COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP275 **Cir. Ct. No. 2005CV1720**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JACQUELYN K. LABARBERA-HAINES,

PLAINTIFF-APPELLANT,

V.

BOARDWALK INVESTMENTS, L.L.C.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 DYKMAN, J. Jacquelyn Labarbera-Haines appeals from an order dismissing her claim for wrongful discharge against her former employer, Boardwalk Investments, L.L.C. Haines argues that her complaint states a cause of

action because it alleges that she was constructively discharged in violation of public policy when Boardwalk repeatedly asked her to engage in illegal acts in the course of her employment, thus creating a work environment so intolerable that a reasonable person would feel forced to resign. We conclude that Haines's complaint sufficiently alleges that she was constructively discharged in violation of public policy, thus stating a cause of action for wrongful discharge. Accordingly, we reverse.

Background

¶2 The following facts are taken from the pleadings.[1] Jacquelyn Labarbera-Haines was employed as a leasing agent/administrative assistant with Boardwalk Investments, L.L.C. between January 2004 and April 2005. Scott Faust was Haines's supervisor at Boardwalk.

¶3 While Haines was employed with Boardwalk, Faust instructed Haines to lie to city assessors about the number of occupants in one of Boardwalk's rental properties, in order to avoid tax liability.[2] Haines refused to do so. Faust also asked Haines to prepare paperwork to charge previous tenants for cleaning services that were not provided. Again, Haines refused to participate in this conduct.

[1] Because this is an appeal from an order dismissing a complaint for failure to state a claim, alleged facts are accepted as true for purposes of our review. ***Bammert v. Don's Super Valu, Inc***., 2002 WI 85, ¶5, 254 Wis. 2d 347, 646 N.W.2d 365.

[2] The complaint alleges Haines was instructed to misrepresent the number of occupants in "at least one" of Boardwalk's rental properties.

¶4 Due to Boardwalk's repeated requests that Haines participate in this conduct, Haines felt forced to resign. Haines submitted her resignation on April 15, 2005. Subsequently, Haines sued Boardwalk for wrongful discharge, alleging she was constructively discharged and that her discharge violated public policy. The circuit court dismissed Haines's complaint for failure to state a claim.[3] Haines appeals.

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[3] Haines argues in her reply brief that the circuit court improperly converted the motion to dismiss into a summary judgment by considering documents submitted with the pleadings. We note at the outset that, contrary to Haines's assertions, she did not raise this issue in her brief-in-chief. However, Boardwalk's response brief also references material submitted with the pleadings, and therefore we will address the effect of the parties submitting those materials.

WISCONSIN STAT. § 802.06(2)(b) (2003-04) states in relevant part:

> If on a motion … to dismiss for failure of the pleadings to state a claim upon which relief can be granted … matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment … and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by s. 802.08.

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

On our own review, we conclude that even though extraneous materials were submitted to the court, the court properly excluded them in deciding the motion to dismiss. Although the court prefaced its decision by stating it had "read the motion papers, affidavits, and memoranda of law filed by the respective parties," it specifically concluded:

> 1. That based on the facts plead in the Amended Complaint a reasonable jury could not, as a matter of law, find that the Plaintiff was constructively discharged; and
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> 2. That the Amended Complaint does not state a violation of a fundamental, well defined public policy upon which a public policy exception to the at-will doctrine can be based; and
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> 3. For other reasons given by the Court on the record on December 12, 2005.

(continued)

Standard of Review

¶5 Whether the circuit court properly dismissed a complaint for failure to state a claim is a question of law, which we review de novo. ***Bammert v. Don's Super Valu, Inc.***, 2002 WI 85, ¶8, 254 Wis. 2d 347, 646 N.W.2d 365. In our review, we apply the same standard as the circuit court. ***Hennig v. Ahearn***, 230 Wis. 2d 149, 164, 601 N.W.2d 14 (Ct. App. 1999). A motion to dismiss tests the legal sufficiency of the complaint. ***Wausau Title, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999). We accept as true the facts stated in the complaint and all reasonable inferences derived from those facts. ***Id.*** Dismissal of a complaint is only appropriate where it is certain that no relief can be granted under any set of facts that the plaintiff could prove in support of his or her complaint. ***Id.***

Discussion

¶6 The general rule in Wisconsin is that an at-will employee may be terminated for any reason or no reason without judicial remedy. ***Goggins v. Rogers Mem'l Hosp. Inc.***, 2004 WI App 113, ¶18, 274 Wis. 2d 754, 683 N.W.2d 510. However, the supreme court recognized a narrow exception to the employment-at-will doctrine in ***Brockmeyer v. Dun & Bradstreet***, 113 Wis. 2d 561, 335 N.W.2d 834 (1983), allowing an at-will employee a cause of action if his or her discharge violated a fundamental and well-defined public policy. To state a cause of action for wrongful discharge in violation of public policy, an employee

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The transcript of the December 12 hearing similarly indicates that the court relied exclusively on the complaint in reaching its decision. Thus, we are not persuaded that the court converted the motion to dismiss into a summary judgment.

must (1) identify a fundamental and well-defined public policy sufficient to trigger the exception to the employment-at-will doctrine, and (2) demonstrate that the discharge violated that public policy. ***Goggins***, 274 Wis. 2d 754, ¶19. "Once the plaintiff satisfies these first two steps, the burden shifts to the employer to show that the discharge actually was sparked by just cause." ***Strozinsky v. School Dist. of Brown Deer***, 2000 WI 97, ¶37, 237 Wis. 2d 19, 614 N.W.2d 443.

¶7 Because we are reviewing a motion to dismiss, we need not determine whether Haines was, in fact, wrongfully discharged in violation of public policy. Instead, we test only the sufficiency of her complaint to state a cause of action. In testing the sufficiency of Haines's complaint, we note that Wisconsin is a "notice pleading" state, and that WIS. STAT. § 802.02(1)(a) requires that a complaint include no more than "[a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief." Under notice pleading, one need only give fair notice of what the claim is and the grounds upon which it is based. ***Wolnak v. Cardiovascular & Thoracic Surgeons of Cent. Wis.***, 2005 WI App 217, ¶47, 287 Wis. 2d 560, 706 N.W.2d 667.

¶8 In general, less particularity is required under WIS. STAT. § 802.02(1)(a) than previously required under Wisconsin's former pleading statute, WIS. STAT. § 263.03. Judicial Council Committee Note, 1974, 67 Wis. 2d 585, 618. Thus, convoluted disputes over the necessary components of complaints have been preempted. Discovery, pretrial conferences and summary judgment now serve the purpose of determining whether the complaint has substance or is only a sham claim. Charles D. Clausen and David P. Lowe, *The New Wisconsin Rules of Civil Procedure: Chapters 801-803*, 59 MARQ. L. REV. 1, 38 (1976).

With these precepts in mind, we turn to Haines's complaint to determine whether she has sufficiently stated a cause of action for wrongful discharge.

1. Fundamental and Well-Defined Public Policy

¶9 Haines argues that the circuit court incorrectly determined that her complaint did not allege a fundamental and well-defined public policy.[4] Whether a complaint identifies a fundamental and well-defined public policy sufficient to meet the narrow exception to the employment-at-will doctrine is a question of law that we review without deference to the circuit court. ***Strozinsky***, 237 Wis. 2d 19, ¶31. Thus, we independently review Haines's complaint to determine whether Haines "has identified a fundamental and well defined public policy in the spirit or the letter of constitutional, statutory, or administrative provisions sufficient to trigger the exception to the employment-at-will doctrine." *See* ***id.***, ¶48. We conclude that Haines has done so.

¶10 The ***Brockmeyer*** exception to Wisconsin's employment-at-will doctrine is based on a "breach of an implied provision that an employer will not discharge an employee for refusing to perform an act that violates a clear mandate of public policy." ***Strozinsky***, 237 Wis. 2d 19, ¶36 n.8 (quoting ***Brockmeyer***, 113 Wis. 2d at 575-76). In cases following ***Brockmeyer***, the supreme court has emphasized that the public policy exception remains a narrow one. ***Id.***, ¶38. Thus, an employee must "allege a clear expression of public policy" to trigger the exception to the employment-at-will doctrine. ***Id.***, ¶38 (citation omitted).

[4] The circuit court said: "I do not see this to have been a violation of a fundamental and well defined public policy. It's a relatively creative characterization of violation of public policy, but I don't—it is kind of broad and kind of vague."

Additionally, the public policy must be "evidenced by existing law." ***Id.***, ¶39 (citation omitted). While "not every statutory, constitutional, or administrative provision invariably sets forth a clear mandate of public policy," our public policy determination is not restricted to the literal language of a provision. ***Id.*** We focus on the spirit as well as the content of a statute when determining whether it reflects a fundamental and well-defined public policy. ***Id.***

¶11 In ***Strozinsky***, the supreme court reviewed its public policy determinations and explained that it had repeatedly found a fundamental and well-defined public policy where an employee "confronted the equally destructive alternatives of termination or statutory penalties." ***Id.***, ¶¶40-42. Thus, in ***Winkelman v. Beloit Mem'l Hosp.***, 168 Wis. 2d 12, 483 N.W.2d 211 (1992), the supreme court held that a nurse who had been discharged because she disobeyed instructions to work in a department of the hospital for which she had not been trained had identified a well-defined public policy of "protecting patients from negligent nurses, in an administrative rule that prohibits nurses from performing services for which they are not qualified." ***Strozinsky***, 237 Wis. 2d 19, ¶42. Because following her employers' instructions would have subjected Winkelman to civil liability in a negligence claim, Winkelman had stated a claim for wrongful discharge in violation of public policy. ***Id.***

¶12 Similarly, in ***Hausman v. St. Croix Care Center***, 214 Wis. 2d 655, 571 N.W.2d 393 (1997), the supreme court "discerned a well defined public policy of protecting nursing home residents and applied the public policy exception to at-will employees who are discharged after they report abuse or neglect." ***Strozinsky***, 237 Wis. 2d 19, ¶40. Because the legislature imposed an affirmative duty on nursing home employees to report abuse, and failure to report subjects

employees to criminal penalties, an employer may not discharge an employee for failing to comply with that duty. ***Id.***

¶13 Several years later, the supreme court decided in ***Kempfer v. Automated Fishing, Inc.***, 211 Wis. 2d 100, 564 N.W.2d 692 (1997), that "a truck driver who refused his employer's command to operate his vehicle without a valid drivers' license alleged a fundamental and well defined public policy." ***Strozinsky***, 237 Wis. 2d 19, ¶41. The court explained that because the Wisconsin statutes exposed the driver to fines or incarceration for driving without a valid drivers' license, and the statutes at issue "reflect[ed] the fundamental and well defined public policy of promoting highway safety," the employee had a cause of action for wrongful discharge in violation of public policy. ***Id.***

¶14 In ***Strozinsky***, the supreme court also noted that it had declined to find a fundamental and well-defined public policy where an employee's conduct was consistent with public policy, but not contrary to the employer's instructions. ***Id.***, ¶¶44-46 (citing ***Bushko v. Miller Brewing Co.***, 134 Wis. 2d 136, 396 N.W.2d 167 (1986)). Thus, a discharged employee must identify a fundamental and well-defined public policy as evidenced in existing constitutional, statutory, or administrative law, and allege that his or her employer instructed him or her to violate that public policy. We therefore turn to Haines's complaint to determine whether she has sufficiently alleged a fundamental and well-defined public policy to trigger the exception to the employment-at-will doctrine.

¶15 Haines's complaint identifies fifteen criminal statutes as the basis for an exception to the employment-at-will doctrine: WIS. STAT. §§ 943.20, 943.21, 943.212, 943.24, 943.32, 943.38, 943.39, 943.392, 943.40, 943.45, 943.50, 946.40, 946.41, 946.60, and 946.72 (2003-04). The supreme court has explained

that "[t]he Criminal Code itself manifestly serves the public interest by seeking to eradicate criminal activity." ***Strozinsky***, 237 Wis. 2d 19, ¶51. Section 943.39, for example, reflects the fundamental and well-defined public policy of proscribing false reporting in business dealings, by deterring fraud by threat of punishment. ***Id.*** Haines's complaint alleges that Boardwalk:

> [I]nstructed Haines to lie to City Assessors and assist in misrepresenting the number of occupants in at least one of [their] rental properties in order to defraud the City of Madison regarding Boardwalk's tax liability….
>
> … [and] asked Ms. Haines to assist in the preparation of paperwork in which Boardwalk charged previous tenants for cleaning services that Boardwalk never provided.

Thus, Haines's complaint alleges that Boardwalk instructed her to commit illegal and fraudulent acts in the course of her employment, in violation of at least one fundamental and well-defined public policy; namely, the public policy of proscribing fraudulent reporting in business dealings.[5] Because Haines herself would be subject to criminal penalties for violating criminal statutes, her allegation that Boardwalk instructed her to commit illegal and fraudulent acts in the course of her employment is sufficient to trigger the exception to the employment-at-will doctrine. *See* ***id.***

¶16 Boardwalk argues, however, that Haines has not pled sufficient facts to allege fraud in violation of a fundamental and well-defined public policy

[5] Haines also alleges that Boardwalk instructed her to type an invoice for one of Boardwalk's tenants for which the underlying contractor's invoice was missing. We agree with Boardwalk that this allegation does not imply criminal activity. Even liberally construing the complaint, the act of typing an invoice for which the underlying invoice is missing is not criminal. Thus, we do not consider this allegation for purposes of this opinion.

because Haines's complaint does not meet the special pleading requirements of WIS. STAT. § 802.03(2). That section provides that: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally." Averments of fraud must be pled with particularity, including the "who, what, when, where and how" of the fraudulent conduct. ***Friends of Kenwood v. Green***, 2000 WI App 217, ¶14, 239 Wis. 2d 78, 619 N.W.2d 271. Thus, Boardwalk argues, Haines's complaint was properly dismissed for failure to plead fraud with particularity. We disagree.[6]

¶17 WISCONSIN STAT. § 802.03(2) is identical to FED. R. CIV. P. 9(b), and we therefore rely on federal cases interpreting the federal statute. ***Wangard Partners, Inc. v. Graf***, 2006 WI App 115, ¶34, _Wis. 2d_, 719 N.W.2d 523; ***Kenwood***, 239 Wis. 2d 78, ¶14; ***Rendler v. Markos***, 154 Wis. 2d 420, 428, 453 N.W.2d 202 (Ct. App. 1990). Federal cases have explained that the particularity requirements for pleading fraud are relaxed when the plaintiff does not have access to all the facts necessary to provide a detailed claim, such as when asserting the defendant committed fraud against a third party. ***Corley v. Rosewood Care Center, Inc.***, 142 F.3d 1041, 1051 (7th Cir. 1998). When, as here, the particularity requirements are relaxed because certain details are necessarily beyond the plaintiff's knowledge, the allegations in the complaint must nonetheless provide "a statement of the facts upon which the belief is founded."

[6] Haines argues that Boardwalk waived the issue of whether Haines's complaint sufficiently alleged fraud under WIS. STAT. § 802.03(2). We disagree. The general rule is that a respondent may raise any issue to support the trial court's decision, even if it was not raised below, and Haines offers no reason to deviate from this rule. *See* ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 Wis. 2d 679 (Ct. App. 1985). We thus address the merits of Boardwalk's argument.

Segal v. Gordon, 467 F.2d 602, 608 (2nd Cir. 1972). Here, Haines has provided a statement of facts supporting her belief that Boardwalk was enlisting her help in defrauding third parties: that she was instructed to lie to city assessors about the number of tenants in Boardwalk's property to avoid tax liability, and to prepare paperwork to charge tenants for cleaning services not provided. Thus, we conclude that Haines has sufficiently alleged fraud against a third party in her complaint despite the absence of the particularity required under § 802.03(2). We therefore turn to the second step in our analysis: whether Haines was discharged in violation of that public policy.

2. Discharge in Violation of Public Policy

¶18 Before addressing whether Haines was discharged in violation of a fundamental and well-defined public policy, we must answer a threshold question. Because Haines resigned from her employment, we must first determine whether Haines sufficiently alleged that her resignation was forced and she was thus constructively discharged. Boardwalk contends that nothing in Haines's complaint supports her contention that her resignation was coerced rather than voluntary. We disagree.

¶19 To demonstrate a constructive discharge, an employee must establish that his or her employer created work conditions so intolerable that the employee felt compelled to resign. ***Goggins***, 274 Wis. 2d 754, ¶25. "Ultimately, whether a resignation was voluntary or coerced is a question of fact reserved for the jury." ***Id.***, ¶30. Therefore, we examine the complaint to determine whether it is clear that under no facts proved in support of Haines's assertions can she prove a constructive discharge.

¶20 A constructive discharge claim requires a work environment that is "unusually aggravating and surpass[es] single, trivial, or isolated incidents of misconduct." ***Strozinsky***, 237 Wis. 2d 19, ¶76 (citation omitted). In ***Strozinsky***, the supreme court recognized a cause of action for constructive discharge in violation of public policy where Strozinsky's employers repeatedly requested she assist in the preparation of fraudulent tax documents and when Strozinsky refused, her employers became hostile, threatening, and verbally abusive. ***Id.***, ¶¶49-52, 79-80. The court explained that while "[t]he mere presence of illegal conduct at the workplace does not render the environment intolerable....[,] requests that an employee participate in an unlawful enterprise, or repeated instances of illegality, may compel a reasonable person to resign." ***Id.***, ¶77.

¶21 Boardwalk argues that ***Strozinsky*** is distinguishable because here, Haines has not alleged that Boardwalk did anything to make Haines's work environment intolerable other than requesting that Haines participate in illegal conduct. Boardwalk argues ***Strozinsky*** only allows a cause of action for constructive discharge in violation of public policy when an employer requests an employee participate in illegal conduct, and then retaliates against the employee when the employee refuses to do so. We do not read ***Strozinsky*** as narrowly. While the ***Strozinsky*** court was faced with a scenario in which the employer retaliated against the employee for her refusal to participate in illegal activity, it explained that its holding was not limited to those facts. ***Id.***, ¶77 (explaining that employers may create intolerable conditions if they "request[] or require[] an employee to engage in illegal acts," and that courts must "turn to the totality of the circumstances, taking into account the frequency of the conduct, its severity, and the remoteness of the illegal acts from the actual date of resignation" when determining whether conditions were intolerable). Thus, we conclude an

employee may have a cause of action for wrongful discharge when an employer repeatedly requests that the employee participate in illegal conduct in the course of his or her employment, and the employee is compelled to resign as a result.

¶22 We are not persuaded by Boardwalk's argument that Haines has not sufficiently alleged a connection between Boardwalk's request that she engage in illegal conduct and her resignation. We agree that there must be a connection between the employer's misconduct and the employee's resignation to allege a constructive discharge. *See* ***Goggins***, 274 Wis. 2d 754, ¶¶31-32. Thus, in ***Goggins***, we concluded that a nurse had not stated a constructive discharge when she alleged she resigned after fulfilling her duty to report patient abuse by a doctor, and was then disappointed with her employer's response to her report. ***Id.***, ¶32. We explained that the nurse had "fail[ed] to demonstrate a connection between her termination of employment and the public policy goal of protecting hospital patients from abuse and neglect" because she did not allege she was prevented from fulfilling her reporting duty. ***Id.***, ¶¶32-33. We declined to "dictate policy on the speed and substance of an employer's investigative response." ***Id.***, ¶32. However, in her complaint, Haines specifically states that she was forced to resign because Boardwalk repeatedly requested she participate in illegal conduct. Thus, unlike the nurse in ***Goggins***, Haines has alleged a connection between her termination and the public policy goal of proscribing false reporting in business dealings.

¶23 Boardwalk also argues that Haines has not alleged a connection between her resignation and requests she engage in illegal conduct because she does not provide specific dates of those requests in her complaint. We disagree. Haines alleges that she resigned on April 15, 2005. She also alleges she was employed with Boardwalk from January 2004 until April 2005, for a total of just

over fifteen months. Thus, the misconduct alleged in Haines's complaint is limited to a fifteen-month time frame. We do not agree that such a time frame supports a conclusion that the misconduct was too remote from the resignation to state a constructive discharge. *See* ***Strozinsky***, 237 Wis. 2d 19, ¶77 (explaining that "a resignation tendered five years after the illegality transpired is too remote to be actionable").

¶24 Because Haines has alleged in her complaint that Boardwalk requested her participation in repeated instances of illegality, we do not agree that she has not alleged a constructive discharge. Ultimately, whether Haines was constructively discharged and whether that discharge violated the fundamental and well-defined public policy identified in Haines's complaint are both questions for a jury. *See* ***id.***, ¶85. Because we conclude that Haines has stated a claim for wrongful discharge in violation of public policy, we reverse and remand for proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

¶25 DEININGER, J. (*Dissenting*). I dissent because I conclude the circuit court correctly determined that LaBarbera-Haines' complaint fails to state a claim premised on Boardwalk's having constructively discharged her from employment.

¶26 I have no quarrel with the majority's observations that, under Wisconsin's notice pleading rules, an elaborate or extensive rendition of one's claim is not required, and further, that the question of whether an employee was constructively discharged is fact-intensive and most often for a jury to decide. *See* Majority, ¶¶7-8, 19. This does not mean, however, that a complaint that fails to allege facts that, if true, would entitle the plaintiff to relief may not be dismissed for failure to state a claim. *See, e.g.*, ***Larson v. Burmaster***, 2006 WI App 142, 720 N.W.2d 134. Although we must "accept as true all facts pleaded and reasonable inferences that may be drawn from such facts[,] … 'legal inferences and unreasonable inferences need not be accepted as true.'" ***Id.***, ¶17 (citation omitted). We "will dismiss the plaintiff's complaint 'if it is quite clear that there are no conditions under which that plaintiff could recover.'" ***Aslakson v. Gallagher Bassett Services, Inc.***, 2006 WI App 35, ¶6, 289 Wis. 2d 664, 711 N.W.2d 667, *review granted*, 2006 WI 108, 292 Wis. 2d 409, 718 N.W.2d 723 (WI June 14, 2006) (No. 2004AP2588) (citation omitted). I conclude that is the case here.

¶27 In order to show that she was constructively discharged, LaBarbera-Haines must establish that Boardwalk made "[working] conditions so intolerable" that a reasonable employee in her position "would feel forced to quit." *See* ***Strozinsky v. School Dist. of Brown Deer***, 2000 WI 97, ¶¶75-76, 237 Wis. 2d 19,

614 N.W.2d 443. Her "situation must be unusually aggravating and surpass '[s]ingle, trivial, or isolated' incidents of misconduct.'" ***Id.***, ¶76. And, although criminal activity, as alleged here, may "sometimes lead[] to intolerable conditions[, t]he mere presence of illegal conduct at the workplace does not render the environment intolerable." ***Id.***, ¶77. The majority concludes that LaBarbera-Haines' complaint survives Boardwalk's motion to dismiss because it sufficiently alleges that Boardwalk requested her to "participate in … repeated instances of illegality" sufficient to "compel a reasonable person to resign." *See* ***id.***; Majority, ¶¶20-21. I disagree.

¶28 Here are the complaint's material factual allegations on the issue of constructive discharge:

> 6. During her employment with Boardwalk, Faust instructed Haines to lie to City Assessors and assist in misrepresenting the number of occupants in at least one of his rental properties in order to defraud the City of Madison regarding Boardwalk's tax liability. Ms. Haines refused to participate in such activity and informed Boardwalk that she would not participate in fraud or any other illegal conduct.
>
> 7. During her employment with Boardwalk, Faust asked Ms. Haines to assist in the preparation of paperwork in which Boardwalk charged previous tenants for cleaning services that Boardwalk never provided. Ms. Haines objected to this repeated pattern of illegal conduct, and again informed Boardwalk that she would not participate in fraud or illegal activity of any kind.
>
> 8. In early April of 2005, and in direct contradiction of Ms. Haines' previous requests, Faust instructed Haines to type up an invoice of costs associated with a build-out for one of Boardwalk's tenants. In preparing the accounting, Ms. Haines noticed that Boardwalk did not have an invoice from the contractor that painted the interior of the tenant's suite. Despite Haines' prior requests to the contrary, Boardwalk sought Haines' assistance in defrauding the tenant in question. Haines refused to do so.

> 9. Due to Boardwalk's repeated efforts to enlist Ms. Haines in the fraudulent and illegal conduct referenced above, Haines was forced to resign from her employment with Boardwalk. Haines resigned on April 15, 2005.

¶29 As Boardwalk points out, nowhere does LaBarbera-Haines allege that Boardwalk "took any action that in any way harmed [her] or in any way threatened to impose sanctions if [she] did not do any act she was allegedly requested to do." For all we know from LaBarbera-Haines' complaint, after making her objections known to her employer, she was never again asked to misrepresent the number of occupants of a property or to prepare paperwork charging tenants for services allegedly not provided, nor was she disciplined, demoted or threatened with dismissal for lodging her objections. More importantly, the only reasonable inference from paragraphs 8 and 9 of her complaint is that the precipitating event for her resignation was Boardwalk's request that she "type up an invoice," a request the majority concedes did not encompass illegal or fraudulent conduct and thus should not be considered "for purposes of this opinion." *See* Majority, ¶15 n.5.

¶30 In short, the material factual allegations in LaBarbera-Haines' complaint are a far cry from those described in ***Strozinsky***, where the employee was yelled at, threatened with firing and became "physically sick" as a result of confrontations with her superiors. *See* ***Strozinsky***, 237 Wis. 2d 19, ¶79-80. As I have noted, in determining whether the complaint states a claim, a court may disregard "'legal inferences and unreasonable inferences'" interspersed with material factual allegations. *See* ***Larson***, 720 N.W.2d 134, ¶17. If one sets to one side the purely conclusory words and phrases in the quoted paragraphs of LaBarbera-Haines' complaint (e.g., "fraud"; "repeated pattern of illegal conduct";

"fraudulent and illegal conduct"; "forced to resign"), as well as the allegations in paragraph 8, the following material allegations remain:

> 6. During her employment with Boardwalk, Faust instructed Haines to lie to City Assessors and assist in misrepresenting the number of occupants in at least one of his rental properties.… Ms. Haines refused to participate in such activity and informed Boardwalk that she would not….
>
> 7. During her employment with Boardwalk, Faust asked Ms. Haines to assist in the preparation of paperwork in which Boardwalk charged previous tenants for cleaning services that Boardwalk never provided. Ms. Haines objected … and again informed Boardwalk that she would not participate….
>
> 8. [not considered for "purposes of this opinion." *See* Majority, ¶15 n.5.]
>
> 9. Due to Boardwalk's … conduct referenced above, Haines … resigned on April 15, 2005.

¶31 Unlike the majority, I cannot conclude that the foregoing factual allegations can form the basis for a claim premised on a constructive discharge. Even if LaBarbera-Haines is correct that the conduct alleged in paragraphs 6 and 7 was illegal or fraudulent, and even if the public policy exception to Wisconsin's employment at will doctrine would apply if Boardwalk had fired her for refusing to do these things, the fact remains that Boardwalk did not discharge her—she quit. The majority concludes that LaBarbera-Haines has alleged enough to let a jury decide whether she was constructively discharged. *See* Majority, ¶24. I do not and therefore respectfully dissent.