Legal Standards for Establishing Constructive Discharge.

Selections from Admin. Judge Tamara Ribas's Initial Decision rendered for MSPB (Western Regional Office) on Sept. 1, 2011:

> Resignations and retirements are presumed voluntary. *See Terban v. Department of Energy*, 216 F.3d 1021, 1024 (Fed. Cir. 2000). In order to overcome the presumption that a resignation or retirement was voluntary, an appellant must show that: (1) the resignation or retirement was the product of misinformation or deception by the agency; or (2) the resignation or retirement was the product of coercion by the agency. *Id.* In order to establish involuntariness on the basis of coercion, an employee must show that the agency effectively imposed the terms of the employee's resignation or retirement, that the employee had no realistic alternative but to resign or retire, and that the employee's resignation or retirement was the result of improper acts by the agency. *Id.,* citing *Staats v. U.S. Postal Service*, 99 F.3d 1120, 1124 (Fed. Cir. 1996). The doctrine of coercive involuntariness is a narrow one, requiring that the employee satisfy a demanding legal standing. *Garcia*, 437 F.3d at 1329, citing *Staats* 99 F.3d at 1124.
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> The common element in all cases where the Board and the courts find an involuntary resignation or retirement is that factors have operated on the employee's decision-making processes that deprived him or her of freedom of choice. *See Heining v. General Services Administration*, 68 M.S.P.R. 513, 519 (1995). The determination of whether the employee was effectively deprived of free choice is based on the totality of the circumstances. *Id.* at 519-20. When intolerable working conditions are alleged, both the courts and the Board will find an action involuntary only if the employee demonstrates that the employer or

agency engaged in a course of action that made working conditions so difficult or unpleasant that a reasonable person in that employee's position would have felt compelled to resign or retire. *Markon v. Department of State*, 71 M.S.P.R. 574, 577-578 (1996). This is an objective standard. *Heining*, 68 M.S.P.R. at 522.

It is well established that the fact that an employee is faced with an inherently unpleasant situation or that his choices are limited to unpleasant alternatives does not make his decision involuntary. *See, e.g., Lawson v. U.S. Postal Service*, 68 M.S.P.R. 345, 350 (1995). Nor is an employee guaranteed a working environment free of stress. *See Miller v. Department of Defense*, 85 M.S.P.R. 310, 322 (2000). In this connection, dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are generally not so intolerable as to compel a reasonable person to resign. *Id.*

In *Miller*, the Board emphasized that it will focus its analysis on the circumstances existing immediately before the actual date of the alleged coerced retirement, because the recent period is the most relevant to determine the alleged involuntariness of the agency action. However, it will not categorically exclude other time periods. *Miller* at 314. The Board's reviewing Court confirmed that emphasis on the most recent events was consistent with its guidance, as follows:

> [T]he most probative evidence of involuntariness will usually be evidence in which there is a relatively short period of time between the employer's alleged coercive act and the employee's retirement. In contrast, a long period of time between the alleged coercive act and the employee's retirement diminishes the causal link between these two events and thus, attenuates the employee's claim of involuntariness.

Terban, 216 F.3d at 1024.

When an appellant raises allegations of discrimination and reprisal in connection with an involuntariness claim, evidence of discrimination and reprisal may be considered only in terms of the standard for voluntariness in a particular situation--not whether such evidence meets the test for proof of discrimination or

reprisal established under Title VII. *Markon*, 71 M.S.P.R. at 578. In an involuntary resignation appeal, evidence of discrimination or reprisal goes to the ultimate question of coercion, i.e., whether under all of the circumstances, working conditions were made so difficult by the agency, that a reasonable person in the employee's position would have felt compelled to resign. *Id.* Once the Board's jurisdiction has been established in a constructive discharge appeal, issues of discrimination and reprisal may be adjudicated under the standards applicable for proof of discrimination and/or retaliation under Title VII as the case is then a mixed case. *Id.* at 580.