

No. 17-380

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IN THE  
**Supreme Court of the United States**

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CONSOL ENERGY INC.,  
CONSOLIDATION COAL COMPANY,  
*Petitioners,*  
v.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,  
*Respondent.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit**

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**REPLY BRIEF IN SUPPORT OF CERTIORARI**

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**INTRODUCTION**

The EEOC's Brief in Opposition only further confirms that this Petition presents issues of national importance under Title VII and the National Labor Relations Act (NLRA). An employee does not have the right to quit his position of employment, and then sustain a constructive discharge claim, without his employer ever forcing him to work in violation of his religious beliefs and before it started reviewable progressive discipline.

This Court’s standard for a constructive discharge is clear: working conditions must be so “intolerable” that an objectively reasonable person would have no other option but to quit. *Green v. Brennan*, 136 S. Ct. 1769 (2016). Consolidation Coal confronting Butcher with a possible verbal warning, which the union could immediately grieve, is not an intolerable working condition sufficient to transform a voluntary resignation into a constructing discharge. The Fourth Circuit’s decision upended this Court’s well-established principals for reviewing a constructive discharge claim. When the trial court precluded the jury knowing of Butcher’s review rights, it presented a false totality of the circumstances. By creating the incorrect and wholly speculative impression that Consolidation Coal would inevitably have terminated Butcher without recourse was plain error.

The Court should grant the Petition to clearly reestablish that the standards for reviewing constructive discharge claims must remain analytically distinct from the test applicable under Title VII for employer termination decisions and failure to accommodate. Such review is particularly compelling when the employee enjoyed rights secured under the National Labor Relations Act to be free from disciplinary action when he refused to work in violation of his religious beliefs. The EEOC’s merits arguments only confirm that this is a question of national importance for employers, unions and employees. This also is an ideal record to delineate employer and employee responsibilities before an employee can simply quit and assert a cause of action.

The Brief in Opposition also does not dispute that there is a clear and deep circuit split on whether benefits paid from an ERISA retirement plan are col-

lateral source income. While the EEOC tries to draw a distinction between benefits from single employer and multiemployer pension plans, the EEOC's own arguments confirm that there is no such distinction. The EEOC's misdirection is also irrelevant: the same split in authority exists regardless of whether single and multiemployer plans are considered interrelated or distinct.

## **ARGUMENT**

### **I. REVIEW IS ESSENTIAL BECAUSE THIS CASE PRESENTS A CLEAR QUESTION OF NATIONAL IMPORTANCE**

The Fourth Circuit's decision that an employee can quit his position of employment and sustain a constructive discharge before his employer forces him to work in violation of his rights, before his employer takes disciplinary action, and without utilizing a collectively-bargained grievance process. This could force the employer to rescind any threatened discipline conflicts directly with prior interpretations of Title VII. *Green v. Brennan*, 136 S. Ct. 1769 (2016). A constructive discharge claim can only arise when working conditions are so intolerable that an objectively reasonable person would have had no other option but to quit. *Id.* An employer advising that it will issue progressive discipline, each step of which the union can challenge while the employee works without violating his religious rights, is simply not a working condition that can be "objectively intolerable" to the point of allowing an employee to pre-emptively quit. *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004); *Blistein v. St. John's Coll.*, 74 F.3d 1459, 1468 (4th Cir. 1996).

1. a. The EEOC's position, summarized at page 11 of its opposition, concisely frames the error in this case: "Petitioners do not dispute that they had made a final decision to deny an accommodation to Butcher, and thus to force him to work in violation of his religious beliefs or to face a discipline process culminating in termination. The union grievance process here was not relevant to whether, at that point, Butcher was constructively discharged." Br. in Opp. 11. This is wrong and is not the law under Title VII.

Had Butcher presented for work instead of quitting, he would have refused to use the scanner, received a verbal warning and then worked his complete shift in the mine without ever violating his religious beliefs. It would then have been Butcher's right under the labor agreement to have the union challenge that Consolidation Coal lacked "just cause" to issue the verbal warning – or any other ensuing discipline. While this process progressed, Butcher would have worked without violating his rights. Putting aside that Consolidation Coal might never have escalated this to a termination of employment, Butcher quitting at this point was not objectively reasonable. The EEOC's position that the union grievance process was irrelevant cannot stand under this Court's precedent on constructive discharge. When an employee is not forced to work in violation of his religious views and has other options than to quit, a constructive discharge does not exist.<sup>1</sup>

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<sup>1</sup> The EEOC's suggestion that the Fourth Circuit's exclusion of evidence of the CBA's grievance procedures is not "encompassed within any question . . . presented" is simply incorrect. The first question presented by the petition specifically identifies the "grievance and arbitration procedure in the [CBA]," which is the precise issue offered for review Pet. (i).

The Court of Appeals erred when it concluded that Butcher could establish a constructive discharge when he resigned before Consolidation Coal even issued a verbal warning. The potential application of such progressive discipline is not an “intolerable” working condition that can support a constructive discharge claim. Most employers utilize some form of progressive discipline policy to enforce work rules and collective bargaining agreements. If employees can quit before exercising internal review rights to such discipline, it renders such policies meaningless.

Although the EEOC does not cite to this language, it is undisputed that Butcher was protected by language in the CBA that required Consolidation Coal to have “just cause” to issue *any* discipline. Pet. App. 42a-43a. Through all of the EEOC’s merits arguments concerning what Butcher thought might happen to him, including his fear of inevitable termination (Br. in Opp. 13-14), in actuality Consolidation Coal never disciplined him and would have had to sustain any such progressive discipline before an arbitrator. Pet. App. 43a. Even if a trial court might find the issuing of such a verbal warning a violation of Title VII, Butcher did not have the right to quit before exhausting that process. Permitting an employee to quit in the face of inaction by the employer and the right of review does not justify a constructive discharge under Title VII.

The EEOC all but concedes this: “To be sure, if the decision to deny an accommodation is not yet final and an internal review process exists where in the employer can consider whether to provide an accommodation, then a constructive-discharge claim may be premature.” Br. in Opp. at 15-16 (*citing e.g., Bozk v. Branstetter*, 912 F.2d 801, 803-804 (5th Cir. 1990)).

Had Butcher received a verbal warning, instead of quitting, he would have worked his shift without any violation of his religious rights and his union could have immediately confronted Consolidation Coal. This is not a working condition that rises to the level of being legally “intolerable.”

b. Review is also necessary because the EEOC improperly conflated the tests for post-termination arbitration rights with current working conditions supporting an employee quitting.

Neither Consolidation Coal nor the EEOC dispute that an employer must accommodate an employee’s religious beliefs. Further, the EEOC properly asserts that if an employer – as was not the case here – terminates an employee, the availability of a grievance procedure neither mitigates the infraction nor affects the timing of a Title VII claim. Br. in Opp. 14-15. But that is not the issue arising out of the Fourth Circuit’s decision.

When Consolidation Coal had yet to initiate any progressive discipline and similarly did not mandate that Butcher work in violation of his religious beliefs, Butcher’s resigning was per se unreasonable. There was no working condition to justify a constructive discharge. The EEOC attempts to avoid this critical error by arguing that the Title VII violation occurs when the company terminates the employee, not after grievance procedures fail later. Br. in Opp. 14 (*citing Delaware State College v. Ricks*, 449 U.S. 250 (1980)). But this unremarkable and correct statement of the law is not the issue presented to this Court. The issue is whether an employee can simply resign prior to any discipline, forego options that could alleviate the working condition, and then claim constructive discharge.

The EEOC intentionally blurred this critical distinction to avoid focusing on Butcher's actual working conditions at the time of his resignation. When Butcher decided he had "no other choice but to quit," the availability of internal remedies was wholly relevant to whether his decision was rational and a factor the trial court should have allowed the jury to consider. However, the trial court excluded from the jury all such avenues of relief available to Butcher before he would have to work in violation of his religious beliefs. This was error as it improperly depicted a situation wholly less than the totality of the circumstances. A rational jury would all but have had no choice to conclude Butcher had no options because the Trial Court improperly excluded that he did. This false omission of review rights prior to having to quit cannot be the standard for submitting such claims to a jury.

A trial court charging a jury that it is "the obligation of the employee not to assume the worst," and "an employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged" (Br. in Opp. 14), is meaningless if the trial court forecloses the jury from knowing about such avenues of redress.

The analysis under a constructive discharge construct is simply different from the situations in which the employer terminates the employee or mandates that the employee work in violation of religious beliefs with no other remedy. Butcher quitting before he received a verbal warning, that the employer would have to had "just cause" to sustain, is not the standard for a constructive discharge under Title VII. The EEOC asserts that "there is no additional requirement that, after a person is discharged, he must pursue an

employer's post-discharge procedures." But Consolidation Coal did not discharge Butcher and it was error when the Fourth Circuit allowed Butcher to make the circular argument that he was constructively discharged given his situation.

c. Contrary to the EEOC's position, the union's conclusion that the collective bargaining agreement excluded "reasonable accommodation claims" (Br. in Opp. 16) is not the issue Consolidation Coal petitions for review. Rather, the collective bargaining agreement gave the union the unequivocal right to challenge any progressive discipline Consolidation Coal might have issued, including two verbal warnings, suspension and termination. Pet. App. 43a. It also allowed Butcher more sophisticated union representation, including the District Representative as the grievance process progressed. *Id.* Because Butcher quit before any discipline issued, this section of the collective bargaining agreement and the right to "Immediate Arbitration" never triggered. *Id.* 43a-44a. It would have had Butcher received a verbal warning for refusing to use the hand scanner.

The Court of Appeals created an unworkable tension under Title VII concerning constructive discharges. It has implications for every employer who contemplates or utilizes progressive discipline with internal review rights. Moreover, a standard that precludes juries from knowing of such review rights when considering a constructive discharge claim is not the law of Title VII. The prejudice to any employer defending against such a case, without the jury knowing the totality of the circumstances, is overwhelming. This Court should grant the Petition to resolve these critical issues of national importance.

## **II. THERE IS A CLEAR AND DEEP SPLIT OF AUTHORITY ON THE SECOND QUESTION PRESENTED**

The EEOC does not dispute that there is a clear and long-standing circuit split on whether retirement benefits received from an ERISA plan are collateral source income under Title VII. Br. in Opp. 19-23. As the petition explained, three circuits (the Second, Fifth, and Tenth) have held that retirement benefits paid through an employer-funded ERISA plan are not collateral source income, two circuits (the Third and Seventh) have held that such benefits are collateral source income, and two more circuits (the Fourth and Eighth) have conflicting intra-circuit precedents regarding the collateral source rule and ERISA retirement plan benefits. Pet. 22-27. This split is by itself a sufficient basis for this Court's review on the second question presented. *See* Sup. Ct. R. 10(a).

The EEOC nevertheless asserts that this case is not a proper vehicle to resolve the deep circuit split because Butcher's retirement benefits were paid through a multiemployer ERISA plan and not through a single employer plan. Br. in Opp. 20-23. This misdirection ignores the question presented and, regardless, misses the mark for two separate reasons:

*First*, the EEOC fails to recognize that there is no difference between the benefits accrued and paid through a single employer or a multiemployer plan. Pet. 28-30. As with a single employer plan, an employee's benefit from a multiemployer plan is funded by contributions made by his employer. *Id.* at 29-30. As with a single employer plan, an employee's benefit under multiemployer plan accrues pursuant to a formula defined by the terms of the plan. *Id.* at 30. And, as with a single employer plan, an employee's

retirement benefit is paid from the plan's trust based on the plan's benefit formula. *Id.* at 30.

The EEOC's misplaced effort to draw a line between single employer and multiemployer plans only reinforces the absence of a distinction. Br. in Opp. 21. The EEOC suggests that benefits under a multiemployer plan "come from an independent third party (the union)," but all ERISA pension benefits are paid from an independent source – the plan – and, as a matter of law, "the union" does not administer a multiemployer plan. The EEOC also suggests that "the employer is not the exclusive contributor to the fund," but ERISA also does not require an employer to be the sole contributor to a single employer plan. *See, e.g., Lubke v. City of Arlington*, 455 F.3d 489, 499 (5th Cir. 2006) ("[W]e hold that an offset should be allowed for the employer's portion of Lubke's retirement plan payout at his termination."). The EEOC further suggests that a multiemployer plan "is a form of deferred compensation for past service rather than a means of compensation for the underlying claim" but retirement benefits paid from a single employer plan serve the same purpose as benefits paid from a multiemployer plan. Pet. 29.

*Second*, even if one is inclined to believe that there is distinction between single employer and multiemployer plans, as the EEOC plainly does, there is still the same split of authority that requires resolution by this Court. The Fifth Circuit has held unequivocally that "[a]n employer's portion of retirement and other payments made to a terminated employee *must be deducted* from an award of lost wages and benefits in [federal] discrimination cases." *Lubke*, 455 F.3d at 499 (emphasis added). By contrast, the Third and Seventh Circuits have "adopted a flat rule forbidding the setoff

of pension . . . benefits against Title VII and ADEA back pay awards.” *EEOC v. O’Grady*, 857 F.2d 383, 390 (7th Cir. 1988). *See also McDowell v. Avtex Fibers, Inc.*, 740 F.2d 214, 217 (3d Cir. 1984) (“pension plan benefits are designed to serve social policies independent of those served by back pay awards”). Regardless of how the question is framed, the EEOC cannot credibly maintain that there is not a clear split of authority on the issue of whether ERISA plan benefits are collateral source income.

Accordingly, this Court should grant the petition to resolve the deep and well-developed circuit split on application of the collateral source rule to retirement benefits paid from ERISA plans.

### CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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