

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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August Term, 2018

(Argued: May 3, 2019

Decided: March 10, 2020)

Docket No. 18-0143

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DYANNA L. GREEN,

*Plaintiff-Appellant,*

- v. -

TOWN OF EAST HAVEN,

*Defendant-Appellee,*

EAST HAVEN POLICE DEPARTMENT,

*Defendant.*

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Before: KEARSE, WESLEY, and CHIN, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the

1 District of Connecticut, Vanessa L. Bryant, *Judge*, dismissing, on summary judgment,  
2 plaintiff's action against defendant Town of East Haven ("Town") alleging age  
3 discrimination in the termination of her employment, in violation of the Age  
4 Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, and state law. The  
5 district court granted summary judgment on the sole ground that plaintiff had failed  
6 to make out a prima facie case of any adverse employment action, because she chose  
7 to retire rather than attend a scheduled disciplinary hearing--the only merits-based  
8 challenge presented in the Town's summary judgment motion. *See Green v. East*  
9 *Haven Police Dep't*, 3:16-cv-00321, 2017 WL 6498144 (D. Conn. Dec. 19, 2017). On  
10 appeal, plaintiff contends that the court erred in failing to view her evidence that the  
11 retirement was not voluntary but was coerced by the threat of likely termination--and  
12 hence constituted a constructive discharge--in the light most favorable to her. We  
13 agree that the evidence, viewed in the light most favorable to plaintiff, sufficed to  
14 present genuine issues of fact as to whether a reasonable person in plaintiff's shoes  
15 would have felt compelled to retire. We thus vacate the judgment and remand for  
16 further proceedings.

17 Vacated and remanded.

1 KAREN R. KING, New York, New York (Jennifer X.  
2 Luo, Paul, Weiss, Rifkind, Wharton &  
3 Garrison, New York, New York, on the brief),  
4 *for Plaintiff-Appellant.*

5 LYNCH, TRAUB, KEEFE & ERRANTE, New Haven,  
6 Connecticut (Hugh F. Keefe, of counsel),  
7 *submitted a brief for Defendant-Appellee.*

8 KEARSE, *Circuit Judge:*

9 Plaintiff Dyanna L. Green appeals from a judgment of the United States  
10 District Court for the District of Connecticut, Vanessa L. Bryant, *Judge*, dismissing her  
11 action against defendant Town of East Haven ("Town") for alleged age discrimination  
12 in terminating her employment, in violation of the Age Discrimination in  
13 Employment Act of 1967, 29 U.S.C. §§ 621-634 ("ADEA"), and the Connecticut Fair  
14 Employment Practices Act, Conn. Gen. Stat. § 46a-60 *et seq.* ("CFEPA"). The district  
15 court granted summary judgment dismissing the action on the sole ground that  
16 Green had failed to make out a prima facie case of any adverse employment action,  
17 because she chose to retire rather than attend a scheduled disciplinary hearing--the  
18 only merits-based challenge presented in the Town's summary judgment motion. On

1 appeal, Green contends that the court erred in failing to view her evidence that the  
2 retirement was not voluntary but was coerced by the threat of likely termination--and  
3 hence constituted a constructive discharge--in the light most favorable to her. We  
4 agree that the evidence, viewed in the light most favorable to Green, sufficed to  
5 present genuine issues of fact as to whether a reasonable person in Green's shoes  
6 would have felt compelled to retire. Accordingly, we vacate the judgment and  
7 remand for further proceedings.

## 8 I. BACKGROUND

9 Many of the following facts are undisputed, as indicated by the parties'  
10 statements submitted pursuant to Local Rule 56(a) as to undisputed and disputed  
11 material facts ("Rule 56(a) Statements"). Other descriptions are, as indicated,  
12 principally taken from the deposition testimony of the Town's Internal Affairs (or  
13 "I.A.") Officer James Naccarato or from the affidavit submitted by Green in opposition  
14 to the Town's motion for summary judgment.

1      *A. Green's Employment at East Haven Police Department*

2                      From about May 2001 through December 2014, Green was an employee  
3      of the Town, working at defendant East Haven Police Department ("EHPD" or  
4      "Department"). She was one of two full-time employees in EHPD's records division,  
5      responsible for processing arrest and accident reports, typing search and arrest  
6      warrants, typing misdemeanor and infraction tickets, and entering data into EHPD's  
7      computer system. In 2012, EHPD Lieutenant David Emerman became supervisor of  
8      the records division. (*See* Rule 56(a) Statements, undisputed ¶¶ 1-3; *see also id.*  
9      undisputed ¶ 27.)

10                     Also in 2012, Jennifer Ward was hired to work in the records division,  
11      replacing Green's recently retired coworker. (*See id.* undisputed ¶ 6.) Green, 47 years  
12      of age when she was hired, was 58 in 2012 (*see* Affidavit of Dyanna L. Green dated  
13      September 6, 2017 ("Green Aff." or "September 2017 Affidavit"), ¶¶ 4-5); Ward, in  
14      2012, was approximately 30 years of age (*see id.* ¶ 7). Green asserted that after Ward  
15      was hired, Green began to experience treatment from Emerman and EHPD Chief  
16      Brent Larrabee that she "believe[s] . . . was intended to create a hostile work  
17      environment and cause [her] to retire." (*Id.* ¶ 12; *see id.* ¶ 17 ("I was singled out" and  
18      "believe that I was subjected to deliberately disparate treatment and a hostile work

1 environment because of my age, which was intended to make my employment  
2 intolerable and force me to resign or retire").)

3 Green stated, *inter alia*, that from the time Ward arrived until Green left  
4 EHPD, Green was made to feel "marginalized in [her] role" (*id.* ¶ 8), with Emerman  
5 "engag[ing] in a sustained and systematic pattern of publicly criticizing,  
6 micromanaging and scrutinizing" Green's work and "subject[ing her] to harassing and  
7 demeaning demands and questioning" (*id.* ¶ 12). Emerman also prepared and filed  
8 a number of criticisms of Green's work that Green viewed as unwarranted. (*See id.*  
9 ¶ 13.) Meanwhile, Ward was given more desirable work assignments and training  
10 opportunities that were denied to Green (*see id.* ¶¶ 8-11) and was treated by Emerman  
11 and Chief Larrabee "with obvious favoritism" (*id.* ¶ 8).

#### 12 B. *The December 2014 Biscuits and Basket Incident*

13 Shortly after 8 a.m. on December 5, 2014, Green went to the EHPD  
14 kitchen/breakroom area to borrow a wire basket that was kept there, to use in an  
15 upcoming holiday party. While there, she observed two canisters of Pillsbury  
16 buttermilk biscuits dough that she had seen in the communal refrigerator since at  
17 least Thanksgiving. Green took one of the canisters, put it and the basket in her tote

1 bag, and took them back to her desk. (*See* Green Aff. ¶¶ 21-22.)

2 Shortly after noon that day, EHPD Lieutenant Joseph Murgo sent an  
3 email to EHPD employees stating as follows:

4 We had two (2) canisters of Buttermilk flavored Pillsbury  
5 biscuits that was [*sic*] brought in on Thanksgiving by one of our  
6 officers. There is now one canister left, which means one canister  
7 grew legs and walked away. If YOU are in possession of Pillsbury  
8 Grands Flaky layers Buttermilk biscuits, please return them to  
9 their rightful owner. We work in a police department people.  
10 Too many things grow legs here. Thank you.

11 (December 5, 2014 email from Joseph Murgo to All Police Department Employees.)

12 After receiving that email, Green "asked Lieutenant Emerman if there  
13 were cameras in the kitchen." (Rule 56(a) Statements, undisputed ¶ 21.) Green then  
14 went into the kitchen area, carrying the biscuits in a bag, intending to return them to  
15 the refrigerator. (*See id.* undisputed ¶ 22.) When she arrived, Chief Larrabee was  
16 there; and the refrigerator was sealed with, *inter alia*, yellow "crime scene" tape.  
17 (Green Aff. ¶¶ 29, 27.)

18 Chief Larrabee asked Green what was in her bag; she responded only  
19 that it contained her salad; she did not tell him that it also contained the biscuits,  
20 which she had taken and was about to return to the refrigerator. (*See, e.g.*, Rule 56(a)  
21 Statements, undisputed ¶¶ 23-25.) "Chief Larrabee then looked in the bag and saw

1 the canister of biscuit[s]." (Green Aff. ¶ 29.) Chief Larrabee took Green back to her  
2 desk, as she attempted to explain that she had taken the biscuits with the intent of  
3 baking them at home--the communal kitchen at EHPD having no oven (*see id.* ¶ 22)--  
4 and bringing the baked biscuits back to the office for officers and staff (*see id.* ¶ 29).  
5 Chief Larrabee refused to listen. Arriving at Green's desk, Chief Larrabee saw Green's  
6 tote bag and asked what was in it. She showed him the wire basket and attempted  
7 to explain that she was temporarily borrowing it for a holiday party, but again he  
8 refused to listen. (*See id.*)

9           Green was immediately placed on administrative leave with pay, having  
10 been found to have in her possession a basket that she admitted she had not asked  
11 anyone whether she could borrow, and biscuits that she admitted she had not asked  
12 anyone whether she could take. (*See, e.g.,* Rule 56(a) Statements, undisputed ¶¶ 14,  
13 18-20; December 11, 2014 Interview of Green by EHPD Internal Affairs Officer James  
14 Naccarato ("Naccarato Interview of Green") at 5-6.)

### 15 *C. The Disciplinary Process and Green's Resignation*

16           EHPD in 2014 had a Code of Conduct policy and a policy governing  
17 internal affairs complaints. "Under the policy governing the Internal Affairs Officer

1 [sic] and Complaints, the Chief of Police and Deputy Police Chief had the authority  
2 to determine the merits of an investigation." (Rule 56(a) Statements, undisputed  
3 ¶ 29.) Under that policy, the Chief of Police and Deputy Police Chief had the  
4 authority to issue "verbal reprimand[s], written reprimand[s], and suspension[s]"; but  
5 for more serious allegations they were to forward the investigation to the Town's  
6 Board of Police Commissioners ("Town BPC" or "BPC"); only the BPC had the  
7 authority to terminate the employee. (*Id.* undisputed ¶¶ 30, 32-33.) The Town and  
8 the BPC were subject to a federal consent decree, *see* Agreement for Effective and  
9 Constitutional Policing, *United States v. Town of East Haven, East Haven Board of Police*  
10 *Commissioners*, No. 3-12-CV-1652 (D. Conn. Dec. 21, 2012), Dkt. No. 11, which  
11 required EHPD to follow a "disciplinary matrix" governing offenses for which an  
12 EHPD employee could be discharged (Deposition of James Naccarato ("Naccarato  
13 Dep." or "Dep.") at 111). They "ha[d] to follow the matrix." (*Id.*)

14 In 2014, Naccarato was EHPD's I.A. Officer. In that position, he was  
15 required to investigate alleged violations of policies and procedures by EHPD  
16 personnel. He conducted an investigation with regard to potential Code of Conduct  
17 violations by Green on December 5, 2014. (Rule 56(a) Statements, undisputed  
18 ¶¶ 10-15.)

1                   As part of his investigation, Naccarato interviewed Green on December  
2   11 in the presence of her union representative. In that interview, Green admitted that,  
3   as indicated above, she had taken the biscuits and the basket without asking anyone's  
4   permission. She told Naccarato, as she had tried to tell Chief Larrabee on December  
5   5, that she had merely been borrowing the basket for a Hanukkah party, and that she  
6   had seen the biscuits in the refrigerator for more than a week and planned to bake  
7   them at home and bring them back for officers and staff. When Naccarato asked why  
8   she had tried to conceal the basket, Green stated that she was not concealing it. She  
9   merely brought the tote bag because it made the basket easier to carry; and it had not  
10  occurred to her to ask permission to borrow it, since for the past 13 years she and  
11  others (she named two) had borrowed and returned such items as the basket without  
12  asking anyone. (See Naccarato Interview of Green at 8, 10-12.)

13                  Naccarato's report on his I.A. investigation of Green-- prepared over  
14  several days' time and signed on December 18 (see Naccarato Dep. 107, 109-10)--  
15  discussed whether Green had violated EHPD's Code of Conduct by, *inter alia*,  
16  "impair[ing] the operation or efficiency of the Department or any member" or  
17  "[v]iolating any federal, state, and local laws," and concluded that she had done so by  
18  engaging in "premeditat[ed] . . . theft" and "purposely conceal[ing] the canister of

biscuits and the basket" (EHPD Internal Affairs Investigation Report No. IA1400000019-00039731 by James W. Naccarato, signed December 18, 2014 ("Naccarato's I.A. Report" or "I.A. Report"), at 1, 3-4). As described in Parts I.D. and II.C.2. below, Naccarato testified in his deposition that he reached his conclusions without interviewing the officer who owned the biscuits or the two persons identified by Green as among those who previously had routinely borrowed baskets without needing to ask permission (*see* Dep. 87-88, 94-96); he also testified as to what he may have told Green he believed were her prospects for remaining employed at EHPD (*see id.* at 35, 85-90).

A hearing into the charges against Green had been scheduled for December 15, 2014. On that date, after receiving advice from her union representative who had just met with Town representatives, including Chief Larrabee, she submitted a letter stating, "I Dyanna Green, hereby retire from the town of East Haven, effective January 1st 2015."

#### D. *The Present Action*

In February 2016, Green, then proceeding *pro se*, commenced the present action against EHPD and the Town. After counsel was appointed to represent her,

1 a First Amended Complaint ("Complaint") was filed, asserting that her employment  
2 had been constructively terminated because of her age in violation of the ADEA, 29  
3 U.S.C. §§ 621-634, and CFEPA, Conn. Gen. Stat. § 46a-60 *et seq.* As Green had been  
4 an employee of the Town, EHPD was dismissed from the action by stipulation.

5 In July 2017, after Green had taken the depositions of Emerman and  
6 Naccarato, the Town moved for summary judgment dismissing the Complaint on the  
7 ground, to the extent pertinent to this appeal, that Green had not made out a prima  
8 facie case of discrimination. In so contending, the Town argued only that because  
9 Green had chosen to resign rather than participate in a hearing before the Town BPC,  
10 *see Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985) (a tenured public  
11 employee is constitutionally entitled to, *inter alia*, a pretermination hearing at which  
12 she is given an opportunity to present her position) ("*Loudermill* hearing"), she could  
13 not establish that she had suffered an adverse employment action.

14 In opposition to the motion, Green disputed the claim that her  
15 resignation had been voluntary, contending that she had essentially been forced to  
16 resign because she was told that if she did not, she would be fired. In support of her  
17 contention, she submitted her September 2017 Affidavit, stating in part as follows:

1                   31. On December 11, 2014, I sat for an interview with  
2 Officer Naccarrato [sic] as part of the EHPD's formal  
3 investigation. . . . Following the conclusion of the interview, I . . .  
4 asked Officer *Naccarato*--who held the position of *Internal Affairs*  
5 *Officer, was obviously familiar with the EHPD's disciplinary procedure*  
6 *and matrix*, and whose judgment I respected--what was going to  
7 happen to me. Officer Naccarrato responded in substance: (i) that  
8 I had stolen from the EHPD; (ii) *that Chief Larrabee and other*  
9 *members of the EHPD no longer trusted me or wanted me to continue*  
10 *working at the EHPD*; (iii) *that I likely would be fired*; and (iv) *if there*  
11 *was a possibility of me resigning or retiring, I should do so.*

12                   32. Based on this conversation, *I understood* that as a result  
13 of Officer Naccarrato's incorrect determination that I had engaged  
14 in a theft, *it was inevitable that I would be fired under the EHPD's*  
15 *disciplinary matrix, and that my only option would be to retire.*

16                   33. On or about December 15, 2014, I was scheduled to  
17 appear with my union representatives, Sandy Santos and Tom  
18 Fascio, before representatives from the Town, including the  
19 Town's attorneys.

20                   34. At the meeting, Mr. Fascio met individually with the  
21 Town's representatives. Mr. Fascio then advised me that the *Town*  
22 *had no interest in speaking with or hearing from me.* He then further  
23 advised that *the Town's position* was that I could either *retire* or  
24 move forward with a L[o]udermill hearing. *He advised me that,*  
25 *based on his discussions with the Town's representatives, including*  
26 *Chief Larrabee, I would almost certainly lose a L[o]udermill hearing.*

27                   35. Based on the statements and advice of Officer  
28 Naccarrato, as confirmed by my union representative's advice, I  
29 was forced to "retire" effective as of December 31, 2014. I did so  
30 under duress. It had been my intention to work for at least  
31 another nine years, until I was 70.

1 (Green Aff. ¶¶ 31-35 (emphases added).)

2 In support of the above statements that she had been advised by  
3 Naccarato that she should resign because she was otherwise likely to be fired, Green  
4 pointed, in part, to the following deposition testimony by Naccarato. Although no  
5 one had suggested to Naccarato "in substance," that "we are going to try and fire  
6 [Green] over this," he testified that

7 *when you look at the disciplinary matrix, that violation falls in that*  
8 *category.*

9 Q. *A fire-able offense?*

10 A. *Yes.*

11 Q. So it was your expectation that she was going to be fired  
12 over this?

13 A. *We have to follow the disciplinary matrix.*

14 (Naccarato Dep. 89 (emphases added).) And after Naccarato said that on December  
15 11, 2014, he "probably" had some discussion with Green "that was not recorded" in  
16 her statement (*id.* at 33-34), he testified as follows:

17 Q. . . . [D]o you recall discussing with [Green] after the  
18 statement was taken *what was going to happen to her?*

19 A. *I don't specifically remember but if she asked me, I would*  
20 *have told her what I thought.*

1 Q. And what would you have told her?

2 A. It didn't look good, stealing in the police department.

3 Q. Did you tell her in substance that you recommended  
4 that she retire because nobody trusted her anymore?

5 A. I *don't remember saying* that.

6 Q. Do you remember her asking you what you thought was  
7 going to happen to her?

8 A. I *don't specifically* remember but I couldn't say she didn't  
9 ask me.

10 Q. Okay.

11 A. And *if she asked me, I would have told her.*

12 Q. And what would you have told her?

13 A. That *it's stealing from a police department, you have a*  
14 *potential to get fired for it. We have a disciplinary matrix that we go by*  
15 *and that's where it falls in there.*

16 Q. Do you recall telling her that it was likely she was going  
17 to be fired unless she took retirement?

18 A. I don't recall *specifically* saying that but *if she asked me*  
19 *what I thought, I would have told her.* I would have been honest with  
20 her. I was always honest with her.

21 (*Id.* at 34-35 (emphases added).)

1 E. *The District Court's Decision*

2 The district court, in an opinion dated December 19, 2017, granted the  
3 Town's motion to dismiss the action for lack of a prima facie case. *See Green v. East*  
4 *Haven Police Dep't*, 3:16-cv-00321, 2017 WL 6498144, at \*6-\*9 (D. Conn. Dec. 19, 2017)  
5 ("*Green*"). The court noted the burden-shifting framework set forth in *McDonnell*  
6 *Douglas Corp. v. Green*, 411 U.S. 792 (1973) ("*McDonnell Douglas*"), under which a prima  
7 facie case of discrimination

8 consists of proof that a plaintiff (1) was within a protected class;  
9 (2) was qualified for her position; (3) *was subject to an adverse*  
10 *employment action*; and (4) the adverse action occurred under  
11 circumstances giving rise to an inference of discrimination.

12 *Green*, 2017 WL 6498144, at \*6 (emphasis added). Because the Town challenged only  
13 the third *McDonnell Douglas* element and the parties did not address any of the others,  
14 the court considered only whether Green adduced sufficient evidence to show a  
15 triable issue as to whether she had suffered an adverse employment action. *See id.*  
16 at \*4, \*7. It concluded that she had not.

17 The district court noted that an "adverse employment action" is one that  
18 causes a "materially adverse change in the terms and conditions of employment," that  
19 "[o]ne example of a materially adverse action is constructive discharge"--a work

1 condition so intolerable "that when[] viewed as a whole . . . a reasonable person in the  
2 employee's shoes would have felt compelled to resign"--and that "[t]hreats of  
3 termination can constitute evidence of constructive discharge." *Id.* at \*7 (internal  
4 quotation marks omitted) (citing, *inter alia*, *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184,  
5 1188 (2d Cir. 1987) ("ample evidence" demonstrated a triable issue of fact that plaintiff  
6 was constructively discharged because plaintiff was notified "he would be fired at the  
7 end of the 90-day probationary period no matter what he did to improve his allegedly  
8 deficient performance"))).

9           However, the court also observed that a claim of constructive discharge  
10 is not sufficiently supported merely by a showing that the plaintiff "resign[ed] to  
11 avoid facing disciplinary charges" or simply "fear[ed] termination." *Green*, 2017 WL  
12 6498144, at \*7. A "plaintiff's failure to go through an available pre-termination  
13 hearing process is evidence that she was not constructively discharged," and this  
14 "often precludes a plaintiff's ability to survive summary judgment." *Id.* But "evidence  
15 [that] an employee was given the choice to either resign or be fired can be sufficient  
16 to create a triable issue of fact." *Id.* "When determining if a threat of termination is  
17 sufficient, courts have relied on factors including whether the threats of termination  
18 were repeated, direct, or involved additional adverse conduct." *Id.* (internal quotation

1 marks omitted).

2 The court found particularly illustrative the case of *Gorham v. Town of*  
3 *Trumbull Board of Education*, 7 F.Supp.3d 218 (D. Conn. 2014) ("*Gorham*"), in which a  
4 high school's night custodian had found a musical instrument in the trash and,  
5 assuming that it was abandoned, took it home intending to donate it to his church.  
6 He was summoned to

7 a disciplinary hearing, charging him with "theft of items  
8 belonging to a public entity," "dishonesty and lying to [his]  
9 supervisors," and "violation of the trust inherent in his position."  
10 . . . . He was informed that possible discipline included  
11 suspension or termination. . . . *The Board of Education plant*  
12 *administrator was alleged to have told him at the disciplinary hearing,*  
13 *"Lester, you're better off resigning right now; if not, we'll have you*  
14 *charged."* . . . . *The plaintiff also averred that his union representative*  
15 *stated, "Lester, this is tough. If you don't . . . resign, they'll not only*  
16 *have you charged; even if you feel like you're right . . . you'll still be*  
17 *messed up."* . . . . The plaintiff resigned on the day of the  
18 hearing. . . . *The court found the evidence sufficient to constitute*  
19 *constructive discharge because "a reasonable person in Gorham's shoes*  
20 *would have felt compelled to resign."* . . . . In short, during the hearing  
21 one of the decision makers and his union representative essentially  
22 told Gorham the outcome of the hearing would be unfavorable and  
23 advised him to resign immediately before the decision was rendered.

24 *Green*, 2017 WL 6498144, at \*8 (quoting *Gorham*, 7 F.Supp.3d at 225, 232 (emphases  
25 ours)).

26 The district court here found that the facts leading to Green's resignation

1 did not measure up to the facts described in *Gorham*. It stated that, "[i]n analyzing a  
2 constructive discharge claim, *the Court must carefully balance the facts to determine*  
3 *whether* a reasonable person *would have* considered the pre-termination hearing a  
4 meaningful process or a formality with a predetermined negative outcome." *Green*,  
5 2017 WL 6498144, at \*8 (emphases added). It concluded that its "*analysis of the facts in*  
6 *this case reveals that the plaintiff chose*"--"*she elected on her own*"--"to resign despite  
7 having a viable pre-termination hearing process . . . for two reasons." *Id.* (emphases  
8 added).

9 *First, Plaintiff had no basis to prejudge the decision makers. Although*  
10 *Officer Naccarato found that she had violated the Code of*  
11 *Conduct, that she was found to have committed an act for which*  
12 *she could be terminated, that Chief Larrabee and others did not*  
13 *trust or want to work with her, and that he thought she should*  
14 *resign, neither he nor Chief Larrabee were decision makers. Neither . . .*  
15 *had the authority to terminate her.*

16 *Id.* (emphases added). Second, despite Green's assertion that "[b]ased on [her  
17 December 11] conversation [with Naccarato], *I understood that as a result of [his]*  
18 *incorrect determination that I engaged in a theft, it was inevitable that I would be fired*  
19 *under the EHPD's disciplinary matrix, and that my only option would be to retire," id.*  
20 (quoting Green Aff. ¶ 32 (emphases ours)), the court found such an understanding  
21 unreasonable:

1 EHPD Policy Number 208.2 makes clear that only the BPC has the  
2 authority to terminate an employee and may do so only after a full  
3 evidentiary Board hearing. . . . *At such a hearing Plaintiff could have*  
4 *offered the testimony of her longstanding coworkers demonstrating that*  
5 *her conduct was conventional.* That process had not begun and *no*  
6 *one advised Plaintiff of the likely outcome of that process.* Indeed, *a*  
7 *reasonable person in Plaintiff's shoes would not have concluded it was*  
8 *inevitable* that she would be fired after speaking with someone  
9 uninvolved in the decisionmaking process.

10 *Green*, 2017 WL 6498144, at \*8 ("inevitable" emphasized in original; other emphases  
11 added). The district court found it

12 *unavailing* that [Green's] union representative advised her "the  
13 Town's position was that [she] could either retire or move forward  
14 with a L[o]udermill hearing" but that she "would *almost certainly*  
15 *lose a L[o]udermill hearing.*" [Green Aff.] ¶ 34. *In light of the fact*  
16 *that there is no evidence Plaintiff's termination was automatic, the loss*  
17 *of a Loudermill hearing would not have inevitably led to termination.*  
18 These statements appear to be nothing more than an *educated guess*  
19 *about a certain outcome.*

20 *Green*, 2017 WL 6498144, at \*8 (emphases ours). The court found that

21 [u]nlike the plant administrator in *Gorham*, *nobody gave Plaintiff an*  
22 *ultimatum or threatened her with criminal charges, and there is no*  
23 *evidence the final decision maker would have even terminated her*  
24 *employment.* The Court finds that Plaintiff[] . . . cannot show  
25 constructive discharge because *she elected on her own to forego a*  
26 *hearing made available to her.*

27 *Id.* (emphases added).

The court granted summary judgment in favor of the Town, concluding that "[i]n failing to establish an adverse employment action, Plaintiff cannot establish a *prima facie* case for her ADEA or CFEPa claims." *Id.* at \*9.

## II. DISCUSSION

On appeal, Green contends that the granting of summary judgment against her for failure to show an adverse employment action was error because the evidence, viewed in the light most favorable to her, showed that she was constructively discharged by the Town because she believed, and objectively reasonably believed, that if she did not resign she would be discharged. As this was the only merits-related argument presented to and considered by the court, we agree that summary judgment was inappropriate.

### A. ADEA Principles

The ADEA provides, in pertinent part, that as to a person over the age of 40, *see* 29 U.S.C. § 631(a), "[i]t shall be unlawful for an employer . . . to discharge [the] individual . . . because of such individual's age," *id.* § 623(a)(1). "In order to

1 establish a prima facie case of age discrimination," the plaintiff "must show (1) that  
2 she was within the protected age group, (2) that she was qualified for the position, (3)  
3 that she experienced adverse employment action, and (4) that such action occurred  
4 under circumstances giving rise to an inference of discrimination." *Gorzynski v.*  
5 *JetBlue Airways Corp.*, 596 F.3d 93, 107 (2d Cir. 2010). As to the fourth element of the  
6 prima facie case, the Supreme Court has made "clear that 'a plaintiff bringing a  
7 disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of  
8 the evidence, that age was the "but-for" cause of the challenged adverse employment  
9 action' and not just a contributing or motivating factor." *Id.* at 106 (quoting *Gross v.*  
10 *FBL Financial Services, Inc.*, 557 U.S. 167, 180 (2009)). Only the third element of the  
11 prima facie case is at issue on this appeal, however, because the only merits-related  
12 basis for summary judgment presented by the Town's motion was that Green had  
13 failed to show an adverse employment action, and that was the only such basis for  
14 summary judgment considered by the district court, *see Green*, 2017 WL 6498144, at \*4,  
15 \*7.

16 Plainly an employee's "discharge," 29 U.S.C. § 623(a)(1), is an adverse  
17 employment action. To satisfy the third element of the prima facie case, a discharge  
18 may consist of either the employer's actual termination of the plaintiff's employment

1 or the existence of intolerable conditions, attributable to the employer, amounting to  
2 a "constructive" discharge. *See, e.g., Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 161 (2d Cir.  
3 1998) ("*Kirsch*"); *Stetson v. NYNEX Service Co.*, 995 F.2d 355, 360 (2d Cir. 1993)  
4 ("*Stetson*"); *Pena v. Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983) ("*Pena*"). "[T]he  
5 plaintiff's burden of establishing a *prima facie* case in a discrimination suit is  
6 *de minimis*." *Chertkova v. Connecticut General Life Insurance Co.*, 92 F.3d 81, 90 (2d Cir.  
7 1999) ("*Chertkova*") (Title VII claim of gender discrimination) (internal quotation marks  
8 omitted).

9           An employee's rights under federal antidiscrimination statutes may be  
10 "violated by *either explicit or constructive* alterations in the terms or conditions of  
11 employment," and if constructive, the alterations, to be actionable, "must be severe or  
12 pervasive." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752 (1998) ("*Ellerth*")  
13 (emphasis added) (discussing Title VII principles announced in *Meritor Savings Bank,*  
14 *FSB v. Vinson*, 477 U.S. 57, 65 (1986)); *see, e.g., Pena*, 702 F.2d at 325 (ADEA claim). "A  
15 *discriminatorily abusive work environment . . . can . . . discourage employees from remaining*  
16 *on the job . . .*" *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993) (emphases added);  
17 *see, e.g., id.* at 19 (after the company president's last sexually harassing comment,  
18 "Harris collected her paycheck and quit").

1 A plaintiff may prove a *constructive discharge* by establishing that  
2 his employer, rather than acting directly, deliberately ma[de his]  
3 working conditions *so intolerable* that [he was] forced into an  
4 involuntary resignation,

5 *Kirsch*, 148 F.3d at 161 (ADEA claim) (internal quotation marks omitted (emphases  
6 ours)), and such an intolerable condition may be shown by evidence that the  
7 employer gave the plaintiff the choice of resigning or being fired, *see, e.g., Lopez v. S.B.*  
8 *Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987) ("*Lopez*") (claim of ethnic discrimination  
9 in violation of 42 U.S.C. § 1981).

10 However, as the district court noted, a constructive discharge cannot be  
11 shown simply by the fact that the employee was unhappy with the nature of her  
12 assignments or criticism of her work, or where the employee found the working  
13 conditions merely "difficult or unpleasant." *See Green*, 2017 WL 6498144, at \*7 (citing  
14 *Stetson*, 995 F.2d at 360). Rather, the standard for assessing whether the alterations  
15 have become intolerable is an objective one:

16 Conduct that is not severe or pervasive enough to create an  
17 *objectively* hostile or abusive work environment--an environment  
18 *that a reasonable person* would find hostile or abusive--is beyond  
19 Title VII's purview.

20 *Harris*, 510 U.S. at 21 (emphases added). Accordingly, the principle we have  
21 consistently applied is that a plaintiff makes a *prima facie* showing of an adverse

1 employment action if she adduces evidence from which a rational juror could infer  
2 that the employer made her working condition, viewed as a whole, "so difficult or  
3 unpleasant that a reasonable person in the employee's shoes would have felt  
4 compelled to resign." *Kirsch*, 148 F.3d at 161 (internal quotation marks omitted); *see*,  
5 *e.g.*, *Chertkova*, 92 F.3d at 89; *Stetson*, 995 F.2d at 361; *Lopez*, 831 F.2d at 1188; *Pena*, 702  
6 F.2d at 325.

7           The fact that this substantive standard is an objective one, however, does  
8 not necessarily mean that what a reasonable person in the plaintiff's shoes would  
9 have felt compelled to do is determinable as a matter of law, for an objective question  
10 is often fact-specific. It hardly need be said that the determination of whether it was  
11 objectively reasonable for an employee to feel compelled to resign in order to avoid  
12 being fired requires at least an examination of the information possessed by the  
13 employee. If any relevant facts are in dispute or subject to competing inferences as  
14 to their effects, or if there is admissible evidence from which a rational juror could  
15 infer that a reasonable employee would have felt so compelled, rejection of the  
16 constructive-discharge theory as a matter of law is impermissible. *See, e.g.*, *Kirsch*, 148  
17 F.3d at 161-62 (affirming denial of defendants' posttrial motion for judgment as a  
18 matter of law); *Lopez*, 831 F.2d at 1189 (reversing grant of defendant's motion for

1 summary judgment). In *Lopez*, for example, we observed that

2 [t]he record in this case amply demonstrates that Lopez has  
3 raised a genuine issue of fact as to whether he was constructively  
4 discharged when, as he alleges, Hunsberger [a regional director  
5 who was Lopez's supervisor] *told him he would be fired at the end of*  
6 *the 90-day probationary period no matter what he did to improve his*  
7 *allegedly deficient performance.* A trier of fact might find that  
8 Hunsberger's statement alone suffices to establish a constructive  
9 discharge. See *Welch v. University of Tex. & Its Marine Science Inst.*,  
10 659 F.2d 531, 533-34 (5th Cir. 1981) (finding constructive discharge  
11 where employer clearly expressed his desire that employee resign  
12 because such a statement would force a reasonable person to  
13 resign).

14 *Lopez*, 831 F.2d at 1188-89 (emphasis added).

15 In contrast, some cases present records so insubstantial that no rational  
16 factfinder could infer that a reasonable employee in the plaintiff's shoes could have  
17 felt compelled to resign. In *Stetson*, for example, we found the evidence insufficient  
18 to show a prima facie case of constructive discharge where the employer "never  
19 mentioned retirement to Stetson and never either expressly or impliedly suggested  
20 that Stetson's employment would be terminated." 995 F.2d at 361; see also *Pena*, 702  
21 F.2d at 325-26 (reversing denial of the defendant's motion for a directed verdict for  
22 lack of evidence of a constructive discharge where, although the plaintiff's role was  
23 "somewhat" changed, she was not faced with loss of pay or change in title, and it was

1 her "own understanding throughout the relevant period"--"[t]aking her own  
2 testimony in the light most favorable to her"--"that [the employer] wished her to  
3 remain" in its employ).

#### 4 B. *Summary Judgment Principles*

5 A motion for summary judgment may be granted only "if the movant  
6 shows that there is no genuine dispute as to any material fact and the movant is  
7 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). On such a motion,  
8 "[t]he inquiry performed is the threshold inquiry of determining whether there is the  
9 need for a trial--whether, in other words, there are any genuine factual issues that  
10 properly can be resolved only by a finder of fact because they may reasonably be  
11 resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250  
12 (1986) ("*Liberty Lobby*"). Thus, in ruling on a motion for summary judgment, "the  
13 district court is required to resolve all ambiguities, and credit all factual inferences  
14 that could rationally be drawn, in favor of the party opposing summary judgment."  
15 *Kessler v. Westchester County Department of Social Services*, 461 F.3d 199, 206 (2d Cir.  
16 2006) (internal quotation marks omitted).

17 "[A]t the summary judgment stage the judge's function is not himself to

1 weigh the evidence and determine the truth of the matter but to determine whether  
2 there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249. "Credibility  
3 determinations, the weighing of the evidence, and the drawing of legitimate  
4 inferences from the facts are jury functions, not those of a judge . . . ruling on a motion  
5 for summary judgment . . . ." *Id.* at 255.

6           These standards also govern our review on appeal. Where "[s]ummary  
7 judgment was granted for the employer, . . . we must take the facts alleged by the  
8 employee to be true." *Ellerth*, 524 U.S. at 747.

### 9       C. *The Present Case*

10           In this case we have difficulties both with the substantive legal standard  
11 adopted by the district court and with the court's treatment of the summary judgment  
12 record.

#### 13           1. *The Substantive Legal Principle Adopted*

14           In granting summary judgment against Green for lack of proof of any  
15 adverse employment action, the district court stated in part that "[u]nlike the  
16 [decisionmaker] in *Gorham*, nobody gave Plaintiff an ultimatum [to resign or be fired]

1 or threatened her with criminal charges." *Green*, 2017 WL 6498144, at \*8. But *Gorham*  
2 merely discussed evidence of statements that were especially clear, authoritative, and  
3 ominous, from which a constructive discharge could be inferred. That evidence did  
4 not mark the minimum standard for what is actionable.

5 Abuses may take many forms and be delivered in many ways. The  
6 district court's transmutation of the facts in *Gorham* into a substantive controlling  
7 principle--ruling that a plaintiff cannot show that a threat of termination constituted  
8 a constructive discharge unless the threat (a) was a categorical ultimatum that if she  
9 did not resign she would be fired, and (b) was delivered by an ultimate  
10 decisionmaker as to firing--imposed a legal standard at an unwarranted level of  
11 specificity.

12 While the identity of the person delivering a termination threat or  
13 prediction and the level of certainty expressed in such a threat or prediction are  
14 considerations for a factfinder to weigh, neither an absolute statement nor a direct  
15 communication by an ultimate decisionmaker is a *sine qua non* for evidence of a  
16 constructive discharge. For example, in *Lopez*, in which the plaintiff was told by his  
17 supervisor that he would be fired at the end of his probationary period regardless of  
18 how well he performed, we stated that a factfinder could permissibly "find that [that]

1 statement alone suffices to establish a constructive discharge," 831 F.2d at 1188; but  
2 nothing in our opinion suggested that the supervisor was a decisionmaker with  
3 respect to firing. In *Stetson*, in concluding that there was not sufficient evidence to  
4 show a prima facie case of constructive discharge, we considered not just whether the  
5 employer told Stetson "expressly" that his employment would be terminated, but  
6 alternatively whether he so "suggested" "impliedly," 995 F.2d at 361. And indeed, our  
7 *Lopez* opinion indicated that a constructive discharge could properly be found where  
8 an employer merely, albeit "clearly[,] expressed *his desire* that [an] employee resign  
9 because such a statement" could cause a reasonable person to feel compelled to  
10 resign, 831 F.2d at 1188-89 (emphasis added).

11           Thus, contrary to the standard applied by the district court here in  
12 finding that Green's constructive-discharge argument failed because her evidence was  
13 less stark than that in *Gorham*, the established standard--as discussed in Part II.A.  
14 above, and indeed as reflected in *Gorham* itself--is whether in light of the evidence as  
15 a whole as to intolerable working circumstances, "a reasonable person in the  
16 employee's shoes would have felt compelled to resign," *Kirsch*, 148 F.3d at 161;  
17 *Chertkova*, 92 F.3d at 89; *Stetson*, 995 F.2d at 361; *Lopez*, 831 F.2d at 1188; *Pena*, 702 F.2d  
18 at 325; see *Gorham*, 7 F.Supp.3d at 232.

1                   2. *The District Court's Assessment of the Record*

2                   In addition to imposing an unduly stringent standard for proof of a  
3                   constructive discharge, the district court engaged in a "balanc[ing of] the facts," from  
4                   which the court inferred that a reasonable person in Green's shoes would not have felt  
5                   compelled to resign in order to avoid termination, and found that Green in fact  
6                   "chose"--"elected on her own"--to resign rather than to proceed with the *Loudermill*  
7                   hearing, *Green*, 2017 WL 6498144, at \*8. But on a motion for summary judgment, the  
8                   court's job was not to weigh the evidence, but rather was to accept as true the facts  
9                   that were sworn to or undisputed, and with all permissible inferences therefrom  
10                  drawn in Green's favor, to determine whether a rational juror could find that a  
11                  reasonable employee would have felt so compelled. The record as a whole, viewed  
12                  in the light most favorable to Green, precluded the grant of summary judgment.

13                 Preliminarily, we note that one of the *Gorham* facts that the district court  
14                 noted Green failed to match was that Gorham had been expressly threatened with  
15                 criminal prosecution, whereas Green was not so threatened. Although ordinarily one  
16                 might reasonably have no fear of being criminally prosecuted for taking a \$2-\$3  
17                 package of biscuit dough, EHPD's treatment of the biscuits affair was hardly

1 ordinary. The district court's suggestion that Green could have had no thought of  
2 being prosecuted criminally ignored the facts that, on arriving in the EHPD kitchen  
3 in her attempt to return the biscuits, Green had been "confronted by Chief Larrabee"  
4 who, telling her "it was a crime scene," barred her from opening the refrigerator,  
5 which was covered with "yellow 'crime scene' tape" (Green Aff. ¶¶ 27, 29).

6 More importantly, we have difficulty with the district court's view that  
7 an employee in Green's shoes would not have had any reasonable belief that her  
8 firing was inevitable (as her affidavit claimed), an inference drawn from the district  
9 court's findings that "no one advised Plaintiff of the likely outcome" of a BPC hearing,  
10 and that she thus "had no basis to prejudge the [*Loudermill* hearing] decision makers,"  
11 *Green*, 2017 WL 6498144, at \*8. The findings that "no one" had given Green such  
12 advice and that there was "no basis" for her to believe that she would lose in a hearing  
13 did not take into account all of the evidence in the record, and surely did not view the  
14 evidence in the light most favorable to Green. First, the court characterized the  
15 hearing scheduled for Green as a "viable" pretermination process, in which she "could  
16 have offered the testimony of her longstanding coworkers *demonstrating* that her  
17 conduct was *conventional*," *id.* (emphases added). But Green had cited past customary  
18 practices of herself and coworkers only to explain borrowing the basket; she did not

1 claim any longstanding practice with respect to taking the biscuits. Moreover, the  
2 court did not mention either (a) the I.A. Report's findings that Green had committed  
3 "premeditat[ed] . . . theft" and had "purposely concealed" the theft (I.A. Report at 3),  
4 or (b) the undisputed fact that "*authority to determine the merits* of an [I.A.]  
5 investigation" resided in the Chief of Police (Rule 56(a) Statements, undisputed ¶ 29  
6 (emphasis added)). Thus, although Chief Larrabee was not an ultimate  
7 decisionmaker as to whether Green should be fired, the record is contrary to the  
8 district court's view that Green had a "viable" chance of having the Town BPC  
9 overrule the Police Chief's I.A. determinations that Green had engaged in theft and  
10 duplicity.

11 Second, there was evidence in the record that Green received advice from  
12 knowledgeable persons, on both sides of the aisle, that the *Loudermill* hearing would  
13 "likely," and indeed "almost certainly," result in her termination:

14 ■ EHPD was subject to a consent decree that required it to follow  
15 a disciplinary matrix governing circumstances under which a  
16 Department employee could be fired (*see* Naccarato Dep. 111);

17 ■ Naccarato, as EHPD's Internal Affairs Officer, was familiar with  
18 (*see id.* 114-16)--and was understood by Green to be familiar with (*see*  
19 Green Aff. ¶ 31)--the EHPD disciplinary matrix;

20 ■ Green stated that when she asked Naccarato what he thought

1 was going to happen to her, Naccarato told her that Chief Larrabee and  
2 other members of EHPD no longer trusted her and did not want her to  
3 continue working at EHPD (*see* Green Aff. ¶ 31);

4 ■ Naccarato advised Green that if the I.A. charges were upheld  
5 she, in accordance with the consent-decree-mandated disciplinary  
6 matrix, "likely would be fired" (*id.*);

7 ■ Green stated that Naccarato advised her that if she could  
8 "resign[] or retir[e]," she "should do so" (*id.*);

9 ■ Naccarato testified that he did not remember "specifically"  
10 Green's asking his view of what was going to happen to her (Dep. 34) or  
11 "specifically" advising her that she should resign or retire (*id.* at 35); but  
12 he testified that "if she asked," he would have told her what he honestly  
13 thought (*id.*);

14 ■ Naccarato testified that he would have told Green that stealing  
15 from the police department falls into the "disciplinary matrix" category  
16 of a "fire-able offense" (Dep. 35, 89);

17 ■ Naccarato testified that if I.A. charges showed a firing offense,  
18 the disciplinary matrix left the BPC "very little" room for an exercise of  
19 discretion (Dep. 111); and, finally,

20 ■ Green stated that on the day of the scheduled hearing, her union  
21 representative met initially with Town representatives, who said the  
22 Town did not want to hear from Green and that she could either have  
23 the *Loudermill* hearing or retire; and her union representative advised  
24 her, "based on his discussions with the Town's representatives, including  
25 Chief Larrabee," that she would "almost certainly" lose at the hearing  
26 (Green Aff. ¶ 34).

27 The district court's view that there was "no basis" for a reasonable belief that Green

1 would lose a *Loudermill* hearing is contradicted by the evidence.

2           While the district court did note Green's statement that her union  
3 representative advised her that she would "'almost certainly lose'" in a *Loudermill*  
4 hearing, *Green*, 2017 WL 6498144, at \*8, the court found that advice--though  
5 admittedly "educated"--to be "unavailing" because there was no evidence that  
6 termination was automatic or inevitable, *id.* This outright dismissal as to any value  
7 or effect of advice from the union representative seems to indicate the court's belief  
8 that, despite having received an I.A. officer's informed view that she has committed  
9 a fire-able offense, a reasonable employee, as a matter of law, cannot feel compelled  
10 to resign rather than insist on a hearing when her union representative--who is  
11 presumably looking after her interests--makes an "educated" prediction that she is  
12 almost certain to lose in the hearing. We know of no authority supporting such a  
13 principle of law. And to the extent that the court found the union representative's  
14 advice "unavailing" simply as a matter of fact--*i.e.*, as outweighed by other evidence  
15 as to what a reasonable employee in Green's shoes "would" have felt compelled to do,  
16 *id.*--the court so found by impermissibly conducting its own weighing of the evidence  
17 and by drawing all inferences adversely to Green.

18           In sum, the evidence to be considered as to whether Green suffered a

1 constructive-discharge adverse employment action, viewed in the light most  
2 favorable to Green on this issue, included the facts that the 61-year-old Green (1) had  
3 admitted taking items from the EHPD kitchen without permission; (2) had admitted  
4 initially lying to the Chief of Police about her actions; (3) had immediately been  
5 caught by the Chief of Police in that lie; (4) was found in the Internal Affairs  
6 investigation (a) to have stolen those items premeditatedly and (b) to have attempted  
7 to conceal the theft; (5) had been told by the Internal Affairs Officer that the Chief of  
8 Police and other members of the Department no longer trusted her and did not want  
9 her to continue working at EHPD; (6) had been advised by the Internal Affairs Officer  
10 (a) that if the I.A. Report were upheld she, in accordance with the EHPD consent  
11 decree disciplinary matrix, "likely would be fired," and (b) that if she could resign or  
12 retire she "should do so"; and (7) had been advised by her own union representative,  
13 who had just conferred with the Town representatives, that she would "almost  
14 certainly" lose at a *Loudermill* hearing. If this case were tried, a factfinder, applying  
15 the correct legal standard to the issue of constructive discharge, could rationally find  
16 that an employee in Green's shoes would have felt compelled to submit her  
17 resignation stating that she was retiring, rather than face nearly certain termination.

18 The district court erred in granting summary judgment on the basis that

such a finding would be impermissible.

## CONCLUSION

We have considered all of the Town's appellate arguments in support of summary judgment and have found them to be without merit. The judgment dismissing Green's claims under the ADEA and CFEPa is vacated, and the matter is remanded for further proceedings. As the Town's merits challenge to Green's action focused only on the element of adverse employment action, we do not rule out the possibility of further pretrial proceedings focusing on other elements.

If Green ultimately prevails on the merits of her action, she will be entitled to the costs of this appeal.