

SCOTUS to Decide Filing Period for Constructive Discharge Claims

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In its October 2015 term, the Supreme Court of the United States will settle a circuit split on the filing period for a constructive discharge claim. On April 27, 2015, the Supreme Court granted a petition for review of *Green v. Brennan*, in which the court held that the limitations period for a constructive discharge claim begins at the time of the employer's last alleged discriminatory act, not when the employee resigned or provided notice of resignation.

Constructive discharge occurs where an employer unlawfully creates working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign. Under the applicable regulations, an employee subject to what he or she believes is constructive discharge must consult with an Equal Employment Opportunity Counselor prior to filing a Complaint in court. For both public and private employees, there is a time limitation on this mandatory consultation. An employee who fails to consult with the Counselor within the allotted time period will be completely barred from bringing his or her claim against the employer.

The issue at the center of the circuit split is when the clock on that time period begins to run: the date of the time the employee resigns or gives notice of resignation, or the date of the employer's last alleged discriminatory act.

In the Tenth's Circuit *Green* decision, the court held that the clock begins to run on the date of the employer's last discriminatory act. In this case, the plaintiff, Marvin Green, sued his employer, the U.S. Postal Service, for constructive discharge arising out of his claims that the U.S. Postal Service discriminated against him on the basis of race. After Mr. Green made his discrimination complaints, the U.S. Postal Service investigated him, threatened him with criminal prosecution, and put him on unpaid leave—acts which served as the basis for his constructive discharge claim. Shortly after putting Mr. Green on leave, the U.S. Postal Service offered him a choice between retiring or working in a position that paid significantly less and that was around 300 miles away from his home.

Mr. Green eventually resigned on February 9, 2010. In his Complaint, Mr. Green alleged that the harassment and bullying by the U.S. Postal Service forced him to retire. In his complaints, however, Mr. Green did not claim that the U.S. Postal Service did anything discriminatory or otherwise unlawful to him after December 16, 2009.

Under the regulations governing federal employees, Mr. Green had 45 days to consult with the Equal Employment Opportunity Counselor. 29 C.F.R. § 1614.105. Mr. Green consulted the EEO Counselor in on March 22, 2010. The court held that Mr. Green's consultation was untimely because it occurred more than 45 days after the last discriminatory act alleged, which occurred on December 16, 2009. The court held that the clock began to run on his 45-day deadline on December 16, 2009 and not on February 9, 2010, which was the date of Mr. Green's resignation. The court's holding in effect prohibited Mr. Green from pursuing his constructive discharge claim.

The Tenth Circuit reasoned that, unlike a formal termination, constructive discharge claims involve *both* an employee's decision to resign and the employer's precipitating conduct. Constructive discharge claims should

therefore receive the same treatment as other claims for discrimination, for which the clock begins to run on the date of the last alleged discriminatory act. The Tenth Circuit also noted that the purpose of a constructive discharge claim is to expand the remedies available to an employee who is subject to improper employer conduct because, otherwise, an employee who resigns would not be entitled to reinstatement or damages for back pay. The court thus concluded, "...the proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful."

In its decision, the Tenth Circuit joined the D.C. Circuit and the Seventh Circuit, who have both issued similar holdings. On the other side of the split are the Second, Fourth and Ninth Circuits, which have held that the limitations period begins to run at the time of the employee's resignation or notice of resignation. These courts reason that the resignation is a distinct discriminatory act, attributed to the employer's precipitating conduct, for which there is a distinct cause of action or claim. The Tenth Circuit in *Green* disagreed with such reasoning, stating, "We cannot endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer."

It is important to note that although Mr. Green was a federal employee and subject to a 45-day time limitation, this case gives the Supreme Court a chance to make a clarification that impacts private-sector employees as to how to calculate whether their time to file a charge runs from the date of resignation or the date of the final allegedly unlawful act by the employer.

Arguments before the Supreme Court are scheduled for November 30, 2015.