See* Nationwide's App. at 88:17-93:23. Some of them were made when Ames was pregnant with her first child in 2008-09. *See id.* at 91:19-92:6. Considering the lack of temporal proximity between these comments and the alleged constructive discharge, the Court is less inclined to find a connection between the comments and the adverse employment action. *Cf. Quick v. Wal-Mart Stores, Inc.*, 441 F.3d 606, 610 (8th Cir. 2006) ("[W]e have been hesitant to find pretext or discrimination on temporal proximity alone." (internal citation and quotation marks omitted)); *Snelson v. Mo. Transp. Comm'n*, No. 06-4073, 2009 U.S. Dist. LEXIS 14456, at *13-14 (W.D. Mo. Feb. 24, 2009) ("[C]lose temporal proximity between an employer's discovery of a protected characteristic and an adverse employment action may, on rare occasions, suffice to create an inference of discrimination." (internal citation and quotation marks omitted)).

or maternity leave. Viewing the alleged discriminatory comments and conduct in the light most favorable to Ames, the Court finds that, at most, they are marginally inappropriate. They are not, however, indicative of Nationwide's negative attitude towards pregnancy, the feminine gender, or maternity leave.

Notably, unlike in *Dams*, here there is no evidence that Nationwide attempted to discourage Ames from taking the entire FMLA leave to which she was entitled. To the contrary, she was actually given an extra week of maternity leave following the birth of her second child. It is also undisputed that Ames did not experience a disparate treatment resembling, even remotely, the one that the *Walsh* plaintiff had to endure. Unlike the *Snyder* plaintiff, Nationwide did not change the essential responsibilities of Ames's position while she was on maternity leave or upon her return to work. Most importantly, unlike the *Vosdingh* plaintiffs, Ames did not have to put up with any derogatory comments on account of her pregnancy, maternity leave, or desire to continue breast-feeding. Indeed, the evidence suggests that Defendants were quite accommodating and understanding of Ames's decisions to take all the FMLA leave to which she was entitled and to continue breast-feeding after coming back to work. Furthermore, Defendants did not, at any point, suggest or imply that Ames's pregnancies, maternity leave, or desire to continue breast-feeding somehow jeopardized her continued employment.

As with Neel's and Brinks's comments and conduct, the Court does not agree that the remaining instances of alleged discrimination by Hallberg and Baccam are sufficient to give rise to an inference of discrimination. Baccam's failure to advise Ames on the specifics of Nationwide's lactation policy does not constitute discriminatory conduct. Indeed, Ames has not presented any evidence that she informed Defendants of her plans to continue breast-feeding following her return to work. At the same time, Ames admits that the lactation policy was readily available to her on the company intranet and that she could have, but did not, ask Baccam any questions regarding the policy. In light of these circumstances, the Court cannot conclude that Baccam engaged in any discriminatory behavior against Ames.

Similarly, the Court must conclude that Hallberg did not discriminate against Ames either. Providing a letter explaining the procedure for obtaining access to a lactation room is not an act of discrimination. When, on July 19, 2010, Ames found out that she would not be able to use a lactation room on that day, Hallberg offered her use of one of the wellness rooms instead. Hallberg also sent an email requesting that Ames's request for access to a lactation room be expedited. *See* Nationwide's App. at 152. The Court cannot agree that these actions exhibit any of the inherent characteristics of discriminatory behavior. To the contrary, Hallberg's actions portray her as someone who was exceptionally sensitive to Ames's recent childbirth and breast-feeding concerns.

ii. *Revised return-to-work date.*

Based on the analysis in § III.B.2.a.i.b, the Court concludes that changing the end date of Ames's maternity leave does not give rise to an inference of discrimination. Although asking Ames to report back to work approximately two weeks earlier than she had expected came as a surprise, it did not prejudice her rights under the FMLA. To the contrary, Defendants allowed Ames to take an extra week of maternity leave over and above what she was entitled to under the law. This is not the type of conduct giving rise to an inference of discrimination.

iii. *Events of July 19, 2010.*

The Court hereby incorporates by reference the analysis in §§ III.B.2.a.i.c and III.B.2.a.i.d. Ames asserts that, on July 19, 2010, two factors prompted her to believe that she had no choice but to resign – not being able to use a lactation room to express milk and her conversation with Brinks concerning the status of her work. With respect to the lactation room, the Court notes that Ames was denied access *solely* due to her failure to fill out the required paperwork. While waiting for this paperwork to be processed, Ames was offered a wellness room where she could express breast milk. Neither the lack of lactation room access nor the need to use a wellness room to express milk belongs to the category of circumstances warranting an inference of discrimination,

however. For that matter, neither does the July 19, 2010 conversation between Brinks and Ames.

During that meeting, Brinks communicated Nationwide's expectation that Ames must not fall behind on her work tasks and could use overtime if she needed it. The Court cannot agree that these were unreasonable expectations; to the contrary, timely completion of the work tasks was central to the loss mitigation specialist position. *See* Nationwide's App. at 48, p. 15:11-19. When asked about the importance of "stay[ing] on top of the work" in the Loss Mitigation Department, Brinks testified as follows:

> Q. And is that because that was a busy department?
>
> A. Yes.
>
> Q. And one where it was important to stay on top of the work?
>
> A. Yes.
>
> Q. Would you say that was probably a No. 1 priority for that department?
>
> A. It was a high priority.

Id. Furthermore, the record establishes that Ames was not treated differently than her co-workers in the Loss Mitigation Department. *See id.* "It was a high priority [that everyone] stay[ed] on top of the work." *Id.* at 48, p. 15:14-19. Even if Nationwide's expectations regarding Ames's timely completion of work

tasks were unrealistic in light of her recent childbirth and three-month maternity leave, that alone does not give rise to an inference of discrimination. *See Standridge v. Union Pac. R.R. Co.*, 479 F.3d 936, 944 (8th Cir. 2007) ("While an employer must treat its employees similarly, it does not have to treat employees in a protected class more favorably than other employees.").

IV. CONCLUSION

For the reasons discussed above, Defendants' MSJ (Clerk's No. 46) is hereby GRANTED. In light of this ruling, the following motions are DENIED AS MOOT: (1) Motion for Summary Judgment (Clerk's No. 44); (2) Motion to Exclude Testimony of Plaintiff's Experts and Request for Oral Argument (Clerk's No. 31); (3) Motion to Strike (Clerk's No. 72); (4) Motion to Strike Section II of Defendants' Response to Plaintiff's Statement of Additional Material Facts (Clerk's No. 75); (5) Motion to Continue the Trial and Request for Expedited Ruling (Clerk's No. 85); and (6) Plaintiff's Motion in Limine (Clerk's No. 87). Additionally, for the reasons articulated in n.2 above, the Court DENIES Plaintiff's Motion for Hearing/Oral Argument (Clerk's No. 69).

IT IS SO ORDERED.

Dated this ___ 16th ___ day of October, 2012.

/s/ Robert W. Pratt
ROBERT W. PRATT
U.S. DISTRICT JUDGE

United States Court of Appeals
for the Eighth Circuit

No. 12-3780

Angela Ames

Plaintiff-Appellant

v.

Nationwide Mutual Insurance Company;
Nationwide Advantage Mortgage Company;
Karla Neel

Defendants-Appellees

Equal Employment Opportunity Commission;
American Civil Liberties Union Foundation;
American Civil Liberties Union of Iowa

Amici on Behalf of *Appellant*

Appeal from United States District Court
for the Southern District of Iowa – Des Moines

Filed: June 26, 2014

Before WOLLMAN, COLLOTON, and GRUENDER, Circuit Judges.

ORDER

Angela Ames petitions for rehearing of this court's decision filed March 13, 2014. Represented by new counsel who appears for the first time on the petition, Ames leads with an entirely new argument. She contends the Supreme Court's decision in *Pennsylvania State Police v. Suders,* 542 U.S. 129 (2004), supersedes circuit precedent such as *West v. Marion Merrell Dow, Inc.,* 54 F.3d 493 (8th Cir. 1995), and similar cases cited in the panel opinion. *See Sanders v. Lee Cnty. Sch. Dist. No. 1,* 669 F.3d 888, 893 (8th Cir. 2012); *Alvarez v. Des Moines Bolt Supply, Inc.,* 626 F.3d 410, 418 (8th Cir. 2010); *Coffman v. Tracker Marine, L.P.,* 141 F.3d 1241, 1247-48 (8th Cir. 1998). According to the petition for rehearing, *Suders* dictates that a plaintiff alleging constructive discharge in violation of Title VII based on an "official act" of a supervisor need not give the employer a reasonable opportunity to address and ameliorate the conditions that she claimed constituted a constructive discharge. The EEOC, as *amicus curiae,* presses the same argument based on *Suders,* also for the first time in support of the petition for rehearing.

"Panel rehearing is not a vehicle for presenting new arguments, and we do not ordinarily consider arguments raised for the first time in a petition for rehearing." *Yankton Sioux Tribe v. Podhradsky,* 606 F.3d 985, 993 (8th Cir. 2010) (internal quotations and citations omitted). The issue of constructive discharge was briefed extensively in the district court and on appeal by the parties and the EEOC as *amicus*

curiae. Before the rehearing stage, neither Ames nor the EEOC cited *Suders* for the proposition now advanced or suggested that *Suders* superseded prior circuit precedent. Ames cannot now invoke a new theory in support of her position. *Id.; United States v. Klotz,* 503 F.2d 1056, 1056 (8th Cir. 1974) (per curiam). We therefore decline to consider this new argument for the first time on rehearing. If the point is timely raised in a future appeal, then the court may consider whether, and if so how, the analysis of *Suders* should be extended to a constructive discharge claim such as the one presented here. *Cf Stremple v. Nicholson,* 289 F. App'x 571, 573 (3d Cir. 2008) ("[I]n *Suders,* the Court did not set forth a rule for all constructive discharge claims, but rather dealt only with the issue of an employer's liability for constructive discharge resulting from a hostile work environment attributable to a supervisor."); James M. Weiss, *If He Makes You Quit, We're Not Liable: How* Pennsylvania State Police v. Suders *Unnecessarily Complicates Title VII Lawsuits,* 82 Wash. U. L. Q. 1621, 1647 (2004) ("The murkiness [after *Suders*] enters the picture when an employer attempts to fight the first part of [the constructive discharge] analysis by introducing evidence to show that no constructive discharge occurred, which essentially is the same evidence it would use to prove the affirmative defense.").

Ames and her *amici* also raise issues concerning the decision of the Seventh Circuit in *EEOC v. University of Chicago Hospitals,* 276 F.3d 326, 332 (7th

Cir. 2002), and about certain *dicta* in the panel opinion. Together with this order, the panel will file an amended opinion in response to those points.

The petition for panel rehearing is granted in part as described in this order and is otherwise denied. The opinion filed on March 13, 2014, is withdrawn and an amended opinion is substituted and filed concurrently with this order. Any new petition for panel rehearing or rehearing *en banc* must be filed within fourteen days of this order.

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides in pertinent part: "It shall be an unlawful employment practice for an employer – (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ."

Section 701(k) of Title VII, 42 U.S.C. § 2000e(k), provides in pertinent part:

> The terms 'because of sex' or 'on the basis of sex' includes, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected by similar in their ability or inability to work. . . .