The Legal Intelligencer



# High Court Weighs In on Limitations Period

Employment Law

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Constructive discharge claims can be some of the trickiest types of claims to pursue. They are - typically fraught with issues about if and when the resignation/termination occurred. Along those same lines, it has not always been clear when the harassment or discriminatory events leading up to the discharge can trigger the commencement of the statute of limitations. There has been many a sleepless night for the employment lawyer trying to figure out if the clock started ticking with notice of resignation or when the person actually stopped working.

Until recently, there was even a split among circuit courts about when the limitations period begins to run for a constructive discharge claim. Fortunately, we no longer need to guess, as the U.S. Supreme Court provided clear-cut guidance in *Green v. Brennan*, 578 U.S. ____ (2016) (May 23, 2016). The holding from the majority of the justices states that a constructive discharge claim accrues (and the limitations period begins to run) when the employee gives notice of her resignation, and not when she signs a contract to either resign or accept a transfer, or on the effective date of her resignation.

Justice Sonia Sotomayor delivered the opinion of the court, in which Chief Justice John Roberts and Justices Anthony M. Kennedy, Ruth Bader Ginsburg, Stephen G. Breyer, and Elena Kagan joined. Justice Samuel Alito filed an opinion concurring in the judgment. Justice Clarence Thomas filed a dissenting opinion.

The facts are as follows. The plaintiff, Marvin Green, sued in federal district court alleging a constructive discharge from his position as postmaster in Englewood, Colorado with the U.S. Postal Service. Green believed that he was passed over for a promotion within the Postal Service and that he was denied the promotion because of his race. Shortly thereafter, two of his supervisors accused him of intentionally delaying the mail, which is a criminal offense. According to the decision, Green was informed by his supervisors that the Postal Service's Office of the Inspector General (OIG) was investigating the charge and that OIG agents had arrived to interview him as part of their investigation. Even though the OIG agents reported to Green's supervisors that no further investigation was warranted, the supervisors continued to represent to Green that "the OIG is all over this" and that the "criminal" charge "could be a life changer."

Five days later, on Dec. 16, 2009, Green and the Postal Service entered into an agreement whereby the Postal Service promised not to pursue criminal charges in exchange for Green's promise to either retire or "report for duty in Wamsutter, Wyoming—population 451—at a salary considerably lower than what he earned in his Denver suburb." Green chose to retire, and submitted resignation paperwork on Feb. 9, 2010, with an effective date of March 31, 2010.

Approximately 96 days after signing the settlement agreement (and 41 days after submitting his resignation paperwork), Green contacted an Equal Employment Opportunity (EEO) counselor on March 22, 2010 to report an unlawful constructive discharge, alleging that the choice the Postal Service had given him effectively forced his resignation. Under federal regulations, a federal employee must contact an EEO counselor within 45 days of the "matter alleged to be discriminatory," (29 CFR Section 1614.105(a)(1)).

The Postal Service moved to dismiss Green's complaint arguing that the "matter alleged to be discriminatory" was his execution of the settlement agreement 96 days earlier, which was beyond the 45-day statute of limitations. The district court granted summary judgment to the Postal Service. The U.S. Court of Appeals for the Tenth Circuit affirmed, declaring that the "matter alleged to be discriminatory" was the Postal Service's discriminatory actions in December 2009, and not Green's resignation two months later. Thus, the court held that the 45-day limit started running in December 2009, when Green signed the settlement agreement.

In order to resolve the circuit split, the Supreme Court granted certiorari and invited amici to brief the issue of whether the limitations period for a constructive discharge claim begins to run when the employee resigns. The court began by finding that the text of the regulation, which refers to the "matter alleged to be discriminatory," was ambiguous when applied to a constructive discharge claim. Relying on the "standard rule" for limitations periods, the court concluded that the phrase "matter alleged to be discriminatory" includes the employee's resignation, not just the employer's alleged wrongful conduct that prompted that resignation in the first place.

The court explained that there are two basic elements to a constructive discharge claim: a plaintiff must prove first that she was discriminated against by her employer to the point where a reasonable person in her position would have felt compelled to resign; and she must also show that she actually resigned. Thus, Green's resignation was "an essential part of his constructive-discharge claim" and therefore was part of the "complete and present cause of action" that was necessary to trigger the limitations period. Also, as a practical consideration, applying the standard rule in this case made sense because "[s]tarting the limitations clock ticking before a plaintiff can actually sue for constructive discharge serves little purpose in furthering the goals of a limitations period—and it actively negates Title VII's remedial structure." After all, the court suggested, an employee who suffered discrimination severe enough that a reasonable person would resign might nevertheless force herself to tolerate that discrimination until she can afford to leave and seek another job.

The final issue resolved by the court was that the limitations period started running when Green gave "notice" of his resignation, and not on the date his resignation took effect (i.e., his last day on the job). The Postal Service contended that Green gave notice when he signed the settlement agreement in December, but Green argued he did not give notice until he submitted his resignation paperwork in February. As a result, the court remanded the case to the Tenth Circuit to determine the precise date on which Green gave notice that he would resign.

The implications from the Green case are pretty clear. In a constructive discharge case, as in most termination cases, the last discriminatory act should be construed as the employee's actual notice of termination, or, in this case, resignation. It is also clear that the last day worked is not necessarily the triggering event. In many cases, the limitations period will start even before the employee has worked her last day.

There is also some very insightful language from Sotomayor's rebuke of the dissenting opinion of Thomas. She wrote: "we do not also require an employee to come forward with proof—proof that would often be difficult to allege plausibly—that not only was the discrimination so bad that he had to quit, but also that his quitting was his employer's plan all along." Powerful words, indeed. •

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