FINDING THE RIGHT JOBS FOR THE REASONABLE PERSON IN EMPLOYMENT LAW

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"The reasonable man adapts himself to the world; the unreasonable one persists in trying to adapt the world to himself. Therefore, all progress depends on the unreasonable man." *George Bernard Shaw*

"I don't know who this reasonable person is we keep talking about. It's nobody I know." *Martha Y., 1L, walking out of Torts class*

I. INTRODUCTION

Much has been written about the "reasonable person" over its lifetime. The reasonable person (or some variant) is a habitué in tort (especially negligence) cases, and to varying degrees it appears in nearly every area of American law, including the relatively new field of employment law.

The reasonable person might appear, for example, in considering an employer's defense to a claim brought under the Fair Labor Standards Act ("FLSA") or whether an employer's stated reason for a personnel action was a pretext for unlawful discrimination.[1] The reasonable person also plays a role in judging employee conduct, such as determining whether an employee claiming unlawful retaliation has engaged in conduct that is protected by law, whether an employee was constructively discharged, or whether an employee has sufficiently mitigated the damages resulting from an employer's unlawful conduct.[2]

The role of the reasonable person in a few specific types of employment (such as sexual harassment) cases has been roundly debated in recent years.[3] But here, I look at the reasonable person's role(s) more broadly in employment law, taking a panoramic view at how the reasonable person has been used in a variety of scenarios.

Historically, courts have invoked the reasonable person when looking to set some "objective," or universal (as opposed to "subjective," or individualized) standard of conduct. But the reasonable person in employment cases can be better explained as embodying either a normative standard or a descriptive expectation, depending on the context of its usage. The proper function to use in any instance should depend on whether the task at hand is to determine if the actor whose conduct is being judged has satisfied a duty. In most employment litigation, it will be the employer who owes a duty to the employee, and a normative application of the reasonable person is, therefore, appropriate when determining whether the employer has met the requisite standard. By using the reasonable person device in this way, we are asking: What ought the employer have done, and has the employer done it?

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[1] *See* discussion *infra* Part IV.A.

[2] *See* discussion *infra* Part IV.B.

[3] *See* discussion *infra* note 35.

Under the FLSA, for example, employers have a duty to pay their employees a minimum wage and time-and-a-half for overtime hours. An employer may defend a claim brought under the FLSA for unpaid wages and liquidated damages by asserting that it acted in good faith to pay workers according to the statute. As part of that inquiry, the court considers whether the defendant acted as a reasonable employer.[4] In such a case, the reasonable person should be used normatively, requiring employers to pay their employees according to the FLSA, and take the action necessary to ensure compliance, even if such might not be customary or typical behavior on the part of employers.

On the other hand, if the immediate question is not whether one has breached a duty, then a descriptive use of the reasonable person is more appropriate. When using the reasonable person device in this way, we are making an observation about the conduct of the actor being judged and asking: How might we expect one in that position, under those circumstances, to act? The descriptive use of the reasonable person recognizes the spectrum of behavior of "actual human actors" in a particular situation.[5] The descriptive reasonable person is a reflection of what *is*, versus the normative reasonable person, which represents what *ought to be*. The reasonable person used descriptively refers not to the reasonable person, but a reasonable person, making due allowance for a variety of acceptable conduct.

An employee claiming she has been "constructively" discharged, for example, must show that the working conditions were so difficult or unpleasant that a reasonable person in her situation would have felt compelled to resign.[6] The question in such a case is not whether the employee has breached some duty to the employer. The reasonable person should, therefore, be used in a descriptive sense: What might we expect an employee to do in this situation, under all the particular circumstances?

To the extent that the reasonable person is used to assess *employer* conduct, courts tend, in practice, to use this approach, but without explicitly making a distinction between the normative and descriptive uses. For example, courts tend to use the reasonable person normatively when using it to decide the validity of defenses to violations of the FLSA, where the employer owes a duty to pay its workers according to the statute. Courts tend to use the reasonable person more descriptively when using it to decide whether an employer's proffered legitimate reason for an employment decision is a pretext for an unlawful motive, where the employer does not owe a duty to its workers under the discrimination laws to act reasonably in making its employment decisions, as long as its decision was for a nondiscriminatory reason.[7]

When courts assess the conduct of an *employee* (who does not owe the employer a duty), the picture is mixed. Courts do tend to hew more closely to a

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[4] *See* discussion *infra* Part IV.A.1.

[5] Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 339 (1996).

[6] *See* discussion *infra* Part IV.B.3.

[7] *See* discussion *infra* Part IV.A.2.

descriptive reasonable person when deciding the issue of mitigation, allowing for a wide range of behavior on the part of employees who are subjected to unlawful conduct by their employers. But courts too often impose normative requirements on employees in cases deciding what conduct is protected from unlawful retaliation and what constitutes a constructive discharge.

II. A BRIEF BIOGRAPHY OF THE REASONABLE PERSON

The reasonable person is a commonplace of the law, yet defies any elegant definition. "He is like the sea-serpent—everybody has heard of him and nobody has ever seen him."[8]

Although the reasonable person (historically, the "reasonable man"[9]) is probably best known in tort law (especially in negligence cases), the reasonable person plays at least some role in almost every area of American law. Today, the reasonable person appears, for example, in contract law, criminal law, the law of trusts, and as discussed more fully below, employment law.[10] But in spite of its ubiquity, longevity, and notoriety, there is no consensus as to how to define the reasonable person. Just as no actual human is subject to a formulaic definition (or obituaries and biographies would be short and tidy, indeed), neither is the reasonable person. The best one can do is to attempt to explain the reasonable person in whatever part it plays.

The reasonable person is not actually a person, of course, but an abstraction, "a creature of the law's imagination,"[11] an apparition that takes on different forms depending on the usage. Broadly speaking, the reasonable person is used to set a standard of behavior in situations where it is not feasible "to lay down a minute code of definite standards by which the conduct of mankind is to be judged in every combination of circumstances which may possibly arise."[12] Thus, the reasonable person standard serves to hold everyone to "the socially

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[8] Carleton Kemp Allen, *Learned and Unlearned Reason*, 36 JURID. REV. 254 (1924).

[9] Other monikers for the reasonable person have included the "prudent man," "man of ordinary prudence," "man of common prudence," "man of ordinary intelligence and prudence," "ordinarily reasonable, careful, and prudent man," "reasonably prudent and skillful man," "man of reasonable sense exercising ordinary care," "typical prudent man," "ideal average man," and "right-minded man." Ronald K. L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man,"* 8 RUTGERS L.J. 311, 312 (1977); PROSSER & KEETON ON THE LAW OF TORTS, at § 32 (5th ed. 1984).

No distinction is made here between a reasonable person, and a person acting reasonably. However, an argument might be made that there is a difference, at least in some contexts (e.g., as to capacity of an actor, in tort or criminal cases). The former articulation might be read to focus on the actor's attributes; the latter on the actor's behavior in a particular situation.

[10] Collins, *supra* note 9, at 312-13.

[11] Fleming James, Jr., *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO L. REV. 1 (1951).

[12] Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1924). *See also* MAYO MORAN, RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD 5 (2003) (the reasonable person device is "a kind of shorthand for intuitive judgements about the appropriateness of a whole range of human behaviour").

acceptable minimum while still being flexible enough to allow great variation in conduct."[13] The reasonable person might also be explained as giving expression to the idea of a fair balance between liberty (allowing people freedom to do as they please) and security (making sure that people are secure from the activities of others).[14]

The reasonable person has appeared in many tort cases,[15] but perhaps none so often as in negligence litigation.[16] In negligence law, "[t]he duty owed by all people generally—the standard of care—is the duty to exercise the care that would be exercised by a reasonable and prudent person under the same or similar circumstances to avoid or minimize risks of harm to others."[17] The reasonable person is used to determine whether one's conduct was unduly risky. Because of its central role in negligence cases, it is not surprising that efforts to put flesh on the reasonable person are most often made in the risk-assessment context.

The reasonable person has been explained variously as one representing some type of model citizen, a "community ideal" of behavior,[18] representing the "responsible citizen, whose degree of understanding, knowledge, caution, and moral sensitivity serves as a yardstick against which that of other individuals can be measured."[19] Other depictions portray not necessarily a paragon of behavior, but one who is "reasonably 'considerate' of the safety of others and does not look primarily to his own advantage."[20]

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[13] Osborne M. Reynolds, Jr., *The Reasonable Man of Negligence Law: A Health Report on the "Odious Creature*," 23 OKLA. L. REV. 410, 426 (1970).

[14] ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 6-7 (1999).

[15] Collins, *supra* note 9, at 313; Reynolds, *supra* note 13, at 411-13.

[16] Warren A. Seavey, *Negligence – Subjective or Objective?* 41 HARV. L. REV. 1, 9 (1927).

[17] 1 DAN B. DOBBS, THE LAW OF TORTS § 117 (2001); RESTATEMENT (SECOND) OF TORTS §§ 282, 283 (1965).

[18] Collins, *supra* note 9, at 314.

[19] M.P. Baumgartner, THE SOCIOLOGY OF LAW, IN A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 406, 414 (1999). In negligence law, "[t]he actor is required to do what this ideal individual would do in his place." RESTATEMENT (SECOND) OF TORTS § 283, cmt. c (1965). But "[t]he fact that this judgment is personified in a 'man' calls attention to the necessity of taking into account the fallibility of human beings." *Id.* § 283, cmt. b.

[20] RESTATEMENT (SECOND) OF TORTS § 283, cmt. f (1965). "Now this reasonably prudent man is not infallible or perfect. In foresight, caution, courage, judgment, self-control, altruism and the like he represents, and does not excel, the general average of the community. He is capable of making mistakes and errors of judgment, or being selfish, of being afraid—but only to the extent that any such shortcoming embodies the normal standard of community behavior." F. HARPER & F. JAMES JR., THE LAW OF TORTS 902 (1956). "Reasonable persons [are moved by a desire for] a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with others." RIPSTEIN, *supra* note 14, at 7 (quoting JOHN RAWLS, POLITICAL LIBERALISM 50 (1993)). The reasonable person is not to be "confused with the rational person who acts effectively in pursuit of his or her ends. Instead, the reasonable person needs to be understood as the expression of an idea of fair terms of social cooperation." RIPSTEIN, *supra* note 14, at 7. "When someone acts rationally, but unreasonably, she pursues her self-interest effectively, but fails to exhibit sufficient respect for the equally legitimate interests of others." Keating, *supra* note 5, at 312.

By now, the attributes of the reasonable person have been enumerated often enough to provide something of a composite sketch of the creature. In England, the reasonable person was "the man who takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves,"[21] riding the Clapham omnibus to and from work each day.[22] The American counterpart might be the Regular Joe, the man in the street, the Everyman.

The reasonable person understands elementary earth science (e.g., that fire burns, water drowns, local weather, the laws of gravity), human physiology (e.g., how much he can lift and carry, the effects of alcohol, his own size), and animal behavior (e.g., dogs bite, bees sting).[23] The reasonable person is one of normal intelligence, with normal perception, memory, and at least a minimum of standard knowledge, as well as any additional intelligence, skill, or knowledge actually possessed of the individual actor whose conduct is being judged.[24] The reasonable person has the physical attributes of the actor whose conduct is at issue,[25] and "has a working knowledge of all laws that may pertain to him."[26] The reasonable person changes with the times, as notions of acceptable behavior evolve.[27]

The reasonable person has been mocked as irritatingly overcautious:

> Devoid, in short, of any human weakness, with not one single saving vice, sans prejudice, procrastination, ill-nature, avarice, and absence of mind, as careful for his own safety as he is for that of others, this excellent but odious character stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his own example.[28]

But such attempts to catalog the attributes of the reasonable person, while colorful and sometimes amusing, do not take us far. It is in the application that the reasonable person takes shape.

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[21] Randy T. Austin, *Better Off with the Reasonable Man Dead or The Reasonable Man Did the Darndest Things*, BYU L. REV. 479, 485 (1992) (quoting Whitman v. W.T. Grant Co., 395 P.2d 918, 920 (Utah 1964)).

[22] *Id.* at 485 (quoting JOHN G. FLEMING, THE LAW OF TORTS 107 n.9 (4th ed. 1971)). "Clapham is a working class suburb of London, and the omnibus is simply the typical English double decker public bus. We [Americans] would express the same idea by talking about 'Joe Six-pack' or 'Bubba.'" Robert C. L. Moffat, *Not the Law's Business: The Politics of Tolerance and the Enforcement of Morality*, 57 FLA. L. REV. 1097, 1105 (2005). "[T]his man is the judicially-created constructed image of a sane, sober, but not extraordinarily gifted person who never takes unreasonable chances and does nothing extraordinary, but does everything that is ordinary to perfection." Richard Lempert, *Following the Man on the Clapham Omnibus: Social Science Evidence in Malpractice Litigation*, 37 WAKE FOREST L. REV. 903, 905 (2002).

[23] Note, *Negligence*, 23 MINN. L. REV. 628, 634-37 (1938); James, *supra* note 11, at 9-11.

[24] DOBBS, *supra* note 17, § 118.

[25] *Id.* § 118-19; RESTATEMENT (SECOND) OF TORTS § 283C (1965).

[26] Collins, *supra* note 9, at 314-15; Reynolds, *supra* note 13, at 414.

[27] Reynolds, *supra* note 13, at 420; Jeffrey J. Rachlinski, *Misunderstanding Ability, Misallocating Responsibility*, 68 BROOK. L. REV. 1055, 1066 (2003).

[28] A. HERBERT, MISLEADING CASES IN THE COMMON LAW 11-12 (4th ed. 1928).

The standard set by the reasonable person is said to be an "objective" one, personifying a universal standard of conduct, as opposed to one that is "subjective," or individualized. It is ostensibly a legal standard of general application that does not account for the particular characteristics of the individual whose conduct is being judged.[29] The objective standard purportedly "eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question."[30]

Yet the reasonable person standard typically includes consideration of the surrounding circumstances. For example, the standard of conduct to avoid being negligent is that of a reasonable person "under the circumstances."[31] "Circumstances" in a negligence case include the defendant's physical characteristics, as well as the particular external facts of a given situation.[32] The reasonable person standard is thus not a purely objective one, if we are using "objective" to mean a fixed, universal standard of conduct regardless of the specific circumstances at play. Once the circumstances are taken into account, the objective and subjective standards are "not miles apart,"[33] leading one commentator to remark that "[t]he monism in the formulation of the 'reasonable man' standard is only a shell. The weasel words 'under the circumstances,' without which the formulation is incomplete, suck its substance."[34] The objective-subjective duality is in practice then something of a sliding scale of circumstances to be considered, depending on the context, and is thus of limited use.[35]

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[29] MORAN, *supra* note 12, at 144-45.

[30] *Id.* at 21.

[31] RESTATEMENT (SECOND) OF TORTS § 283 (1965).

[32] DOBBS, *supra* note 17, at § 119; Reynolds, *supra* note 13, at 414-15. In negligence cases, "circumstances" might also include the actor's gender. DOBBS, *supra* note 17, at § 117.

[33] Reynolds, *supra* note 13, at 425. *See also* MORAN, *supra* note 12, at 21 ("[I]n practice the reasonable person standard often . . . borrows heavily from the qualities of the actual litigant.")

[34] Ross Parsons, *Negligence, Contributory Negligence and the Man Who Does Not Ride the Bus to Clapham*, 1 MELB. U. L. REV. 163, 169-70 (1957).

[35] Closely related to the objective-subjective dilemma is the question of whose shoes the reasonable person wears. In spite of the name change in recent years from "reasonable man" to "reasonable person," the standard has been widely criticized as still representing white, male norms of conduct. *See, e.g.*, Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 466 (1997); MORAN, *supra* note 12, at 306. As a result, various alternatives to the reasonable person have been proposed and debated. The use of a "reasonable woman" standard, for example, has been proposed for certain types of cases, such as sexual harassment in the workplace. *See, e.g.*, Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L. J. 1177 (1990); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769 (1995); Robert Unikel, Comment, *"Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 NW. U. L. REV. 326 (1992). But the reasonable woman standard does not answer the question of *which* woman. *See* Bernstein, *supra*, at 473 ("In its hidden specificity, the reasonable woman standard elevates one type above others such that she requires no modifiers, whereas departures from this norm might include the "reasonable woman of color," "reasonable lesbian," or "reasonable blue-collar woman." A woman who does not fit in the confines of the profile thus may not find a place in

III. THE REASONABLE PERSON'S FORAY INTO EMPLOYMENT LAW

There is no single, all-purpose reasonable person in any area of law. As difficult as it is to explain the reasonable person in negligence cases, where the reasonable person is a long-time fixture, it is even more problematic in employment cases, where the reasonable person is a relative newcomer.

Employment law consists primarily of statutory and common law that governs the relationship between an employer and its individual employees.[36] It is a relatively new field. Prior to the 1960s, there were few statutes regulating the relationship of employer and individual employee,[37] and few common law claims were recognized in the workplace at that time.[38] Absent a contract that provided otherwise, employment was "at will," and an employer was free to fire or otherwise discipline an employee for any reason or no reason at all without incurring legal liability. This doctrine of employment-at-will is still the default rule in almost every jurisdiction in the United States, but over the past half century, numerous exceptions to the rule have been statutorily adopted or judicially developed.[39]

In 1963, Congress enacted the Equal Pay Act, which generally prohibits wage discrimination based on sex.[40] The Equal Pay Act was soon followed by

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the unmodified reasonable woman standard."). Some commentators have proposed various alternative standards of reasonableness, depending on the context. *See, e.g.*, Diane Klein, *Distorted Reasoning: Gender, Risk-Aversion and Negligence Law*, 30 SUFFOLK L. REV. 629 (1997) (proposing a "reasonable risk-averse person" in negligence cases); Unikel, *supra*,, at 372 (supporting a modified reasonable person standard requiring that "where a woman's conduct or perceptions are at issue, jury instructions must acknowledge and reflect the female perspective."). Still others advocate abandoning a "reasonableness" standard altogether, at least in some types of cases. *See, e.g.*, Bernstein, *supra*, at 453 (proposing a "respectful person" standard in sexual harassment cases); MORAN, *supra* note 12 (proposing a standard that looks to whether the conduct at issue "betrayed culpable indifference").

[36] The focus of this article is on employment law. Employment law differs from labor law, in that the latter principally governs the relationship between employers and collective bargaining units. The primary American labor statute is the National Labor Relations Act, enacted in 1935 to protect the rights of employees to engage in collective bargaining and other forms of concerted action with respect to the terms and conditions of their employment. 29 U.S.C. §§ 151-169 (2006).

[37] The most notable example is the Fair Labor Standards Act, enacted in 1938, which requires employers to pay covered employees a minimum hourly wage plus overtime pay at one and one-half times the regular rate of pay for time worked in excess of 40 hours per week. 29 U.S.C. §§ 201-219 (2006). In addition, some states and municipalities had by then enacted employee protection statutes. Marjorie Gelb & Joanne Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy for Employment Discrimination*, 35 HASTINGS L. J. 1055, 1057-59 (1983); Will Maslow & Joseph Robison, *Civil Rights Legislation and the Fight for Equality*, 1862-1952, 20 U. CHI. L. REV. 363, 392-99 (1953).

[38] *See* Lisa J. Bernt, *Wrongful Discharge of Independent Contractors: A Source-Derivative Approach to Deciding Who May Bring a Claim for Violation of Public Policy*, 19 YALE L. & POL'Y REV. 39, 43-46 (2000) (discussing some of the most widely recognized common law claims).

[39] *Id.* at 43-44. *See also* HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE §§ 1.01, 1.02, 2.02, 3.01 (5th ed. 2006) [hereinafter *Employee Dismissal Law*].

[40] 29 U.S.C. § 206(d) (2006).

Title VII of the Civil Rights Act of 1964, which prohibits discrimination in the terms and conditions of employment based on race, color, sex, religion, and national origin, and was later amended to prohibit discrimination based on pregnancy.[41] Numerous other federal statutes have since been enacted to regulate the relationship between an employer and the individual employee, including the Age Discrimination in Employment Act of 1967 ("ADEA"),[42] the Americans with Disabilities Act of 1990 ("ADA"),[43] and the Family and Medical Leave Act of 1993 ("FMLA").[44] Most states, too, have by now enacted statutory employment protections.[45] Depending on the jurisdiction, common law exceptions to the employment-at-will rule might be based on breach of an express or implied promise of continuing employment,[46] a breach of the implied covenant of good faith and fair dealing,[47] or an employer's violation of some public policy.[48] It is into this complex patchwork of federal and state law that the reasonable person enters the workplace.

We could look to employment cases to try to make a composite sketch of the reasonable person at work. Courts have decided, for example, that a reasonable employee is not hypersensitive to the everyday frustrations of the

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[41] 42 U.S.C. §§ 2000e (2006).

[42] The ADEA prohibits discrimination because of age against covered employees age 40 and over. 29 U.S.C. §§ 621-634 (2006).

[43] 42 U.S.C. § 12101 (2006). The ADA is modeled on the Rehabilitation Act of 1973, 29 U.S.C. § 701, which prohibits discrimination based on disability by federal agencies, federal contractors, recipients of federal grants, and participants in federal programs. 1 HENRY H. PERRITT, JR., AMERICANS WITH DISABILITIES HANDBOOK § 8.01 (4th ed. 2003)

[44] The FMLA entitles covered employees to a maximum of 12 weeks unpaid leave necessary to care for themselves or specified relatives with serious health conditions, or for childbirth or adoption. 29 U.S.C. §§ 2611-2654 (2006). Other federal statutes include: the Occupational Safety and Health Act, enacted in 1970, which prohibits employers from discharging employees because they file complaints or otherwise exercise rights afforded by the Act, 29 U.S.C. § 660(c)(1) (2006); the Uniformed Services Employment and Reemployment Rights Act, enacted in 1994 (overhauling the Veterans' Reemployment Rights Act) which provides job protections for covered employees who take leave for uniformed service, 38 U.S.C. § 4301-4333 (2006); and Sarbanes-Oxley Act of 2002, which provides protections for employees of publicly traded companies who disclose fraud by their employers against shareholders, 18 U.S.C. § 1514A (2006).

[45] See *Employee Dismissal Law*, *supra* note 39, at chs. 2-3 for discussion of federal and state statutes prohibiting discrimination in employment. In addition, some municipalities have enacted ordinances prohibiting discrimination in employment. *E.g.*, N.Y.C. ADMIN. CODE § 8-107(1).

[46] In such a case, a court might hold the employer to its assurances (e.g., in oral statements or employee handbooks) that it will terminate only for just cause or utilize certain disciplinary procedures before termination. Courts vary widely on what statements will bind an employer, and when a disclaimer will negate those promises. Bernt, *supra* note 38, at 44 and n. 24.

[47] *Id.* at 44.

[48] "The idea behind the public policy exception is that despite the traditional at-will rule, 'a discharge is wrongful and actionable if it is motivated by the fact that the employee did something that public policy encourages or that he refused to do something that public policy forbids or condemns.'" Bernt, *supra* note 38, at 43 (quoting Percival v. General Motors Corp., 539 F.2d 1126, 1130 (8th Cir. 1976)).

workplace,[49] is not violent,[50] and does not want to work in needlessly unsafe conditions.[51] One may similarly attempt an outline of a reasonable employer. Courts have said, for example, that a reasonable employer is aware of its legal obligations,[52] wants to employ trustworthy people,[53] and wants employees to follow company policy.[54] But such general descriptions are of limited use. Reasonableness in employment matters, as in other litigation, depends on the context of a particular case.

In contemporary American employment law, the reasonable person (or a variant) works many jobs. It might be used to judge an employer's conduct. For example, an employer may defend a claim brought under the FLSA for unpaid wages and liquidated damages by asserting that it acted in good faith to pay workers according to the statute. As part of that inquiry, a court will consider whether the defendant acted as a reasonable employer.[55]

The reasonable person might also play a role in deciding issues of an employer's motive in cases alleging unlawful discrimination. Once the plaintiff has made out a prima facie case of unlawful discrimination, the employer has the burden of proffering a legitimate, nondiscriminatory reason for its action. The

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[49] *E.g.*, Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 54 (1st Cir. 2000) ("The workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins – thick enough, at least, to survive the ordinary slings and arrows that workers routinely encounter in a hard, cold world."). *See also* EEOC v. Clay Printing Co., 955 F.2d 936, 945 (4th Cir. 1992) (explaining that "[e]very job has its frustrations, challenges and disappointments; these inhere in the nature of work."). *Id.*

[50] *E.g.*, Mazzarella v. United States Postal Serv., 849 F. Supp. 89, 94 (D. Mass. 1994) ("[T]he fundamental requirements that an employee not engage in violent or destructive behavior are a matter of common sense."); Haworth v. Deborah Heart & Lung Ctr., 638 A.2d 1354, 1356 (N.J. Super. Ct. App. Div. 1994) (no reasonable employee protests employer's alleged unethical conduct by physically assaulting a co-worker or deliberately damaging employer's property).

[51] *E.g.*, Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781, 790 (7th Cir. 2007) (reasonable person could feel compelled to resign job that would compromise her personal safety); Strouss v. Mich. Dep't of Corrections, 250 F.3d 336, 353 (6th Cir. 2001) (reasonable person – here, a prison employee – could find a transfer that put her in contact with prisoners who threatened her intolerable); Ladson v. Ulltra East Parking Mgmt. Corp., 853 F. Supp. 699, 705 (S.D.N.Y. 1994) (reasonable for plaintiff to refuse reinstatement when physical safety is threatened).

[52] *E.g.*, Kanagy v. Fiesta Salons, Inc., 541 S.E.2d 616, 621 (W. Va. 2000) (reasonable employer should know not to intimidate or retaliate against employee testifying in legal action). *See also* cases cited *infra* notes 85-88.

[53] *E.g.*, Armani v. Maxim Healthcare Servs., Inc., 53 F. Supp. 2d 1120, 1128 (D. Colo. 1999) (reasonable employer would consider important misstatements by applicant for job of certified nurse assistant concerning education and criminal history); Churchman v. Pinkerton's Inc., 756 F. Supp. 515, 521 (D. Kan. 1991) (reasonable employer in security business would not hire applicant who lied about drug use, mental health, prior employment, residences).

[54] *E.g.*, Cooper v. N.Y. Dep't of Human Rights, 986 F. Supp. 825, 829 (S.D.N.Y. 1997) (employer was reasonable in wanting to enforce its policies, maintain employee morale, utilize employee skills efficiently); Bevins v. Dollar Gen. Corp., 952 F. Supp. 504, 511 (E.D. Ky. 1997) ("Most businesses would consider the firing of an at-will employee for violating company policy reasonable and a good business decision.")

[55] *See* discussion *infra* Part IV.A.1.

plaintiff must then come forward with evidence that the employer's justification for its action is a pretext. In determining whether the employer's proffered nondiscriminatory reason for the challenged employment decision is true, a court might examine the employer's conduct and ask whether a reasonable employer might act in such a way.[56]

But at least as often, the reasonable person is used in employment litigation to assess an employee's behavior. For example, worker protection statutes generally prohibit an employer from retaliating against an employee who opposes conduct that is made unlawful under such act or for asserting her rights under such act. Typically, the employee is protected from retaliation whether or not the underlying complaint is meritorious if she can show that she had a reasonable, good faith belief that the underlying conduct violated the particular law at issue.[57] The test for evaluating whether an employee has been "constructively" discharged requires that she prove that the working conditions were so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.[58] Where a plaintiff seeks redress for an employer's unlawful conduct, she must make reasonable efforts to mitigate her damages or risk forfeiting some or all of her damages.[59] The reasonable person might play multiple roles in the same litigation if it involves several causes of action.[60]

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[56] The employer in such a case does not owe a duty to its workers to act reasonably in making its employment decisions. However, the unreasonableness of its conduct can indicate that the employer's explanation is not credible. *See* discussion *infra* Part IV.A.2.

[57] *See* discussion *infra* Part IV.B.2.

[58] *See* discussion *infra* Part IV.B.3.

[59] *See* discussion *infra* Part IV.B.1. This is not an exhaustive list of the roles played by the reasonable person in employment litigation. Reasonableness requirements also appear, for example, throughout cases of discriminatory harassment. Under Title VII, the threshold for actionable sexual harassment based on a hostile environment is one that is "severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). The severity of the harassment is to be "judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (quoting *Harris*, 510 U.S. at 23).

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[60] Under federal (and many state) anti-discrimination laws, employers must provide a reasonable accommodation for an employee's religious practices and disabilities. 1 BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 368, 876 (2007); *Employee Dismissal Law*, *supra* note 39, §2.10. One might treat such reasonable accommodation requirements as akin

IV. REASSIGNING THE REASONABLE PERSON IN EMPLOYMENT LITIGATION

The reasonable person has always been an imperfect construct for judging behavior, but it has served its purpose well enough in its historical milieus that we have learned to live with the "old friend."[61] If we are going to continue using the reasonable person in employment litigation, however, we need to recognize that there are fundamental differences between employment law and negligence law, where the concept is perhaps most fully formed. As long as it continues to be used in employment law, the reasonable person needs a more explicit job description.[62]

As discussed above, in negligence cases, the reasonable person is used to determine whether an actor's conduct was unduly risky. The issue is one of blameworthiness, where duties run among all, in that all members of society owe each other a duty not to act in an unreasonably risky manner. But in the workplace, duties generally run in one direction – from employer to employee.[63] Yet, in many cases, the plaintiff-employee must show that he acted reasonably. (For example, to support a claim of constructive discharge, an employee must prove that he acted reasonably when he left his employment in reaction to the employer's unlawful conduct.) So while the reasonable person is generally used to decide whether a defendant has breached a duty in negligence cases,[64] in employment law the reasonable person is at least as often used to judge the conduct of the plaintiff.

Another difference is that most employment law is transformative.[65] Employment law was not generally designed and developed to reinforce existing

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to the use of the reasonable person. *See, e.g.*, Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1264-68 (2003). However, for my purposes, the employer's duty to provide a reasonable accommodation differs from the reasonable person in an important way, in that an accommodation that satisfies the law is a reasonable resolution of conflicting interests of the employer, employee, and affected co-workers; *i.e.*, it is the *result* that must be reasonable.

[61] Seavey, *supra* note 16, at 9.

[62] I am not necessarily advocating the widespread use of the reasonable person in employment litigation. But to the extent that it is used, it should be used more thoughtfully, and consistent with the remedial purposes of employment law.

[63] There are exceptions. *See infra* note 73.

[64] To the extent that contributory or comparative negligence has been alleged, the reasonableness of the plaintiff's conduct is also at issue. *See* discussion *infra* note 75.

[65] *See* Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. 476, 477-79 (2000) (discussing transformative law: "In attempting to understand the relationship between law and the larger society of which it is a part, it is useful to distinguish between laws designed to enforce existing social norms and laws enacted to displace or transform them. Similarly, it is important to differentiate laws that reinforce established institutions and social meaning systems from laws designed to destabilize, subvert, and ultimately reconstruct them. Laws function quite differently . . . in these two contexts.").

workplace behavior; to the contrary, employment law is largely remedial.[66] It is intended to change behavior, to "alter the dynamics of the workplace,"[67] and to provide new protections to employees. While the reasonable person in negligence cases embodies a community standard of conduct, the purpose of most employment law (and discrimination law, in particular) is to change (sometimes, dramatically) the way people behave in the workplace.[68]

The reasonable person has traditionally been explained as personifying an "objective" standard of conduct (a standard not particularized to the individual whose conduct is at issue), but with some elements of "subjectivity" (individual qualities) considered. But in employment law, instead of using the objective-subjective distinction, the reasonable person is better explained as embodying a normative standard, or a descriptive expectation, depending on the context of its usage. Are we demanding an action (or inaction) from the actor whose conduct is at issue, and asking whether the actor has satisfied that demand? Or, is the inquiry more descriptive, observational? Are we observing what one in the actor's position might have done under the circumstances?[69] In the first instance, we are using the reasonable person more in the sense of the "community ideal," described above, to which "ordinary folk ought to aspire." [70] In the latter instance, the reasonable person resembles not an ideal, but accounts for the range of behavior that one might expect to see from actual humans in a particular set of circumstances.

Which function to use should depend on whether the immediate task is to determine if the actor whose conduct is being judged has satisfied a duty.[71] Here, I use "duty" to mean an obligation to act (or refrain from acting) in a particular

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[66] Not all of what might comprise employment law is remedial. To the extent that common law contract principles pertain to workplace relationships, for example, such are not necessarily remedial.

[67] Davis v. Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1988).

[68] *See* Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 198 (1994) ("Tort law focuses on compensation of individuals, not on the removal of structural barriers to equal employment. Reasonableness acts as the central mediating concept in a tort system of risk allocation. A person who injures another is liable for harm to others if she acted unreasonably. Reasonableness is determined by the trier of fact with reference to community standards. Thus, reasonableness incorporates into the law societal norms of behavior. It is a defender of the status quo as defined by those who dominate majority discourse. This is a uniquely inappropriate standard to use in an antidiscrimination statute, the main purpose of which is to provide protection to minority interests over majoritarian interests.").

[69] Moran argues that it is critical to "disentangle the normative ideal of reasonableness from its too-common companion — the notion of what is ordinary or customary." MORAN, *supra* note 12, at 281.

[70] Bohen explains the reasonable person as normative: "The factor controlling the judgment of the defendant's conduct is not what *is*, but what *ought to be*. . . . [I]t is the opinion of the court or jury as to what ought to be done under the circumstances of that particular case which is controlling and which is expressed in its decision." Bohlen, *supra* note 12, at 113-14.

[71] Of course, the *ultimate* issue is generally whether a defendant has fulfilled some duty.

manner, or to risk liability for damages sustained for failure to so act.[72] (In most employment law cases, it will be the employer who owes the employee such a duty, and most cases involve an employee suing an employer for breach of some duty.[73] For simplicity's sake, I will refer to the defendant-employer as the party owing the duty.)

A normative application of the reasonable person is appropriate when determining whether the employer has met the requisite standard. By using the reasonable person device in this way, we are saying that the employer is required to do (or refrain from doing) *X*, or risk liability for resulting damages. The question then becomes: What *ought* the employer have done, and has the employer done it? The inquiry is not whether this or other employers might well behave in such a way. Indeed, many employers might, and do, act unlawfully. But even if a substantial number of employers act unlawfully, that does not make their conduct reasonable in any normative sense. This might be especially true if the reasonableness requirement is a product of a new law or a new interpretation of law that mandates conduct. (Consider, for example, how prevalent and "ordinary" race and sex discrimination was in the period immediately following passage of the Civil Rights Act of 1964.)

On the other hand, if the immediate question is not whether one has breached a duty, then a descriptive use of the reasonable person is more appropriate, recognizing the spectrum of behavior of "actual human actors" in a particular situation.[74] The descriptive reasonable person is a reflection of what *is* versus the normative reasonable person, which represents what *ought to be*. Such descriptive use of the reasonable person thus refers not to <u>the</u> reasonable person, but <u>a</u> reasonable person, recognizing that "reasonable people differ in their beliefs, approaches and characteristics" and making due allowance for a variety of acceptable conduct.[75] Such a descriptive usage puts more emphasis on

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[72] The word 'duty' is used throughout the Restatement of Torts "to denote the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor's conduct is a legal cause." RESTATEMENT (SECOND) OF TORTS § 4 (1965).

[73] There are exceptions. For example, a contract between employer and employee might impose duties on the employee. *See* 11 JOSEPH M. PERILLO, CORBIN ON CONTRACTS, §§ 60.7-60.8 (2005). Also, an employee might owe the employer duties under agency principles. *See* RESTATEMENT (THIRD) OF AGENCY §§ 8.01-8.15 (2006).

[74] Keating, *supra* note 5, at 339.

[75] This is the approached suggested in Ken Cooper-Stephenson, *Sense and Sensibility: The Concept of Reasonableness in the Tort of Negligence*, National Judicial Council, Conference on Tort Law, May 2002 (on file with author). The notion of an asymmetrical use of the reasonable person based on duty is not new. For example, the circumstances considered in judging plaintiff's conduct in contributory negligence cases might include qualities of the individual plaintiff that are not considered when judging the defendant's conduct. *See* Keating, *supra* note 5, at 371 ("Whatever our capacities, we are expected to exercise reasonable care when we impose risks on others, but we are allowed our weaknesses and idiosyncrasies when we are protecting ourselves from the carelessness of others."); DOBBS, *supra* note 17, at § 199 ("One who exposes himself to risks does not necessarily stand in the same moral position as one who exposes others to the same risks. . . . [T]he plaintiff is not guilty of contributory fault merely because she engages in the same conduct as

context, is more flexible, and considers the totality of circumstances in which the actor finds himself. [76]

In some types of employment cases, courts tend to use the reasonable person as proposed herein, but without explicitly making a distinction between the normative and descriptive uses (and generally insisting that the reasonable person is "objective"). In particular, to the extent that the reasonable person is used to assess *employer* conduct, courts tend to use the reasonable person as proposed. To illustrate, below I contrast the generally normative use of the reasonable person when used to decide the validity of defenses to violation of the FLSA with the generally descriptive use of the reasonable person in cases where courts are using it to decide whether an employer's proffered reason for an employment decision is pretext for an unlawful motive.

On the other hand, where *employee* conduct is at issue, the courts' usage of the reasonable person presents a muddled picture. Below, I compare the way courts use the reasonable person in the following contexts: (a) determining whether an aggrieved employee has made sufficient efforts to mitigate damages; (b) determining whether an employee claiming unlawful retaliation has engaged in protected conduct; and (c) determining whether an employee was constructively discharged. Courts do tend to hew more closely to a descriptive reasonable person when deciding whether a plaintiff-employee has sufficiently mitigated his damages, allowing for a wide range of behavior on the part of employees who are subjected to unlawful conduct by their employers. But courts

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the defendant. . . . [T]he plaintiff is not guilty of either negligence or contributory negligence if responsibility has been allocated solely to the defendant . . . ."); GUIDO CALABRESI, IDEALS, BELIEF, ATTITUDES, AND THE LAW 24 (1985) ("It is important to distinguish this person as 'victim' from this person as 'injurer.' The premise is that unreasonable behavior bars a victim from recovery and also is the basis of liability of injurers to innocent victims. But it does not follow that what is reasonable or unreasonable will be the same for both injurers and victims. In fact, *some* (but not all) of the deviations from the standard of the reasonable man have different effects, depending on whether the person deviates from the standard in such a way as to injure others or only in such a way as to injure himself or herself. Some idiosyncrasies that are unreasonable in an injurer are not so treated in a victim."); Fleming James, Jr. & John J. Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 787-88 (1950) ("The defense of contributory negligence has often been justified as a healthy deterrent against careless conduct on a plaintiff's part, just as the law of negligence is justified as a deterrent against a defendant's carelessness. But . . . this is putting the pressure towards safety on the wrong person and relieving the pressure in the quarter where it will do the least good. . . . The courts have often refused to extend the defense of contributory negligence to actions based on the violation of a statute intended to protect the plaintiff from some of the weaknesses of his position (e.g., child labor laws)."); RESTATEMENT (SECOND) OF TORTS § 283, cmt. f (1965) ("In so far as the conduct of the reasonable man furnishes a standard by which negligence is to be determined, the *standard is one which is fixed for the protection of persons other than the defendant*. In so far as the contributory negligence of the actor is concerned, the standard is one to which the actor is required to conform *for his own protection*.") (emphasis added).

[76] To the extent that the reasonable person continues to be used, the general principles proposed here can help guide its usage in unlawful harassment cases. However, such cases present additional complexities that make a thorough treatment beyond the scope of this article. *See* discussion *supra* note 59.

too often impose normative requirements on employees in cases of protected conduct and constructive discharge.

A. Reasonable employers

1. Defenses to the Fair Labor Standards Act

Under the FLSA, employers have a duty to pay their employees a minimum wage and time-and-a-half for overtime hours. Because the Act exempts certain classes of employees from coverage,[77] FLSA litigation often involves questions of whether the employer properly classified its workers as exempt. In addition, FLSA cases often involve questions of what time is compensable.

The FLSA provides for liquidated damages for plaintiffs in an amount equal to their unpaid overtime.[78] Liquidated damages under the FLSA are not punitive; rather, they are awarded to compensate employees for a delay in receiving wages due to them.[79] The Act includes two "good faith" defenses, one to liability and one to liquidated damages, and the reasonable person plays a role in both defenses.

The liability provision insulates an employer from liability for failure to pay minimum wages or overtime compensation under the FLSA if it proves that such failure was in good faith, in conformity with, and reliance on certain writings issued by the Department of Labor, or a DOL practice or policy.[80] The test of good faith under the liability provision is a two-part inquiry, asking how a reasonably prudent person would have acted under the same or similar circumstances and requiring "that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry."[81]

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[77] FLSA exempts, for example, from its overtime pay requirements "any employee employed in a bona fide executive, administrative, or professional capacity . . . ." 29 U.S.C. § 213(a)(1) (2006).

[78] "Any employer who violates the [minimum wage or overtime] provisions of this Act 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." 29 U.S.C. § 216(b) (2006).

[79] Craig Becker, *The Check is in the Mail: Timely Payment Under the Fair Labor Standards Act*, 40 UCLA L. REV. 1241, 1252-53 (1993).

[80] The liability provision says:

> [N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the [FLSA] . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation [of the Department of Labor], or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged.

29 U.S.C. § 259(a) (2006).

[81] An employer's good faith under the liability provision is "not to be determined merely from the actual state of his mind." 29 C.F.R. § 790.15(a) (2008). It also depends upon:

> [W]hether the employer, in acting or omitting to act as he did, and in relying upon the regulation, order, ruling, approval, interpretation, administrative practice or

The FLSA's second good faith provision provides a full or partial defense to liquidated damages (but still requires the defendant to pay the unpaid wages). Under that provision, courts retain discretion to withhold some or all of the statutory liquidated damages award where "the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]."[82] Whether the employer had reasonable grounds and acted in good faith is to be viewed through the lens of the reasonable person.[83]

In deciding whether the employer has satisfied its burden, courts have to some extent looked at the circumstances of each case, giving the defendant-employer some latitude in asserting that it acted reasonably. Some courts have, for example, entertained an employer's explanation that it acted reasonably and in good faith in its compensation practices by relying on the advice of counsel,[84] and have given employers leeway where the law concerning the payment of wages in question was unsettled, ambiguous, or complex.[85]

But courts more frequently tend to use the reasonable person in a normative way in ruling on these FLSA defenses. Courts have, for example, regularly said that an employer's ignorance of the law's requirements is insufficient, that an employer has an obligation to learn and comply with FLSA provisions,[86] and that when faced with conflicting interpretations of the law's requirements, the

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> enforcement policy, acted as a reasonably prudent man would have acted under the same or similar circumstances. "Good faith" requires that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry.

Id.

[82] 29 U.S.C. § 260 (2006).

[83] Walton v. United Consumers Club, Inc., 786 F.2d 303, 312 (7th Cir. 1986).

[84] *E.g.*, Brooks v. Ridgefield Park, 185 F.3d 130, 137-38 (3d Cir. 1999); Schneider v. City of Springfield, 102 F. Supp. 2d 827, 841 (S.D. Ohio 1999); Horan v. King County, 740 F. Supp. 1471, 1482 (W.D. Wash. 1990).

[85] *E.g.*, Cross v. Ark. Forestry Comm'n, 938 F.2d 912, 918 (8th Cir. 1991); Hultgren v. County of Lancaster, 913 F.2d 498, 509-10 (8th Cir. 1990); Marshall v. Baptist Hosp., Inc., 668 F.2d 234, 237-38 (6th Cir. 1981).

[86] *E.g.*, Mireles v. Frio Foods, Inc., 899 F.2d 1407 (5th Cir. 1990) (finding that trial court did not err in deciding that the employer had not met its burden under the good faith defense to liability, where the only evidence on this issue was that the employer's general manager had discussed minimum wage requirements with state agency not involved in enforcing FLSA and had reviewed brochures and pamphlets on topic); *Walton*, 786 F.2d at 312 ("A good heart but an empty head does not produce a defense" to liquidated damages under FLSA); Barcellona v. Tiffany English Pub, Inc., 597 F.2d 464, 468-69 (5th Cir. 1979) (reversing the district court's conclusion that employers had satisfied defense to liquidated damages in case of unpaid wages to restaurant servers, claiming inexperience and operating on blind faith is not reasonable grounds: "Even inexperienced businessmen cannot claim good faith when they blindly operate a business without making any investigation as to their responsibilities under the labor laws. Apathetic ignorance is never the basis of a reasonable belief."); Troutt v. Stavola Bros., Inc., 905 F. Supp. 295, 302 (M.D.N.C. 1995) ("An employer cannot 'simply remain blissfully ignorant of FLSA requirements' and avoid liability for liquidated damages.") (citation omitted), *aff'd*, 107 F.3d 1104 (4th Cir. 1997).

employer may not simply choose the one most favorable to it.[87] That an employer might be an unsophisticated, small, or new operation is not enough to meet the burden of the good faith defenses.[88] Courts have generally held that an employer's conformity with industry trends is insufficient to support a defense.[89] In these cases, courts use the reasonable person normatively, telling the defendant-employer: You had a duty to pay your employees according to the FLSA, and you ought to have taken whatever action was necessary to ensure that you fulfilled that duty, even if such compliance might not be customary or typical.

2. Showing pretext in discrimination cases

In a different context, the reasonableness of an employer's conduct might be considered when its motives are at issue. For example, once an employee has made out a prima facie case of unlawful discrimination, the employer has the

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[87] *E.g.*, Alvarez v. IBP, Inc., 339 F.3d 894, 907 (9th Cir. 2003) (noting that Congress did not intend for the good faith defense to apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to it); Cole v. Farm Fresh Poultry, Inc., 824 F.2d 923, 927-30 (11th Cir. 1987) (an employer's actual reliance upon his own incorrect interpretation of a vague and general administrative guideline will not suffice); Olson v. Superior Pontiac-GMC, Inc., 765 F.2d 1570, 1580 (11th Cir. 1985) (finding that defendant was not entitled to good faith defense to liability, where employer's president and one of its top administrators had differing interpretations of the provision in the amendment of the Wage and Hour Field Operations Handbook upon which they relied: "If such differing interpretations existed, a prudent person would have sought professional advice. There is no evidence that such advice was sought or ascertained in this instance."), *modified on other grounds*, 776 F.2d 265 (11th Cir. 1985); Chavez v. IBP, Inc., No. CV-01-5093, 2005 U.S. Dist. LEXIS 29714, at *110 (E.D. Wash. May 16, 2005) ("[A] reasonably prudent person would have examined the conflicting . . . interpretations [concerning compensable time to its employees] and taken the more conservative path.").

[88] *E.g.*, *Barcellona*, 597 F.2d at 468 (rejecting defendant-restaurant's contention that "the owners were merely a couple of farmers, acting for the first time as employers, with blind faith in their franchisor"); Leonard v. Carmichael Props. & Mgmt. Co., 614 F. Supp. 1182, 1188 (S.D. Fla. 1985) (rejecting defendant's contention that it relied in good faith on previous owner's payment practices).

[89] *E.g.*, Keeley v. Loomis Fargo & Co., 183 F.3d 257, 270 (3d Cir. 1999) ("[R]easonable good faith is not shown when an employer does not inquire about the law's requirements, simply follows an industry trend of not complying with the law, or violates the law in order to remain competitive."), *cert. denied*, 528 U.S. 1138 (2000); Reich v. Southern New England Telecomm. Corp., 121 F.3d 58, 71 (2d Cir. 1997) (showing conformity with industry-wide practice does not establish good faith sufficient to avoid liquidated damages); Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 910 (3d Cir. 1991) ("In lieu of any affirmative attempt by an employer to determine the legality of its wage payment practices, the employer's adherence to customary and widespread industry practices that violate the Act's overtime pay provisions is not evidence of an objectively reasonable good faith violation. . . . The district court's good faith theory that Cooper's violative pay practices were 'reasonable and necessary' competitive responses to the 'market for qualified employees' is also mistaken. This reasoning tends improperly to favor companies in industries where economic conditions make violations of the Act most attractive or pervasive."), *cert. denied*, 503 U.S. 936 (1992).

burden of proffering a legitimate, nondiscriminatory reason for its action.[90] The employee must then come forward with evidence that the employer's justification for its action is a pretext.[91] In determining whether the employer's proffered nondiscriminatory reason for its challenged employment decision is a pretext, a court might examine the employer's conduct and ask whether a reasonable employer might act in such a way.

The employer in this instance does not owe a duty to its workers under the discrimination laws to act reasonably in making its employment decisions; it need only have made its decision for a nondiscriminatory reason. The task, therefore, is not to use the reasonable person to make a dispositive finding as to whether the employer breached a duty. Instead, the courts use the reasonable person in these cases in deciding whether the employer's purportedly lawful explanation for its decision is credible; the unreasonableness of its conduct can indicate that the employer's explanation is not plausible, and therefore might suggest that it is not the actual reason for its decision.[92]

The courts tend to use the reasonable person in a descriptive sense in these cases, essentially framing the question this way: Is this the type of behavior one might expect of an employer in these circumstances? In doing so, courts tend to consider the context and the specific circumstances of the situation, giving wide latitude in assessing reasonableness of an employer's conduct. In making decisions as to whom to hire or retain, for example, courts have held that a reasonable employer might base its selection on one or more of any number of criteria. A reasonable employer might make its decision based on written credentials;[93] alternatively, a reasonable employer might look past written credentials, and consider factors such as personal interviews or enthusiasm or interest in the job.[94] Courts will find that an employer in these cases acts unreasonably only when its behavior seems nonsensical.[95] Such a descriptive use

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[90] LINDEMANN & GROSSMAN, *supra* note 60, at 47.

[91] *Id.*

[92] *E.g.*, Wexler v. White's Fine Furniture, 317 F.3d 564, 576 (6th Cir. 2003); Rossy v. Roche Prods., Inc., 880 F.2d 621, 625 n.4 (1st Cir. 1989); Meiri v. Dacon, 759 F.2d 989, 997 n.13 (2d Cir.).

[93] *E.g.*, Webber v. Int'l Paper Co., 417 F.3d 229, 238 (1st Cir. 2005) (explaining that a reasonable employer might prefer to retain an employee (engineer) with a degree over one without one in a reduction in force); Goetz v. Farm Credit, 927 F.2d 398, 403 (8th Cir. 1991) (in deciding whom to retain in reduction in force, a reasonable employer might look at job applications and evaluations).

[94] *See, e.g.*, Fischbach v. District, 86 F.3d 1180, 1183-84 (D.C. Cir. 1996) ("Selecting a pool of qualified candidates based upon their written credentials and then making a final selection based upon personal interviews is an obviously reasonable method of hiring a professional employee."); Dabrowski v. Warner-Lambert, 815 F.2d 1076, 1081 (6th Cir. 1987) ("When presented with a number of applicants who possess the requisite technical proficiency, it is perfectly reasonable for an employer to look beyond the words on the applicants' resumes in an effort to gauge, among other things, the interest and enthusiasm the applicant brings to the job."); Threadgill v. Spellings, 377 F. Supp. 2d 158, 162 (D.D.C. 2005) ("Making a final selection based upon personal interviews is a reasonable method of hiring an employee.").

[95] *E.g.*, Hill v. Nettleton, 455 F. Supp. 514, 519 (D. Colo. 1978) (finding that the employer acted unreasonably by suddenly requiring that the plaintiff, a faculty member in the college physical

is appropriate here, where the answer to the question is not going to determine directly whether the employer breached a duty to the employee.

B. Reasonable employees

1. Mitigation of damages

An employee who claims economic damages resulting from an employer's unlawful conduct is required to act reasonably to avoid or reduce the amount of resulting damages sustained.[96] A plaintiff is required to:

> use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to back pay if he refuses a job substantially equivalent to the one he was denied.[97]

Such mitigation requirement is not a duty in the sense that the employee would face liability for a breach (although failure to mitigate could limit his damages).[98] The issue, then, should be framed with a descriptive use of

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education department, have a PhD after the plaintiff had already been employed for three years and when having a doctorate was unrelated to the job).

[96] Title VII expressly states that "[interim] earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. § 2000e-5(g) (2006). Such mitigation principles also apply to other causes of action. *E.g.*, Miller v. AT&T Corp., 250 F.3d 820, 838 (4th Cir. 2001) (FMLA case) (plaintiff has responsibility to use reasonable diligence in finding other suitable employment); Benjamin v. Anderson, 112 P.3d 1039, 1050 (Mont. 2005) (claimant bringing sexual harassment case to state human rights commission "must take reasonable steps to mitigate his or her damages . . . to do what an ordinarily prudent person would do under the circumstances").

[97] Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982) (Title VII case). In mitigation cases, the burden is on the defendant-employer to show the lack of reasonable efforts. Le v. Univ. Of Pa., 321 F.3d 403, 407 (3d Cir. 2003); *Miller*, 250 F.3d at 838.

[98] This is often inaccurately called a "duty" to mitigate, but is more precisely expressed as the doctrine of avoidable consequences. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 128 (1935) ("The present rule is frequently described in the cases as a rule which imposes a 'duty' to minimize damages, and the expression is a convenient one. However, it has been pointed out that the 'duty,' if it can be so called, is not one for which a right of action is given against the person who violates it. The penalty is merely the disallowance of damages for losses which a compliance with the 'duty' would have avoided. It has been suggested that the person wronged should not be spoken of as under a 'duty' to avoid damage, but rather a 'disability' to recover for avoidable loss."); 2 STUART M. SPEISER, ET AL., THE AMERICAN LAW OF TORTS § 8.3 (2003) ("[The failure to take reasonable action to limit damages creates no affirmative right to anyone. The only result of such a failure is that the court will not allow damages for those consequences of the injury that it believes the plaintiff could reasonably have avoided. Thus, this doctrine should be viewed as disability on (or a 'no right' to) recovery of reasonably avoidable damages."). For simplicity, the doctrine of avoidable consequences is herein referred to as a mitigation requirement.

reasonable person: Is the employee's conduct what we might expect of one in his position under these particular circumstances?

In deciding whether the plaintiff acted reasonably to mitigate, courts tend to consider the totality of a wide range of circumstances.[99] Such factors might include not only the plaintiff's individual characteristics, but also facts concerning her specific family circumstances and her community. Courts have considered, for example, the plaintiff's physical condition (e.g., pregnancy, disabilities, illnesses, injuries),[100] the plaintiff's emotional or mental condition,[101] the plaintiff's age,[102] the plaintiff's education level, training, skills, and prior

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[99] *E.g.*, EEOC v. Pape Lift, Inc., 115 F.3d 676, 685 (9th Cir. 1997) ("[C]ourts have consistently based a determination of whether a plaintiff's efforts to procure suitable work were reasonable on that individual's particular circumstances and characteristics."); EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, 925 (S.D.N.Y. 1976) ("The range of reasonable conduct is broad and the injured plaintiff must be given the benefit of every doubt in assessing her conduct.").

[100] *E.g.*, Signore v. People & Props., Inc., No. 96 Civ. 0592, 1997 U.S. Dist. LEXIS 650 (S.D.N.Y. Jan. 23, 1997) (denying summary judgment on damage issue and holding that a jury could consider plaintiff's illness when deciding issue of mitigation where plaintiff did not look for work for 17 months, and then limited job search to nearby part-time and temporary positions); Shpargel v. Stage & Co., 914 F. Supp. 1468 (E.D. Mich. 1996) (denying summary judgment on issue of damages. The court considered the plaintiff's physical condition, carpal tunnel syndrome, as a factor in explaining why he removed himself from the restaurant management job market after an unsuccessful job search and took a job as a cookie stacker at bakery); Turic v. Holland Hospitality, Inc., 849 F. Supp. 544 (W.D. Mich. 1994) (finding after a bench trial that plaintiff sufficiently mitigated, recognizing that plaintiff's job search for factory and restaurant jobs was hindered by her pregnancy), *aff'd in relevant part*, 85 F.3d 1211 (6th Cir. 1996). *But see,* Johnston v. Harris Flood Control Dist., 869 F.2d 1565, 1579 (5th Cir. 1989) (reversing district court's award of backpay, finding that plaintiff did not act reasonably to mitigate where, as plaintiff put it: "I talked to one man about some security work, hadn't even filled out an application because after I talked to him he told me that I didn't have enough education to handle it; and they wouldn't let me go out there on account I just had one eye; and I never went out"; court giving little weight to the facts that plaintiff was 59-year-old unskilled laborer who had worked for defendant for 31 years; he had little education, one lung, emphysema, and one eye).

[101] *E.g.*, *Pape Lift*, 115 F.3d at 685 ("[E]vidence about [the plaintiff's] mental condition following his discharge was sufficient to support the jury's conclusion that his mitigation efforts were reasonable."); Ortiz v. Bank of America, 852 F.2d 383, 387 (9th Cir. 1987) (affirming jury decision; jury could find plaintiff reasonably refused unconditional reinstatement to original job, given evidence that plaintiff could not work because of plaintiff's poor mental condition); *Benjamin*, 112 P.3d at 1050 (affirming backpay award, the court considered plaintiff's "debilitated emotional condition" resulting from sexual harassment and discrimination – including plaintiff's loss of self-confidence, anxiety, and reluctance to meet new people – as a reason she did not immediately seek new employment); Hughes v. Park Place Motor Inn, 446 N.W.2d 885, 889 (Mich. Ct. App. 1989) (affirming damage award for plaintiff, considering, inter alia, plaintiff's depression).

[102] *E.g.*, Ollie v. Titan Tire Corp., 336 F.3d 680, 688 (8th Cir. 2003) (finding district court did not abuse its discretion by awarding only two years front pay where plaintiff "is relatively young and should therefore have a number of years to mitigate his damages"); EEOC v. Gurnee Inn Corp., 914 F.2d 815, 819 (7th Cir. 1990) (affirming damage award, the court considered the two plaintiffs' youth and lack of work experience, finding it was not unreasonable for a 15-year-old high school

work experience,[103] the job market and economic conditions in the relevant geographical area,[104] the plaintiff's particular financial circumstances, and how they affected efforts to find alternative employment,[105] the location of the alternative employment, whether it would require moving or a lengthy commute, and any personal circumstances that would make such alternative employment especially problematic.[106]

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student constructively discharged by sexually harassment to wait some period of time before looking for work; same for 20-year-old college student who might be "gun shy" about encountering similar sexual harassment); Moore v. Univ. of Notre Dame, 22 F. Supp. 2d 896, 907 (N.D. Ind. 1998) ("[Plaintiff] is presently 66 yrs old. The options available to him are not as great as those available to someone younger. . . . the chances of finding 'comparable work' are slim."); Burnside v. Simpson Paper Co., 832 P.2d 537, 549 (Wash. Ct. App. 1992) (affirming damage award and finding that because plaintiff was nearing retirement age, retraining and/or finding suitable alternative employment was unrealistic).

[103] *E.g.*, Yancey v. Weyerhaeuser Co., 277 F.3d 1021, 1025 (8th Cir. 2002) (affirming jury decision that the plaintiff mitigated by registering with a national job search network in his field and continuing to monitor classifieds. The court also considered that plaintiff had ninth-grade education, limited job skills, and had spent 31 years working for the defendant in small town); Wangsness v. Watertown Sch. Dist., 541 F. Supp. 332, 341 (D.S.D. 1982) (in finding after bench trial that plaintiff mitigated, the court considered plaintiff's training and skills); *Kallir,* 420 F. Supp. at 925-26 (in finding the plaintiff mitigated, the court considered skills, training, job market, usual practice of job searching in the plaintiff's field, and the specialized nature of that field).

[104] *E.g.*, Muldrew v. Anheuser-Busch, 728 F.2d 989, 992 (8th Cir. 1984) (affirming damage award and finding that the plaintiff's failure to find work was not unreasonable, considering the employment market at the time); Rasimas v. Mich. Dep't of Mental Health, 714 F.2d 614, 624 (6th Cir. 1983) (in reversing the trial court's decision on damages, holding that the reasonableness of effort to find substantially equivalent employment should be evaluated in light of the individual characteristics of the claimant and the job market); Jackson v. Shell Oil Co., 702 F.2d 197, 202 (9th Cir. 1983) (affirming damage award, the court said a jury could consider general economic conditions in the state).

[105] *E.g.*, Dailey v. Societe Generale, 108 F.3d 451, 455-58 (2d Cir. 1997) (affirming verdict for plaintiff, looking at her overall financial situation and higher cost of living in New York, where her job with defendant-employer was located, versus Pennsylvania, where she moved to attend school because after unsuccessful job search, she could no longer support herself in New York); Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269, 1274-75 (4th Cir. 1985) (affirming in part decision on damages; following one year of diligent searching for alternative work, it was reasonable for plaintiff to pursue his education while continuing to seek full-time employment and later to accept full-time employment at lower wage than at defendant-employer, where the new job provided steady and regular wages).

[106] *E.g.*, Jackson v. Wheatley Sch. Dist., 464 F.2d 411, 413 (8th Cir. 1972) ("We think it is unreasonable to expect a married couple . . . to maintain separate residences for the sole purpose of reducing damages caused by the unlawful actions of [defendant]."); Quinn-Nolan v. Schulte, Roth & Zabel, No. 00-Civ. 7936, 2002 U.S. Dist. LEXIS 13898, at *13-16 (S.D.N.Y. July 26, 2002) (denying motion to dismiss, the court considered plaintiff's explanation that she selected part-time work rather than full-time, as she had worked while at defendant-employer, a short distance from her home because it allowed her to spend more time with her family); Oldfather v. Ohio Dep't of Transp., 653 F. Supp. 1167, 1175, 1179 (S.D. Ohio 1986) (finding after bench trial that plaintiff reasonably declined offer of other position with defendant because of commuting distance and because of family reasons, where plaintiff was in middle of divorce and had children, and commute would have been three hours per day); Jacobson v. Pitman-Moore, Inc., 582 F. Supp. 169, 178 (D.

In these cases, courts tend to use the reasonable person in a descriptive way, allowing for a broad range of acceptable efforts to mitigate under the circumstances, rather than requiring that the plaintiff follow a prescribed course of conduct. Such a flexible approach is consistent with traditional principles of damage calculations, which give an aggrieved party wide latitude in choosing how to minimize damages.[107]

2. Protected conduct in retaliation cases

Unlike in mitigation cases, courts too often use the reasonable person in its normative sense when assessing the conduct of a plaintiff alleging unlawful retaliation.

Worker protection statutes (such as discrimination laws) typically prohibit an employer from retaliating against an employee who opposes (by objecting to

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Minn. 1984) (affirming damage award; plaintiff mitigated, in spite of limited search to 15 miles because plaintiff relied on bus); Buckley v. Mass. Comm'n Against Discrimination, 478 N.E.2d 1292, 1301 (Mass. App. Ct. 1985) (affirming damage award, finding although plaintiff looked for work only very near her home, she had reasonable wish to work at location near her ten children, one of whom was disabled); Hulett v. Bozeman Sch. Dist., 740 P.2d 1132, 1134 (Mont. 1987) (affirming decision for plaintiff; plaintiff mitigated, despite her failure to apply for comparable positions outside her geographical area; she was reluctant to apply to rural schools for teaching because they paid much less than defendant and would involve lengthy commute to work; rural positions would have required expenditures for an all-weather vehicle, additional child-care arrangements, expenses beyond what would have been required had she been able to teach in vicinity of defendant); Baril v. Aiken Reg'l Med. Ctrs., 573 S.E.2d 830, 838 (S.C. 2002) (reversing summary judgment, court found that the trial court erred by not allowing jury to consider all the reasons that plaintiff, an emergency room nurse, did not look for alternative job; court considered that were no other hospitals with emergency rooms in or near her home, and so she would have been forced to either commute or relocate to perform similar work; she did not want to relocate or have a lengthy commute because she had a home, family, and second job in vicinity of defendant).

[107] MCCORMICK, *supra* note 98, at 134 ("A wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him. If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen. . . . It should not be assumed that only one course of conduct could reasonably have been chosen by the party wronged. His conduct must be judged in the light of the one viewing the situation at the time the problem was presented to him. Certainly, as a person wronged, he is not to be judged by the same standards as apply to one who has had presented to him the choice of whether he will adopt a course of conduct which will probably injure another."); RESTATEMENT (SECOND) OF TORTS § 918, cmt. c (1979) (The injured party's "physical and mental condition after an injury are considered in determining whether he was unreasonable in failing to take steps to reduce the harm or in refusing aid. He is required to exercise no more than reasonable judgment or fortitude; and, if different courses of action are open to him he is not required, as a condition to obtaining full damages, to choose the course that events later show to have been the best. He is not barred from full recovery by the fact that it would have been reasonable for him to make expenditures or subject himself to pain or risk; it is only when he is unreasonable in reusing or failing to take action to prevent further loss that his damages are curtailed."); *Id.* at § 918, cmt. e ("[T]he personal situation of the plaintiff" must be considered.)

or protesting) conduct that is made unlawful under such statute.[108] Many jurisdictions have also enacted whistleblowing statutes protecting employees from retaliation for reporting certain unlawful activity.[109] A key question in these retaliation cases is whether the employee has engaged in conduct that is "protected."[110] (The plaintiff also needs to prove that she suffered an adverse action and that there was a causal connection between such action and the protected activity.[111])

Even if the employer's actions about which the plaintiff originally complained are not found to be unlawful, a plaintiff might still have a claim for retaliation. An employee is typically protected from retaliation whether or not the underlying complaint is meritorious if she can show that she had a good faith, reasonable belief that the underlying conduct violated the particular law at issue.[112]

In such a case, the employee owes no duty to the employer to act in any particular manner. The question, then, should be framed this way: Might we expect that someone in the employee's position and circumstances could have believed he was protesting unlawful conduct? Such should be a descriptive use

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[108] *See*, *e.g.*, anti-retaliation provisions in Title VII (42 U.S.C. § 2000e-3(a)), in ADEA (29 U.S.C. § 623(d)), and ADA (42 U.S.C. § 12203(a)).

[109] *E.g.*, New Jersey's Conscientious Employee Protection Act. N.J.S.A. 34: 19-1 to -8; Sarbanes-Oxley: 18 U.S.C. § 1514A; False Claims Act: 31 U.S.C. § 3730(h). In addition, most states have recognized a common law claim of wrongful discharge for violation of public policy. Bernt, *supra* note 38, at 44. Such cases tend to be those in which the plaintiff was discharged in retaliation for refusing to perform an unlawful act, reporting illegal activity, exercising some right, or performing a civic duty. *Id.* at 49.

[110] Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII's Anti-Retaliation Provision*, 39 ARIZ. ST. L. J. 1127 (2007). Brian A. Riddell & Richard A. Bales, *Adverse Employment Action in Retaliation*, 34 U. BALT. L. REV. 313, 315 (2005).

[111] Rosenthal, *supra* note 110; Riddell & Bales, *supra* note 110, at 315.

[112] Deborah L. Brake, *Retaliation*, 90 MINN..L. REV. 18, 76-78 (2005); *Rosenthal*, *supra* note 110. Some courts have required only a good faith belief, without a showing of reasonableness. However, most jurisdictions currently require that the employee had a good faith belief that the activity was unlawful and that that belief was reasonable. *Id.* at 310-11. This issue went to the Supreme Court in *Clark v. Breeden* (a retaliation case brought under Title VII), but the Court declined to rule on the standard because it found that no reasonable person could have believed she was complaining of unlawful harassment in the circumstances presented. Shirley Breeden was an employee in the company's human resources department. She, her male supervisor, and a male coworker were reviewing psychological evaluation reports of job applicants when the supervisor read a comment aloud from a report that one of the applicants disclosed that he had once commented to a coworker, "I hear making love to you is like making love to the Grand Canyon." Breedon's supervisor looked at her and said, "I don't know what that means." The other employee then said, "Well, I'll tell you later," and both men chuckled. In a short opinion, the Supreme Court concluded that "[n]o reasonable person could have believed that the single incident recounted . . . violated Title VII's standard." The court noted especially that it was Breeden's job as a human resources employee to review the report containing the offensive comment. 532 U.S. 268 (2001) (per curiam).

of the reasonable person, giving the plaintiff a generous allowance as to the reasonableness of his belief.

Some courts do give the plaintiff in a retaliation case some leeway in this regard, and look into at least some of the circumstances in which the plaintiff formed a belief regarding the alleged unlawfulness of the employer's conduct. Some opinions include consideration of the interactions between the plaintiff and her supervisors, the history of the particular employment relationship, and the plaintiff's observations of activity in the workplace.[113] For example, in *Yanowitz v. L'Oreal USA, Inc*.[114] the plaintiff, a regional sales manager, refused to carry out an order from a male supervisor to fire a female sales associate who, in the supervisor's view, was not sufficiently sexually attractive. The California Supreme Court concluded that the plaintiff reasonably believed such a directive would have violated the state anti-discrimination law. In so deciding, the court considered the history of her employment relationship with the company and her interactions with her supervisor, including the plaintiff's statements that she had hired and supervised both male and female sales associates for a number of years, and had never been asked to fire a male sales associate because he was not sufficiently attractive.[115]

Courts have also considered the plaintiff's particular job responsibilities, experience, and knowledge.[116] For example, in *Berg v. LaCrosse Cooler Co*.,[117] the Seventh Circuit Court of Appeals considered the plaintiff's background and training in determining that she had engaged in conduct protected by Title VII.

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[113] *E.g.*, Firestine v. Parkview Health Sys., Inc., 388 F.3d 229, 233-35 (7th Cir. 2004) (reversing trial court's dismissal; plaintiff could have reasonably believed she was protesting unlawful discrimination when she complained of unfair appraisal in light of boss's anti-Catholic comments and negative appraisal soon after boss was moved into position to affect plaintiff's job); Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1180 (2d Cir. 1996) (affirming jury verdict that plaintiff engaged in protected conduct when she complained that she was subjected to an unlawfully hostile environment because of her sex; court considered "larger context of plaintiff's experience" with defendant; under the circumstances, plaintiff reasonably perceived boss's objectionable comment not in isolation but as last in series of incidents that led her to believe that she was victim of hostile environment); Abramian v. President & Fellows of Harvard Coll., 731 N.E.2d 1075, 1087-88 (Mass. 2000) (affirming jury verdict on retaliation claim; there was sufficient evidence to permit jury to conclude that plaintiff reasonably and in good faith believed that defendant was discriminating against him because of his national origin; court looked at alleged harassing incidents, unequal discipline between plaintiff and coworkers for similar infractions, derogatory comments by supervisor).

[114] 116 P.3d 1123 (Cal. 2005).

[115] *Id.* at 1130-33.

[116] *E.g.*, Fine v. Ryan Int'l Airlines, 305 F.3d 746, 752-54 (7th Cir. 2002) (holding that in forming belief as to whether employer is acting unlawfully, reasonable employee might rely on what she learns from coworkers); Sullivan v. Mass. Mutual Life Ins. Co., 802 F. Supp. 716, 727-28 (D. Conn. 1992) (denying summary judgment in claim for wrongful discharge in violation of public policy where plaintiff claimed retaliation for reporting suspected violation of securities laws; court looked at the plaintiff's job duties, training, knowledge of the laws, suspicious activity at the company, and comments by supervisors).

[117] 612 F.2d 1041 (7th Cir. 1980).

Although the employment practice that Laurel Berg protested was later deemed lawful, the court considered that she had been informed otherwise at a college course on the subject.[118]

In other opinions, however, courts have flatly declared as a matter of law that no reasonable person could have found the underlying conduct unlawful. Especially troubling is the extent to which some courts have required that employees know and understand the patchwork of substantive employment law. In *Freilich v. Upper Chesapeake Health, Inc*.,[119] the Fourth Circuit held that the plaintiff, a doctor, could not have reasonably believed her complaint of substandard medical care for dialysis patients was a violation of the Americans with Disabilities Act ("ADA").[120] In affirming dismissal of the doctor's retaliation claim, the court said that the allegedly inferior treatment of patients constituted, at most, medical malpractice, rather than infractions of the ADA provision that prohibits discrimination on the basis of disability in the provision of "services, facilities, privileges, advantages, or accommodations of any place of public accommodation."[121] Dr. Freilich's complaints included failures in diagnoses, failure to adhere to medical protocols, unsupervised dialysis of patients, and failure to provide correct dialysis for several patients.[122] By concluding that no reasonable person would believe that such conduct could constitute a violation of the ADA, the court essentially said that it expected this plaintiff – a doctor, not a lawyer – to know the difference between medical malpractice and violations of the ADA.

The Eleventh Circuit Court of Appeals in *Weeks v. Harden Manufacturing Corp.*[123] held that the plaintiff, who claimed retaliation under various federal anti-discrimination statutes, could not have reasonably believed that he was protesting unlawful activity by refusing to agree to a provision that would have required compulsory arbitration of any prospective dispute with his employer. The court found that the arbitration provision at issue was lawful, per earlier court decisions, and therefore, the plaintiff's belief that the employer's conduct was unlawful was not objectively reasonable. The court reached this conclusion notwithstanding the plaintiff's reliance on Equal Employment Opportunity Commission ("EEOC") guidance and a decision to the contrary from another

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[118] *Id.* at 1045. *Cf.* Volberg v. Pataki, No. 96-7296, 1996 U.S. App. LEXIS 27299, at *4 (2d Cir. Oct. 17, 1996) (finding that plaintiff, as an attorney, should have known that the conduct she was protesting was not unlawful).

[119] 313 F.3d 205 (4th Cir. 2002).

[120] *Id.* at 215-16.

[121] *Id.* at 216. 42 U.S.C. § 12182 provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." Public accommodations include hospitals and professional offices of health care providers. 28 C.F.R. § 36.104 (2008).

[122] *Freilich*, 313 F.3d at 216-17.

[123] 291 F.3d 1307 (11th Cir. 2002).

circuit. The *Weeks* court said that the plaintiff could not stand on his ignorance of the substantive law to argue that his belief was reasonable.[124]

Courts have also held that an employee does not engage in protected activity by protesting what he believes are discriminatory grooming or appearance standards. In *Talanda v. KFC National Management Co.*,[125] the Seventh Circuit, in affirming summary judgment for the employer, held that no reasonable person would believe he was opposing unlawful discrimination when he refused to take an employee with bad teeth off the front counter of a fast-food restaurant. Paul Talanda, a restaurant manager, was ordered by his supervisor to reassign an employee who was missing some of her front teeth from her job as a cashier to one where she would not be seen by customers.[126] Talanda believed the cashier was protected by the ADA, so he refused to carry out his supervisor's directive and was fired for insubordination.[127] The Seventh Circuit held that the cashier was not disabled under the ADA, and that the manager had no reasonable basis for believing that she was.[128] The court said that Paul Talanda "ought to have realized" the employee was not protected by the ADA.[129] The court affirmed the district's decision that this was not even a "close call," and that it did not fall into any "legal grey area."[130] The court added that it was "common sense" that the employee was not covered by the ADA, and that an "ordinary person" would know this.[131]

In *Harper v. Blockbuster Entertainment Corp.*,[132] the Eleventh Circuit held, in affirming the dismissal of retaliation claims under Title VII, that the male plaintiffs could not reasonably have believed that the defendant was unlawfully discriminating based on sex when it prohibited men but not women from wearing long hair. The court said every circuit that had considered the issue concluded that such a policy was unlawful, but it also acknowledged that the EEOC had earlier taken a contrary position on the issue. The court rejected the plaintiffs' argument that they, as laypersons, should not be charged with substantive knowledge of the current state of the law: "If the plaintiffs are free to disclaim knowledge of the substantive law, the reasonableness inquiry becomes no more than speculation regarding their subjective knowledge."[133]

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[124] *Id*. at 1317.
[125] 140 F.3d 1090 (7th Cir. 1998).
[126] *Id*. at 1093.
[127] *Id*. at 1096-97.
[128] *Id*.
[129] *Id.* at 1097-98.
[130] No. 94C1668, 1997 U.S. Dist. LEXIS 4006, *14 (N.D. Ill. Mar. 31, 1997).
[131] *Id.* at *12, 16. Yet a magistrate's earlier report to the district court recommended that summary judgment on this issued be denied, finding that there was sufficient evidence to support Talanda's assertion that his belief was reasonable. No. 94C1668, 1996 U.S. Dist. LEXIS 7634 (N.D. Ill. May 31, 1996), *rev'd in relevant part*, No. 94C1668, 1997 U.S. Dist. LEXIS 4006 (N.D. Ill. Mar. 31, 1997).
[132] 139 F.3d 1385 (11th Cir. 1998).
[133] *Id.* at 1388.

But the lawfulness *vel non* of the employer's conduct that the employee is protesting is often ambiguous, at least to a non-lawyer who is put in the uncomfortable position of making a (sometimes instantaneous) decision about whether to risk one's job. In spite of the *Talanda* and *Harper* opinions, the lawfulness of some employer standards for employee appearance and grooming has not been so clear.[134] The EEOC Compliance Manual devotes eight pages to the subject of Grooming Standards, including a statement that "the Commission considers it a violation of Title VII for employers to allow females but not males to wear long hair."[135] Similarly, courts have not universally and definitively found lawful compulsory arbitration provisions such as the one at issue in *Weeks v. Harden*,[136] and the EEOC's position is that such provisions are "contrary to the fundamental principles evinced" in federal anti-discrimination statutes.[137]

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[134] *See* MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 644-46 (5th ed. 2003) (comparing cases brought for discrimination based on appearance and grooming standards). Some jurisdictions have enacted measures prohibiting discrimination based on appearance, or height and weight. Some plaintiffs have also successfully brought appearance-based claims under discrimination statutes where the claim could be characterized as based on a prohibited classification, such as sex, race, or age. William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y 153, 155 (2007).

[135] EEOC Compl. Manual, § 619, ¶¶ 3500-3506 (1998). The Commission does note that because of the conflict with the courts on this question, it will discontinue processing charges based on such differential grooming standards. *Id.* at § 619.1.

[136] *See, e.g.*, EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003) (remanding to district court to decide whether adverse action against employee who refused to sign mandatory arbitration agreement gives rise to retaliation claim); Ackerman v. The Money Store, 728 A.2d 873 (N.J. Super. Ct. 1998) (finding that defendant violated the state discrimination statute by requiring plaintiff, as a condition of continued employment, to execute an arbitration agreement); *cf.* Taylor v. Richardson Auto. II, L.P., No. 05-CV-2397-D, 2007 U.S. Dist. LEXIS 49023, at *32 (N.D. Tex. July 6, 2007) (finding that requiring employee to sign arbitration agreement could be adverse action: "[W]hen she reported her allegations of sexual harassment to [defendant], she was told that if she did not sign the Arbitration Agreement, she would not have a job, *i.e.*, that she was required to choose between signing an agreement that waived her right to a jury trial or facing discharge. A reasonable jury could find based on this evidence that being compelled to choose between signing a binding arbitration agreement and termination might have dissuaded a reasonable worker from making or supporting a charge of discrimination."); State *ex rel.* Saylor v. Wilkes, 613 S.E.2d 914 (W.Va. 2005) (finding compulsory arbitration agreement unenforceable as unconscionable adhesion contract).

[137] An employee looking for information on the subject of mandatory arbitration from the EEOC would find this on its website:

> The [EEOC], the federal agency charged with the interpretation and enforcement of this nation's employment discrimination laws, has taken the position that agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in these laws. . . . The use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination. Those whom the law seeks to regulate should not be permitted to exempt themselves from federal

Charging employees with knowledge of the current state of substantive law is especially disturbing when one considers the widespread ignorance among employees concerning their legal rights. Consider where in actual practice employees learn of their rights in the workplace. Employers are required to post a limited amount of information regarding workers' rights under certain statutes.[138] Otherwise, employees might get their information (accurate or not) from the media, co-workers, family, or friends. If they are resourceful, they might visit a library or the internet, where the accuracy and completeness of information is uneven and might not be tailored to the employee's jurisdiction. Government agencies and their websites can be useful, but do not address all workplace situations. (Of course, the employee needs to know which government agency to consult.) And if the employee might have a common law claim, there are no agencies to help. Indeed, studies have shown that employees are systematically uninformed about their rights, lacking the most basic knowledge about the law of the workplace. (For example, workers are ignorant of the default employment-at-will rule, instead persistently and erroneously believing that the law requires employers to have "just cause" to discharge.[139])

Because of the patchwork of employment law, the many differences in the substantive law across jurisdictions, and the various interpretations of those laws,[140] even the most determined employee is unlikely to get a grasp of what is

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> enforcement of civil rights laws. Nor should they be permitted to deprive civil rights claimants of the choice to vindicate their statutory rights in the courts – an avenue of redress determined by Congress to be essential to enforcement."

Equal Employment Opportunity Comm'n Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, July 10, 1997, *available at* http://www.eeoc.gov/policy/docs/mandarb.html.

[138] *See* 1 GUIDE TO EMPLOYMENT LAW & REGULATION §§ 2:59, 2:60, 13:61 (Thompson/West 2007) and 2 GUIDE TO EMPLOYMENT LAW & REGULATION § 18:24 (Thompson/West 2007) (discussing federal posting requirements).

[139] Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447; Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-At-Will in Light of Findings that Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307, 310 (2002); Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does it Matter*?, 77 N.Y.U. L. REV. 6 (2002); RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 118-120 (1999).

[140] For example, some courts have found that an employee engages in protected conduct under anti-discrimination statutes when she protests favoritism toward a supervisor's sexual partner. *E.g.*, Drinkwater v. Union Carbide Corp., 904 F.2d 853, 865-66 (3d Cir. 1990); Miller v. Dep't of Corrections, 115 P.3d 77, 96 (Cal. 2005); Ritchie v. Dep't of State Police, 805 N.E.2d 54, 62 (Mass. App. Ct. 2004). Other courts have disagreed. *E.g.*, Sherk v. Adesa Atlanta, LLC, 432 F. Supp. 2d 1358, 1370-72 (N.D. Ga. 2006); Sullivan-Weaver v. New York Power Auth., 114 F. Supp. 2d 240, 243 (S.D.N.Y. 2000); O'Patka v. Menasha Corp., 878 F. Supp. 1202, 1208-09 (E.D. Wis. 1995). The EEOC Policy Guidance on the subject is hardly a model of clarity for a lay employee who is expected to understand the substantive law. The EEOC says that "isolated" instances of favoritism by a boss toward a paramour is not prohibited under Title VII, but "widespread favoritism" may constitute unlawful harassment under that Act. EEOC Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism, No. N-915.048 (Jan. 12, 1990), *available at* http://www.eeoc.gov/policy/docs/sexualfavor.html. Depending on the totality of the circumstances, including the number of instances of favoritism and the egregiousness of the

lawful without consulting counsel, which might itself lead to discharge if the employer learns of it.[141]

So while courts deciding retaliation cases appear to allow for an employee's reasonable belief that she was protesting unlawful conduct, the employee bears the risk of being fired with no remedy if she protests what turns out to be lawful conduct, even if the plaintiff can show that she suffered retaliation *because of her complaint*. Employees are thus put in a position of learning the law or risk forfeiting the rights under the statutes written to protect them.[142]

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instances, such guidance might make sense for judging allegations of sexual harassment after the fact. But it is of limited use to an employee who is still on the job, faced with what she perceives as unlawful favoritism to the boss's paramour. She has to decide whether to complain and risk her job. Suppose the employee is aware of two or three incidents of favoritism. Does she have to decide whether they are "isolated" before she raises the matter with the employer's human resources department? Suppose there are two employees, one of whom is aware of two incidents of favoritism; the other is aware of another. Are three enough? And if they complain separately, are they not engaging in protected conduct because each is complaining only of "isolated" incidents? How would the employer's human resources department learn of the alleged conduct if no one employee is confident enough that she knows of more than "isolated" incidents? Similarly, when it comes to reporting harassment, employees are often put in a bind. Reporting it before it rises to the level of severity required to constitute unlawful harassment – as a court will later decide – might not be protected conduct. Waiting too long, however, could leave the employee without a remedy for failure to put the employer on timely notice of the conduct. For discussion of this catch-22 in harassment cases, *see* Rosenthal, *supra* note 110.

[141] Some jurisdictions have allowed a cause of action for wrongful discharge in violation of public policy where an employee is fired in retaliation for consulting counsel. *E.g.*, D'Alessandro v. Nipmuc, Inc., No. 06-1071, 2007 Mass. Super. LEXIS 7 (Mass. Super. Ct. Jan. 16, 2007); Chapman v. Adia Servs., Inc., 688 N. E. 2d 604 (Ohio Ct. App. 1997); Bennett v. Hardy, 784 P.2d 1258 (Wash. 1990). However, a claim of wrongful discharge in violation of public policy is not recognized in all states. Bernt, *supra* note 38, at 45 n.29. Even in those states that do allow such a claim, some courts have refused to apply it to cases of discharge for consulting counsel. *E.g.*, Porterfield v. Mascari II, Inc., 823 A.2d 590 (Md. 2003); Clement v. Farmers Ins. Exchange, 766 P.2d 768 (Idaho 1988).

[142] Some courts have recognized that "[e]mployees often are legally unsophisticated and will not be in a position to make an informed judgment as to whether a particular practice or conduct *actually* violates the governing antidiscrimination statute." Yanowitz v. L'Oreal USA, Inc., 116 P.3d 1123, 1143 (Cal. 2005); *accord* Moyo v. Gomez, 40 F.3d 982, 985 (9th Cir. 1994) (noting that the reasonable person standard must make "due allowance" for "the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims."); Gifford v. Atchison, Topeka & Santa Fe Ry. Co., 685 F.2d 1149, 1157 (9th Cir. 1982) ("It requires a certain sophistication for an employee to recognize that an offensive employment practice may represent sex or race discrimination that is against the law."); Berg v. La Crosse Cooler Co., 612 F.2d 1041, 1045 (7th Cir. 1980) ("The plaintiff here was an educated and informed layperson who should not be burdened with the sometimes impossible task of correctly anticipating how the Supreme Court may interpret a particular statute.") Gerard v. Camden County Health Servs. Ctr., 792 A.2d 494, 499 n.4 (N.J. Super. Ct. App. Div.) ("[W]e do not impose precise legal knowledge upon [plaintiff]. . . . [T]he legislature did not condition [statutory retaliation] protection upon a law degree.").

3. Constructive discharge

In deciding cases of constructive discharge, courts vary in the extent to which they use the reasonable person in a normative versus descriptive sense.

A constructive discharge is not an independent cause of action; rather, "[u]nder the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes."[143] Constructive discharge merely satisfies the discharge element in a case alleging unlawful discharge; the plaintiff must still make out the elements of the particular claim. A constructive discharge claim might arise in statutory or common law causes of action.[144] A plaintiff claiming constructive discharge must show that her working conditions become "so intolerable that a reasonable person in the employee's position would have felt compelled to resign."[145] A constructive discharge might include, for example, "a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions."[146] But, opinions vary (sometimes widely) on what other conditions might amount to a constructive discharge.

When an employee leaves a job claiming constructive discharge, the question is not whether she breached some duty to the employer. The reasonable person, then, should be used in a descriptive sense. Some courts have, to varying degrees, taken a holistic approach in deciding constructive discharge cases, considering what a reasonable employee might do under all of the circumstances surrounding the plaintiff's departure from the defendant's employment.[147] Courts

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[143] Pennsylvania State Police v. Suders, 542 U.S. 129, 130 (2004).

[144] The doctrine of constructive discharge originated in labor law, under the National Labor Relations Act. The National Labor Relations Board developed the constructive discharge doctrine "to address situations in which employers coerced employees to resign, often by creating intolerable working conditions, in retaliation for employees' engagement in collective activities." *Id.* at 141. The doctrine of constructive discharge has since been applied throughout employment litigation. Steven D. Underwood, Comment, *Constructive Discharge and the Employer's State of Mind: A Practical Standard*, 1 U. PA. J. LAB. & EMP. L. 343, 344 (1998).

[145] *Suders*, 542 U.S. at 141. Some jurisdictions have added a requirement that the employer must have specifically intended the employee to resign. Cathy Shuck, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKELEY J. EMP. & LAB. L. 401, 410-17 (2002); Stephen F. Befort & Sarah J. Gorajski, *When Quitting is Fitting: The Need for a Reformulated Sexual Harassment/Constructive Discharge Standard in the Wake of Pennsylvania State Police v. Suders*, 67 OHIO ST. L. J. 593, 603-04 (2006). *Suders*, decided in 2004, included no such "specific intent" requirement, but *Suders* does not make explicit whether the Court intended the constructive discharge standard to eliminate the specific-intent requirement used in several circuits. *Id.* at 624. Consequently, "the *Suders* decision has not eliminated the ongoing circuit split with respect to the appropriate test for determining the existence of a constructive discharge." *Id.* at 597.

[146] *Suders*, 542 U.S. at 134.

[147] *E.g.*, Chertkova v. Connecticut Gen. Life Ins. Co., 92 F.3d 81, 90 (2d Cir. 1996) (reversing summary judgment on constructive discharge claim: "Because a reasonable person encounters life's circumstances cumulatively and not individually, it was error to treat the various conditions as separate and distinct rather than additive."); Thompson v. Tracor Flight Sys., Inc., 104

have considered factors such as the plaintiff's physical condition (e.g., disabilities, illnesses) and how such condition affected the plaintiff's tolerance for the particular working conditions,[148] the history of the particular employment relationship and the totality of communications and interactions among the plaintiff, supervisors, and co-workers,[149] what might be considered demeaning, humiliating, or degrading conditions to an employee in the particular plaintiff's shoes,[150] and the impact of working conditions on the plaintiff's family life.[151]

Cal.Rptr.2d 95, 104 n.1 (Cal. Ct. App. 2001) (affirming jury verdict of constructive discharge, rejecting employer's attempts to "slice into separate incidents – and to evaluate individually – evidence from which the jury could and clearly did find a 'continuous pattern' of conduct" on the part of the employer and its employees "[i]n determining whether a reasonable employee would have felt compelled to resign, the jury is entitled to consider all of the circumstances of the employment relationship. The jury is not required to start with an artificial baseline of a 'normal' employer-employee relationship on the date of the first protected activity."); Strozinsky v. School Dist. of Brown Deer, 614 N.W.2d 443, 465 (Wis. 2000) ("reasonability calculus" includes consideration of "totality of the circumstances").

[148] *E.g.*, Smith v. Henderson, 376 F.3d 529 (6th Cir. 2004) (denying summary judgment on constructive discharge claim, where employer worked disabled employee in poor health to exhaustion, denying reasonable accommodation); Price v. Del. Dep't of Corrs., 40 F. Supp. 2d 544 (D. Del. 1999) (affirming jury verdict for plaintiff; court considered the plaintiff's illness and the fact that he was on sick leave; employer asked co-worker to convince plaintiff to resign; employer was aware of plaintiff's heart condition; employer asked plaintiff's doctor for information without plaintiff's authorization; employer cut off plaintiff's contacts with clients and co-workers; employer did unannounced audit in plaintiff's files while he was on sick leave); Pendas v. Runyon, 933 F. Supp. 187 (N.D.N.Y. 1996) (denying summary judgment on constructive discharge claim where plaintiff placed on an early morning work shift required him to stand for eight hours at a time, contrary to his physician's orders); Schwarz v. Nw. Iowa Cmty. Coll., 881 F. Supp. 1323, 1339-40 (N.D. Iowa 1995) (denying summary judgment on constructive discharge claim where plaintiff, who was under doctor's orders not to drive at night, was moved to work shift ending at 9 p.m.).

[149] *E.g.*, Wallace v. City of San Diego, 479 F.3d 616, 628-29 (9th Cir. 2007) (jury entitled to consider plaintiff's past experience with defendant-employer in assessing reasonableness of plaintiff's fear of future discriminatory acts if she stayed on); *Chertkova*, 92 F.3d at 88-89 (reversing summary judgment on constructive discharge claim where supervisor engaged in pattern of baseless criticisms, said plaintiff would not "be around," and that plaintiff would be fired instantly if she did not meet certain ambiguous behavior objectives; plaintiff's former supervisor was terminated for reasons similar to those that allegedly formed the basis for plaintiff's current supervisor's disapproval of plaintiff); Kurschinske v. Meadville Forging Co., No. 06-87, 2007 U.S. Dist. LEXIS 45041, at *14-16 (W.D. Pa. June 21, 2007) (denying summary judgment on constructive discharge claim; court considered history of interactions between plaintiff and harassing co-workers and plaintiff's knowledge that defendant had never previously disciplined co-workers for harassment, arguably justifying plaintiff's conclusion that defendant would not remedy hostile environment); Wyatt v. Ford Motor Co., No. C04-5666, 2006 U.S. Dist. LEXIS 48464, at *12-13 (W.D. Wash. July 17, 2006) (denying summary judgment on constructive discharge claim considering history of alleged harasser's physically threatening mannerism and verbal harassment of many employees, including plaintiff).

[150] *E.g.*, Logan v. Denny's Inc., 259 F.3d 558, 571-72 (6th Cir. 2001) (reversing summary judgment on constructive discharge claim, where plaintiff, the only full-time African-American server at restaurant, was given the choice of resignation or demotion to busing tables, was informed of demotion in humiliating fashion, and plaintiff experienced disparaging comments. "[A]lthough

Some courts have recognized that an employee who is being forced out of a job might still need to wait before separating, to find another position or to give notice,[152] and some courts have clarified that the plaintiff need not prove that

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working as a busboy from the outset may not be considered menial work by some, a reasonable person standing in Plaintiff's shoes may have found the job menial. Had Plaintiff accepted that busboy position, she would have gone from waiting on customers and serving meals - a job that she had successfully performed for over ten years - to mopping floors."); Brown v. E. Miss. Elec. Power Ass'n., 989 F.2d 858, 863 (5th Cir. 1993) (reversing trial court's decision for defendant on constructive discharge claim, where plaintiff, an African-American man, was demoted for conduct he did not do, after management took word of two white problem customers over plaintiff's); EEOC v. Cone Solvents, Inc., No. 3:04-0841, 2006 U.S. Dist. LEXIS 29866, at *40-41 (M.D. Tenn. April 21, 2006) (denying summary judgment on constructive discharge claim, finding that alleged sexual harassment could compel a reasonable person to resign, especially given that plaintiff was teenage receptionist and alleged harasser was 65-year-old company president); Taylor v. Oakbourne Country Club, 02-1177 (La.App. 3 Cir. 5/14/03); 846 So. 2d 959, 966 (affirming verdict for plaintiff on constructive discharge claim where plaintiff was told he would be demoted or fired and his only choice was to return to job of bartender, a position he had 33 years earlier).

[151] *E.g.*, EEOC v. Marion Motel Assocs., No. 91-2070, 1992 U.S. App. LEXIS 9589, at *15-16 (4th Cir. May 5, 1992) (affirming denial of judgment notwithstanding verdict on constructive discharge claim where jury found employer required plaintiff to work hours that employer knew she could not work because of her responsibilities caring for her mother); Schafer v. Bd. of Pub. Edu., 903 F.2d 243, 249-50 (3d Cir. 1990) (reversing summary judgment on constructive discharge, where plaintiff, a public school teacher, applied for a one-year leave of absence to care for child, and employer denied request, even though employer knew he would have to resign); Fitzgerald v. Gonzales, No. 04-CV-00421, 2006 U.S. Dist. LEXIS 13019, at *29 (D. Colo. March 8, 2006) (denying summary judgment on constructive discharge claim where plaintiff's husband, also employed by defendant, was involuntarily relocated from Colorado to Kansas, and to continue working for defendant, plaintiff would have had to maintain separate residence and live apart from her family).

[152] *See, e.g.*, *Wallace*, 479 F.3d at 629 n.7 (finding that plaintiff's decision to remain on job for short period after last overt discriminatory act did not foreclose constructive discharge claim: "[T]he jury could have viewed Wallace's efforts to stay on the job despite the intolerable conditions as evidence that he indeed had 'the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer.'") (citations omitted); Sholl v. Plattform Adver., Inc., 438 F. Supp. 2d 1303, 1313-14 (D. Kan. 2006) (denying summary judgment, rejecting defendant's argument that plaintiff cannot show constructive discharge because she had found another job before leaving); Barbetta v. Chemlawn Servs. Corp., 669 F. Supp. 569, 572 (W.D.N.Y. 1987) ("The passage of time [prior to resignation] is not dispositive. A constructive discharge need not follow immediately upon the heels of an offensive incident – it need not be a case of the 'straw breaking the camel's back.' Individuals can tolerate discrimination to varying degrees. [Plaintiff] felt constrained to continue working for a period in an environment which may objectively be found to be 'intolerable'; this could be seen as a tribute to her perseverance rather than as a bar to relief. She is entitled to have those reasons for continuing employment during that four-month period determined at a trial."); Valdez v. City of Los Angeles, 282 Cal.Rptr. 726, 735 (Cal. Ct. App. 1991) ("The length of time the plaintiff remained on the job is relevant in determining the severity of the impact of the working conditions but does not as a matter of law prevent the plaintiff from proceeding with a claim for wrongful discharge. Some employees may stay on the job and endure very difficult circumstances that might have caused others similarly situated to quit sooner. Financial circumstances may not allow the employee the luxury of resigning before finding other employment. But the fact that for a time

conditions were literally intolerable or unbearable.[153] Courts that consider the totality of the particular plaintiff's situation recognize that one's ability to "tough it out" at a difficult job is necessarily going to depend at least in part on the employee's particular situation.

However, in many other cases, the courts seem to be setting fixed requirements of employee behavior, using the reasonable person standard in a normative sense. Courts have held as a matter of law that no reasonable person would feel compelled to leave where, for example, she was publicly humiliated,[154] she was required to work under unsafe conditions,[155] a change in work hours made it more difficult to meet family responsibilities,[156] or she was

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circumstances prevented the employee from resigning certainly does not decrease the burden the employer has placed on him."). *But see* cases cited *infra* at note 158.

[153] *E.g.*, Flaherty v. Metromail Corp., 59 Fed. Appx. 352, 354 (2d Cir. 2002) ("An employee may find conditions unbearable when no relief is in sight, and yet be able to put up with the same conditions when she knows that freedom (through resignation) is at hand. This is especially so when the employee believes that bearing the intolerable situation for a limited period is essential to qualify for needed benefits."); EEOC v. Foodcrafters Distribution Co., No. 03-2736, 2006 U.S. Dist. LEXIS 11426, at *37-38 (D.N.J. Feb. 24, 2006) ("[C]ontinuing to work in a hostile environment does not preclude a constructive discharge claim since a jury could conclude that the conditions of [plaintiff's] employment were intolerable, and that while she had the fortitude to stay, her strength finally failed."); Van Meter Indus. v. Mason City Human Rights Comm'n, 675 N.W.2d 503, 511-12 (Iowa 2004) ("[W]e observe that an employee's work environment need not be literally unbearable in order to effect a constructive discharge. It is enough that the employee has no recourse within the employer's organization, or "reasonably believes there is no chance for fair treatment.") (citations omitted).

[154] *E.g.*, Williams v. Giant Food Inc., 370 F.3d 423, 434 (4th Cir. 2004) (affirming summary judgment on constructive discharge claim, where, *inter alia*, supervisors yelled at plaintiff and chastised her in front of customers); Morgan v. Houston's Rests., Inc., No. 99-6970, 2000 U.S. Dist. LEXIS 19242, at *10-11 (S.D. Fla. Oct. 23, 2000) (granting summary judgment on constructive discharge, where plaintiff, a restaurant server, was repeatedly called fat while pregnant and although given permission to wear shirt out, she was publicly humiliated for doing so). *See also* cases cited *infra* note 157.

[155] *E.g.*, Stephenson v. City of Philadelphia, No. 05-1550, 2006 U.S. Dist. LEXIS 43998, at *20 (E.D. Pa. June 27, 2006) (granting summary judgment, finding no reasonable person would resign where plaintiff, a correctional officer, feared for her safety when a co-worker with a history of violence made threats against her, supervisors were indifferent to plaintiff's concerns, and plaintiff was erroneously reported as absent without authorization); Cripe, Inc. v. Clark, 834 N.E.2d 731, 732-33 (Ind. Ct. App. 2005) (reversing trial court's denial of motion to dismiss, finding no constructive discharge where employer refused to provide plaintiff, who installed and serviced garage doors, a safe vehicle for work, plaintiff was repeatedly assigned to drive company vehicles with faulty brakes and tires, non-operational turn signals and lights, and sudden losses of power, and plaintiff had several near-accidents while driving hazardous vehicles).

[156] *E.g.*, Grube v. Lau Indus., Inc., 257 F.3d 723, 728-29 (7th Cir. 2001) (affirming summary judgment on constructive discharge claim where plaintiff's shift changed after 20 years with defendant, making it difficult for her to care for disabled husband); Cross v. Sw. Recreational Indus., Inc., 17 F. Supp. 2d 1362, 1376 (N.D. Ga. 1998) (granting summary judgment on constructive discharge claim where demotion resulted in change of hours, making it difficult to get child care; court said this was merely an inconvenience). *See also* Long v. First Union Corp., 894 F. Supp. 933, 943-44 (E.D. Va. 1995) (granting summary judgment on constructive discharge

transferred so as to require relocation, or substantially longer commute.[157] Some courts have been unsympathetic regarding the plaintiff's physical condition (e.g., pregnancy or disability), which contributed to the plaintiff's inability to stay on the job.[158]

In some cases, courts have held that as a matter of law no reasonable person would have resigned when subjected to harassment that included outrageously abusive behavior by supervisors and/or co-workers.[159] In *Tatum v. Ark. Dep't of*

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where in retaliation for discrimination complaints, employer refused to adjust plaintiff's schedule to accommodate her school schedule, while others were allowed such adjustments).

[157] *E.g.*, Gartman v. Gencorp Inc., 120 F.3d 127, 130-31 (8th Cir. 1997) (finding no constructive discharge where plaintiff transferred from Arkansas to Indiana location); Smith v. Goodyear Tire & Rubber Co., 895 F.2d 467, 472-73 (8th Cir. 1990) (reversing verdict for plaintiff on constructive discharge claim, finding that plaintiff's belief that he could not accept job transfer because of financial considerations cannot constitute "intolerable working conditions," noting, "[Plaintiff] placed great emphasis on the fact that he would be unable to sell his home because of the downturn in the economy [in the area]. Because [plaintiff] refused the job offer without attempting to sell his house, his testimony arguably is speculative and unsupported. Furthermore, Goodyear cannot be held accountable for the downturn in the economy . . . . Plaintiff's personal circumstances do not constitute grounds for a claim that the employer constructively discharged him."); Burnette v. Northside Hosp., 342 F. Supp. 2d 1128, 1139 (N.D. Ga. 2004) (granting summary judgment on constructive discharge claim where plaintiff was reassigned, resulting in commute that was increased by 1-1 ½ hrs. each way); Flanagan v. Reno, 101 F. Supp. 2d 1022, 1026-27 (N.D. Ill. 2000) (granting summary judgment on constructive discharge claim where plaintiff was transferred on 45 days notice from Chicago to Newark).

[158] *E.g.*, *Williams*, 370 F.3d at 434 (affirming summary judgment on constructive discharge claim, where conditions included being required to work with injured back); Pagliaroni v. Daimler Chrysler Corp., No. 04-C-1213, 2006 U.S. Dist. LEXIS 83708, at *6-7 (E.D. Wisc. Nov. 15, 2006) (denying motion for reconsideration of summary judgment, finding no constructive discharge where plaintiff was required to work temporarily in a department in which her doctor told her not to work and in which plaintiff began to experience an allergic reaction; court said plaintiff should have refused to work there, and then if she were discharged, she could have brought a claim for retaliation); Rosell v. Kelliher, 468 F. Supp. 2d 39, 50 (D.D.C. 2006) ("[A]n employer is not liable for constructive discharge when an employee's stress-related health problems mandate resignation, even if those problems are caused by the demand or criticisms of the employer."), *aff'd*, No. 06-5138, 2006 U.S. App. LEXIS 26314 (D.C. Cir. Oct. 20, 2006); *Morgan*, 2000 U.S. Dist. LEXIS 19242, at *10-11 (granting summary judgment on constructive discharge where plaintiff, a pregnant restaurant server, was repeatedly given heavy assignments and denied permission to switch assignments).

[159] *E.g.*, Reedy v. Quebecor Printing Eagle, Inc., 333 F.3d 906 (8th Cir. 2003) (affirming summary judgment, finding no constructive discharge where plaintiff was subjected to racist graffiti with death threat and racial epithets); Duncan v. Gen. Motors Corp., 300 F.3d 928, 935-36 (8th Cir. 2002) (reversing jury verdict for plaintiff, over a dissent, finding that plaintiff was not constructively discharged where conditions included sexual harassment, inappropriate touching, and being called a man-hater); Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1155 (8th Cir. 1999) (affirming summary judgment on constructive discharge claim, over a dissent, where conditions included supervisor using offensive language, making sexually inappropriate comments, and continuously fondling his genitals in front of her; when plaintiff talked to another supervisor about it, she was told "that is just the way he is"); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 308 (5th Cir. 1987) (reversing trial court's decision for plaintiff after bench trial on constructive discharge claim, where on business trip, plaintiff's (a woman) co-worker (a man) put

Heatlh,[160] for example, a jury found for Jane Tatum on her constructive discharge claim, where her co-worker propositioned her, put her hand on his crotch and made lewd comments to her.[161] After she notified management, the investigation took two weeks to begin and eight weeks to complete.[162] In the meantime, she had to work with the co-worker, and her boss warned her that she would have "hell to pay" if she pursued the matter.[163] Ms. Tatum testified that she was afraid to work with the alleged harasser.[164] Nevertheless, the district court granted, and the Eighth Circuit affirmed, the defendant's motion for judgment as a matter of law, finding no reasonable person would quit under such circumstances.[165]

In *Larry v. North Mississippi Medical Center*,[166] the court granted summary judgment on the plaintiff's claim of constructive discharge in retaliation for reporting harassment. Carla Larry's allegations included same-sex harassment that included frequent touching of her breasts, staring, and inappropriate comments about her body.[167] When Ms. Larry reported the conduct, the employer merely reprimanded the alleged harasser and left the two of them to work in the same space.[168] The court concluded that no reasonable person would have quit under such circumstances, in spite of the defendant's knowledge that Ms. Larry had a history of sexual abuse.[169]

Some courts have disregarded an employee's need to make a well-considered decision about whether to leave, deciding that the plaintiff stayed too long, undercutting the assertion of intolerability.[170] But courts have also said an

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his hands on plaintiff's hips in an airport ticket line and dropped his pants in front of passengers while waiting to board the airplane, co-worker touched her breasts, at business dinner he put his stocking feet on cocktail table directly in front of plaintiff and "playfully" choked her when she complained, company president told plaintiff that she would not have to work with him after the trip, but that she would have to put up with him for the day and a half until they returned; court decided that plaintiff did not give defendant a fair opportunity to demonstrate that it could curb co-worker's behavior); Colon v. Envtl. Techs., Inc., 184 F. Supp. 2d 1210 (M.D. Fla. 2001) (granting summary judgment on constructive discharge claim where plaintiff was subjected to coworker's crotch-grabbing, spitting, calling her stupid, and making obscene hand gestures).

[160] 411 F.3d 955 (8th Cir. 2005).

[161] *Id*. at 957.

[162] *Id*.

[163] *Id*. at 957-58.

[164] *Id*. at 958.

[165] The district court also decided that the plaintiff had not shown the requisite employer intent. *Tatum*, 411 F.3d at 960. *See* discussion, *supra* note 145, on specific-intent element required in some jurisdictions.

[166] 940 F. Supp. 960 (N.D. Miss. 1996), *aff'd in part without opinion sub nom*. Larry v. Grice, 156 F.3d 181 (5th Cir. 1998).

[167] *Id*. at 961-62.

[168] *Id*. at 962.

[169] *Id*. at 966-67.

[170] *E.g.*, Duffy v. Paper Magic Group, Inc., 265 F.3d 163, 171 (3d Cir. 2001) (affirming summary judgment, finding no constructive discharge: "When pressed to explain why she elected to resign, Duffy responded that her decision was based, in part, on her son's recent graduation from college and her resultant financial ability to leave. She stated: 'Well, I thought about it, and I just couldn't take it no more. I wasn't getting cooperation from anybody. In my opinion, I was just being forced out. Plus, I had my son in college and he was on his own, so in that situation I could, you know, I

employee is expected to stay and try hard to work things out, and undermines his constructive discharge claim if he leaves too soon.[171] When a court uses the reasonable person in this normative sense, it often overlooks or underestimates the surrounding circumstances – the reality – surrounding *this* employment relationship, as well as other circumstances that might affect an employee's ability to cope with the job conditions imposed.[172]

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could afford to leave. Other years I couldn't afford to leave and stuff.' This admission undermines Duffy's claim that she was constructively discharged."); Smith v. Bath Iron Works Corp., 943 F.2d 164, 167 (1st Cir. 1991) (affirming judgment for defendant rendered by magistrate, where plaintiff did not leave until six months after last act of discrimination); Rutschke v. Nw. Airlines, Inc., No. 04-3212, 2005 U.S. Dist. LEXIS 18725, at *26-27 (D. Minn. Aug. 30, 2005) (granting summary judgment on constructive discharge claim: "[Plaintiff's] testimony regarding his decision to retire indicates that he considered his options, weighed the costs and benefits of retiring earlier than he had expected to and, after having reasoned through these factors, he finally came to a decision to retire. He asked the pension department how much less a month he would receive if he decided to retire in March 2003 rather than waiting, and this factored into his decision. Significantly, once he made the decision to retire, he set his retirement date ("tentatively") for nearly two months out – he made his final decision in early February 2004, and elected a retirement date of March 26, 2004. This meant [plaintiff] was at work for almost two months after coming to his decision."); Shepherd v. Hunterdon Developmental Ctr., 803 A.2d 611, 631 (N.J. 2002) (majority finding no constructive discharge where plaintiff contemplated retiring more than a year before the resignation, which the court said suggested that he intended to retire for reasons other than the complained-of violations; dissent would have sent constructive discharge issue question to jury because the record indicated that plaintiff endured pervasive, regular, and intentional hostility in the form of overly strict supervision, absence of social contact, both direct and veiled threats, and apparently unwarranted disciplinary charges: "[O]ne can view these facts through the semantic prism of employment law and argue that a reasonable juror in the workplace would find the situation tolerable. But that crimped view of the landscape ignores the realities of *this* workplace.") (Zazzali, J., dissenting).

[171] *E.g.*, Tidwell v. Meyer's Bakeries, Inc., 93 F.3d 490, 494 (8th Cir. 1996); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 307 (5th Cir. 1987); Garner v. Wal-Mart Stores, Inc., 807 F.2d 1536, 1539 (11th Cir. 1987).

[172] In 2004, the Supreme Court, in *Pennsylvania State Police v. Suders*, 542 U.S. 129, decided a case alleging constructive discharge in a Title VII case. Nancy Drew Suders, an employee of the state police, alleged that her supervisors had subjected her to sexual harassment of such severity that she was constructively discharged. The question presented concerned the proof burdens the parties bear in a case where a constructive discharge claim in based on sexual harassment, and in particular, whether the defendant could avail itself of an affirmative defense that the plaintiff failed to make use of the defendant's remedial policy. In deciding the question regarding the affirmative defense, the Court stated the constructive discharge standard this way: For a plaintiff asserting a constructive discharge claim arising out of a hostile work environment, the plaintiff "must show that the abuse working environment became so intolerable that her resignation qualified as a fitting response." *Id.* at 131. A plaintiff who advances such a claim must show working conditions "so intolerable that a reasonable person would have felt compelled to resign." *Id.* at 147. The Court's intent here is not clear. The court says that the employee's decision to leave the job must be "*a* fitting response," (emphasis added) not the only fitting response. *Id.* at 130. By saying "*a* fitting response," it is possible that the court was recognizing that there is no single acceptable course of conduct an employee must take in reaction to an employer's unlawful (here, discriminatory) conduct. On the other hand, the *Suders* opinion says that the conditions must be so intolerable that a reasonable person *would* feel compelled to resign. It also says that the conduct prompting the

C. Looking forward: *Burlington Northern v. White*

Some language in a 2006 Supreme Court case suggests that the Court might be casting the reasonable person in a more descriptive role when assessing an employee's conduct. In *Burlington Northern v. White*,[173] the Supreme Court decided what constitutes an "adverse action" under the anti-retaliation provision of Title VII. As discussed above, an employer may not retaliate against an employee for engaging in conduct that is protected by employee protection statutes (such as those prohibiting discrimination).[174] A retaliation plaintiff must also show that the employer took an adverse action because of such protected conduct.[175]

The Court in *Burlington Northern* defined an adverse action as one that would have been materially adverse to a reasonable employee (or applicant, in the case of an alleged unlawful hiring practice): "[T]he proper formulation requires a retaliation plaintiff to show that the challenged action well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[176] While the court in *Burlington Northern* said that the test for adverse actions is an objective one, it also said that the particular circumstances must be considered.[177]

Sheila White, the only woman in her department, was a forklift operator with the defendant, Burlington Northern.[178] White complained to Burlington Northern officials that her immediate supervisor had repeatedly told her that women should not be working in their department, and made insulting and inappropriate remarks to her in front of her male colleagues.[179] The supervisor was subsequently disciplined for sexual harassment, but White was removed from forklift duty to more menial laborer tasks.[180] She filed a charge with the EEOC, claiming that the reassignment was sex discrimination and retaliation for her complaint.[181] Burlington Northern then suspended White without pay for insubordination.[182] The company later found that White had not been insubordinate, reinstated her, and awarded her back pay for the 37 days she was suspended.[183] White then filed another EEOC charge for retaliatory suspension.[184] White brought the matter to court, where a jury awarded her

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employee's departure must be intolerable to qualify as a constructive discharge. It is unclear how literal the court intended to mean "intolerable."

[173] 548 U.S. 53 (2006).

[174] *E.g.*, Title VII's anti-retaliation provision forbids "discriminat[ion] against" an employee or job applicant who, *inter alia,* has "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation, § 2000e-3(a).

[175] Rosenthal, *supra* note 110; Riddell & Bales, *supra* note 110, at 315.

[176] *Burlington Northern*, 548 U.S. at 54 (internal quotations omitted).

[177] *Id.* at 68-69.

[178] *Id.* at 57.

[179] *Id.* at 58.

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.* at 58-59.

[184] *Id.* at 59.

compensatory damages.[185] The Sixth Circuit affirmed, and Burlington Northern appealed to the Supreme Court.[186]

The Supreme Court affirmed, finding that there was sufficient evidence to support the jury's conclusion that Sheila White's reassignment from forklift operator to laborer was an adverse action under the anti-retaliation provision of Title VII.[187] The Court looked at the specifics of the jobs at issue:

> Common sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable. . . . Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and "should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" . . . [H]ere, the jury had before it considerable evidence that the track labor duties were "by all accounts more arduous and dirtier"; that the "forklift operator position required more qualifications, which is an indication of prestige"; and that the forklift operator position was objectively considered a better job and the male employees resented White for occupying it.[188]

The Court also decided that there was sufficient evidence to support the finding that the 37-day suspension was an adverse action.[189] The Court considered Sheila White's economic and family situation, noting that she and her family had to live for that period without income, not knowing whether she would return to work.[190] The Court also looked at the plaintiff's physical and emotional condition, citing evidence that White required medical treatment as a result of living without a paycheck.[191]

The court explained its use of the reasonable person in this case: "[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[192] It added:

> [T]he significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school

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[185] *Id.*
[186] *Id.*
[187] *Id.* at 70-72.
[188] *Id.* at 70-71 (internal citations omitted).
[189] *Id.* at 71-73.
[190] *Id.* at 72-73.
[191] *Id.* at 72.
[192] *Id.* at 68 (internal quotations omitted).

> age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others."[193]

The Court stuck to the "objectivity" script,[194] but by considering Sheila White's particular situation and the totality of her circumstances at work and at home, the court tilted the reasonable person in a descriptive direction.

It remains to be seen the extent to which the state courts and the lower federal courts will use the reasonable person in the same way the Supreme Court did in *Burlington Northern*.[195] To date, post-*Burlington Northern* cases

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[193] *Id.* at 69 (internal citations omitted).

[194] "We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." *Id.* at 68-69. Justice Alito, in his concurrence, noted the apparent incongruity between the majority's language of objectivity and its consideration of Sheila White's individual circumstances. *Id*. at 78.

[195] Before *Burlington Northern*, some courts, in deciding whether the plaintiff suffered an adverse action, used the reasonable person in a descriptive sense, looking at the plaintiff's individual situation and the actual circumstances of the particular employee-employer relationship. For example, in deciding whether a job transfer was an adverse action, some courts have considered whether the new position conflicted with the particular employee's family's needs. *E.g.*, Washington v. Ill. Dep't of Revenue, 420 F.3d 658 (7th Cir. 2005) (finding employer's rescinding of plaintiff's flextime, which employer knew plaintiff needed to care for disabled son, could be adverse action); Raffaele v. City of New York, No. 00-CV-3837, 2004 U.S. Dist. LEXIS 17786, at *61 (E.D.N.Y. Sept. 7, 2004) (finding that transfer that required added commute might be adverse action: "A round-trip commute twice a week of approximately 75 miles, while certainly inconvenient, is arguably not objectively adverse compared to a normal workplace. However, a reasonable jury could conclude, given all the circumstances of the case, including Raffaele's medical and family needs, that the transfer to the Bronx and refusals of requested transfers out of the Bronx were sufficiently adverse to qualify as actionable. There is a material issue of fact as to whether Raffaele suffered an adverse action."); Patten v. Grant Joint Union High Sch. Dist., 37 Cal.Rptr.3d 113, 120-21 (Cal. Ct. App. 2005) (holding that jury could find that the lateral transfer of the plaintiff was an adverse action under state whistleblower statute; court considered various factors specific to the plaintiff's situation, e.g., the new position conflicted with her family's schedule and interfered with her educational plans; the test for defining adverse action "must be interpreted liberally," with "reasonable appreciation of the realities of the workplace") (quoting Yanowitz v. L'Oreal USA, Inc., 116 P.3d 1123, 1138 (Cal. 2005)). Although *Burlington Northern* was a case brought under Title VII, the same analysis has been used in retaliation cases brought under other statutes. *See, e.g.*, Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164 (10th Cir. 2006) (applying *Burlington Northern* analysis to retaliation cases under ADEA, FMLA, ADA); Jeter v. Montgomery County, 480 F. Supp. 2d 1293 (M.D. Ala. 2007) (following *Burlington Northern* in FLSA retaliation case); Hoffelt v. Ill. Dep't of Human Rights, 867 N.E.2d 14 (Ill. App.

recognize that the Supreme Court has articulated a relaxed, expansive, flexible use of the reasonable person in defining an adverse action in retaliation cases,[196] and have generally followed suit, considering the totality of the specific circumstances.[197] Recent cases have found, for example, that negative performance evaluations or references could deter an employee from engaging in protected conduct, even if such actions do not result in any change in employment status, especially where the plaintiff's specific circumstances could make such actions particularly damaging,[198] and that refusing plaintiff's request to work part-time, or otherwise accommodate plaintiff's schedule, might in some circumstances constitute an adverse action.[199] In deciding whether the plaintiff

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Ct. 2006) (following *Burlington Northern* in retaliation claim brought under Illinois Human Rights Act), *leave to appeal denied*, 862 N.E.2d 234 (Ill. 2007).

[196] *E.g.*, Hare v. Potter, No. 05-5238, 2007 U.S. App. LEXIS 6731, at *129 (3d Cir. Mar. 13, 2007) (finding that plaintiff's exclusion from training program was an adverse action, but would not have sufficed before *Burlington Northern*); Del Carmen Pezoa v. County of Santa Clara, No. C 05-03717, 2006 U.S. Dist. LEXIS 58027, at *20 (N.D. Cal. Aug. 8, 2006) (*Burlington Northern* articulated a "flexible standard" for retaliation cases).

[197] *E.g.*, Moss v. Wal-Mart Stores, Inc., No. 04-3090, 2007 U.S. Dist. LEXIS 19057, at *38 (E.D. La. Mar. 18, 2007) ("While any of [the alleged] incidents taken alone would not likely constitute an adverse employment action, the Court finds that taken together . . . these incidents of disparate treatment could have dissuaded a reasonable worker from reporting a charge of discrimination."); Faircloth v. Bowers, 2007 U.S. Dist. LEXIS 12074, at *27 (E.D. Ark.) ("a series of unfavorable actions toward an employee can rise to [the] level [of an adverse action]").

[198] *E.g.*, Rascon v. Austin I.S.D., No. A-05-CA-1072, 2007 U.S. Dist. LEXIS 33964, *21 (W.D. Tex. May 8, 2007) ("The issue is whether a hypothetical reasonable employee, if she found out that retaliation in the form of negative employment references were being used as a stick to keep employees from exercising their rights under Title VII, would be dissuaded from filing a charge of discrimination. It is an unremarkable proposition to state that they would. Employment references are often the key to obtaining a job, and a negative reference can guarantee that a prospective employee does not obtain a position. Clearly, knowing that one would receive a negative reference for complaining about discrimination could dissuade a person from making the charge in the first instance."); Layman v. Gutierrez, No. 05-CV-01890, 2006 U.S. Dist. LEXIS 88420, at *25-30 (D. Colo. Dec. 6, 2006) (finding that a positive performance evaluation with negative comments attached was adverse action. "Although one positive performance evaluation with negative comments attached during a more than two decade tenure may, at first blush, appear to be the type of 'petty slights or minor annoyances' that cannot constitute a retaliatory adverse action under Title VII, the context of this performance evaluation reveals there is more at stake. . . . [Because plaintiff soon planned to retire], these comments were likely to be the last entry in Plaintiff's personnel file. Thus, should Plaintiff seek another job, which he in fact did, and should a prospective employer seek a reference from Defendant, it is these Performance Comments that could very well lead the prospective employer to conclude that, in spite of Plaintiff's many years of exemplary performance, either his skills or attitude had deteriorated in his final months on the job and perhaps led to Plaintiff's departure. If, on the other hand, Plaintiff had subsequent evaluations on file showing these negative comments as an anomaly, this court's analysis might have been different.").

[199] *E.g.*, Mickelson v. New York Life Ins. Co., 460 F.3d 1304, 1316 (10th Cir. 2006) (finding that refusing to accommodate plaintiff's request to return to work part-time after FMLA leave could be adverse action, where as result of defendant's refusal, plaintiff's depression worsened before leave expired, and plaintiff lost her job); Seldon v. National R.R. Passenger Corp., 452 F. Supp. 2d 604, 610 (E.D. Pa. 2006) (finding that not allowing plaintiff to work from home could be materially

has suffered an adverse action, courts have considered the dynamics of the particular workplace and the plaintiff's prior experience with and knowledge about the employer's practices, and how that might have affected the plaintiff's perspective,[200] as well as the plaintiff's mental condition, disability, or pregnancy.[201]

V. CONCLUSION

For better or worse, the reasonable person has become a fixture in much of employment law. But if we are going to continue working with the creature, we need to assign it to the right jobs. In employment litigation, the reasonable person should work a double shift. The device should be used in a normative sense when deciding whether a party (typically, the employer) has breached a duty. Otherwise, the reasonable person should be used descriptively, to account for a wide variance of acceptable conduct. This is not a mechanical approach, and using the reasonable person in this way certainly does not resolve all of its

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adverse); Mayo v. Research Analysis & Maint., No. 04-1014, 2006 U.S. Dist. LEXIS 55303, at *20-21 (W.D. La. July 26, 2006) (finding that defendant's refusal to permit employee to work part-time so she could attend school could be adverse action, where employer accommodated other employees who had not complained of discrimination).

[200] *E.g.*, Morrison v. Gonzales, No. C05-04351, 2007 U.S. Dist. LEXIS 36462, at *23-24 (N.D. Cal. May 9, 2007) (considering plaintiff's prior experience at defendant to support plaintiff's inference that transfer would have been a step down in his career); Murry v. Gonzales, No. 5:04-CV-498-Oc-10, 2006 U.S. Dist. LEXIS 60925, at *30 (M.D. Fla. Aug. 28, 2006) (considering plaintiff's knowledge that in the past, defendant transferred only "problem employees" to the location plaintiff was reassigned); *Hoffelt*, 867 N.E.2d at 21 (considering evidence that reassignment at issue was commonly known by plaintiff and coworkers as a "punishment post").

[201] *E.g.*, Carmona-Rivera v. Commonwealth of Puerto Rico, 464 F.3d 14, 20 (1st Cir. 2006) (delay in satisfying disabled employee's accommodation requests could constitute adverse action if it causes significant injury or harm); *Mickelson*, 460 F.3d at 1316 (finding that refusing to accommodate plaintiff's request to return to work part-time after FMLA leave could be adverse action, where as result of defendant's refusal, plaintiff's depression worsened before leave expired and plaintiff lost her job); Hollomon v. City of New York, No. 04-CV-2964, 2006 U.S. Dist. LEXIS 52424, at *17-18 (E.D.N.Y. July 31, 2006) (finding that pregnant prison guard could be dissuaded from making discrimination charge by following actions: reassignment to areas with inmate contact contrary to medical status, denial of requested duties that were matter of course for pregnant employees, placement of modified duty where her shield was taken away, she could not wear a uniform, and was required to do menial and degrading tasks). Not all courts have taken the expansive approach enunciated in *Burlington Northern*. For example, the Fifth Circuit in *Higgins v. Gonzales*, 481 F.3d 578 (8th Cir. 2007), affirmed summary judgment of a retaliation claim brought by a U.S. Attorney, finding that she had not suffered an adverse action when she was transferred to another city. The court dismissed the plaintiff's argument that the new job would have required her to leave all of her cases and start all over with different cases. In addition, the transfer would have required that she and her family relocate, requiring her children to attend a different school. The court dismissed such an upheaval as a "mere inconvenience," and found that the transfer could not dissuade a reasonable employee from engaging in protected conduct. *Id*. at 591.

historic problems. But using the reasonable person in this manner better comports with the remedial purposes of employment law, which is to change workplace behavior to provide some measure of job protection to employees.