

SCOTUS Adopts New Rule Regarding Constructive Discharge Filings

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All discrimination, retaliation, and whistleblower claims have strict timelines – often within 180 or 300 days – for making complaints about such potential violations to the relevant government agencies. Employees of the federal government also have just 45 days to make complaints to individuals in their agencies to begin the administrative process. Failure to adhere to these timelines can lead to dismissal of a claim, regardless of its merit.

Employees usually find it fairly easy to know the date of an adverse employment decision and to count the days to ensure they file timely complaints. However, in the case of a constructive discharge, the triggering event is not as clear-cut.

A constructive discharge occurs when an employer does not fire an employee, but the employee reasonably decides that working conditions have become so intolerable that he cannot continue on the job. Constructive discharge claims frequently arise in the context of ongoing workplace harassment when the harassment escalates to the point of being intolerable. The courts have had different views of what constitutes the triggering event in such a situation – something the employer did to make the employee decide to leave, i.e., the last discriminatory or retaliatory act of the employer, or the employee’s actual decision to leave.

On May 23, in a 7-1 decision, the Supreme Court resolved this vexing question with a straightforward rule – the clock begins to run when an employee decides to quit and tells his employer of that decision. See *Green v. Brennan*, No. 14-613, --- S. Ct. --- (2016).

Marvin Green’s Constructive Discharge Claim

Marvin Green, who is African American, worked for the U.S. Postal Service for 35 years, and was postmaster in Englewood, Colo. when he applied for the vacant postmaster position in nearby Boulder in 2008. He was passed over and complained that he believed he had been denied the position because of his race. Things went downhill after that, and in December 2009, his supervisors accused him of intentionally delaying the mail and said the Office of the Inspector General (OIG) was investigating the matter and could bring criminal charges.

After Green met with the OIG inspectors, they concluded the charge was unwarranted, but his supervisors failed to tell him that, and instead told him the OIG “is all over this” and that a criminal charge could be a “life changer.” His supervisors placed him on off-duty status and then on Dec. 16, 2009, Green and the U.S. Postal Service signed an agreement that there would be no criminal charges in exchange for his leaving his job in Englewood. This agreement stated that Green could choose between retiring by March 31, 2010, or reporting for duty on March 31 in Wamsutter, Wyo., for a salary drastically less than he was making in Englewood. Green submitted his resignation on Feb. 9, 2010, effective March 31.

On March 22, Green contacted an Equal Employment Opportunity (EEO) counselor (a required

administrative step for federal employees) to report an unlawful constructive discharge. He alleged that his supervisors had threatened him with criminal charges and negotiated the resulting settlement giving him the option to retire or move to Wyoming at a lower salary in retaliation for his earlier complaint of race discrimination. An employee who wishes to challenge a discriminatory or retaliatory employment action must contact an EEO counselor within 45 days. March 22 was 41 days after Green submitted his resignation, but 96 days after he signed the settlement agreement.

Green filed suit in the Federal District Court for the District of Colorado, alleging constructive discharge. The government moved for summary judgment on the ground that Green had not made timely contact with an EEO counselor. The district court granted the motion and the 10th Circuit affirmed. The lower courts held that the retaliation Green challenged encompassed only the U.S. Postal Service's actions, and not Green's independent decision to resign. Therefore his 45-day time period for contacting an EEO counselor started to run on Dec. 16, 2009, and he waited too long to make that contact.

The Supreme Court Takes the Case

Because the lower courts have adopted conflicting rules about the trigger date for a claim of constructive discharge, the Supreme Court took the case to resolve the split.

The Court first noted that the federal sector regulations telling employees they have 45 days to contact an EEO counselor do not actually explain what event starts the clock running in a case like this. The Court thus relied primarily on the fundamental rule governing all limitations periods – that the time begins when a plaintiff has a cause of action. Further, a cause of action does not exist for purposes of triggering the limitations period until the plaintiff can file suit and be entitled to relief. In a case of constructive discharge, the Court explained, the plaintiff has no complete cause of action until he actually resigns.

The Court identified three reasons for adopting that rule in this case:

- (1) a resignation is a necessary component of the claim for constructive discharge;
- (2) nothing in the governing regulations compels a different rule; and
- (3) as a practical matter, this rule makes administration of the law simpler and fairer.

In discussing the fact that a resignation is an essential component of a constructive discharge claim, the Court did not plough new ground. It had already made this point 12 years ago in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), where it held that a claim of constructive discharge requires proof of two facts – that an employer created intolerable working conditions that would lead a reasonable person to resign and that the plaintiff in fact did resign. In the *Green* case, the Court simply applied that understanding of the nature of a constructive discharge claim to the issue of when the claim actually arises and reached to common-sense conclusion that the claim cannot arise until the employee resigns.

The Court rejected the notion that the language in the regulation calls for an exception to this rule. The regulation says a federal employee must complain within 45 days of “the matter alleged to be discriminatory” and many defendants (although not the government in this case) have argued that the discriminatory matter must be the actions of the employer, not the decision of the employee. The Court explained that a constructive discharge is the same as a regular discharge for purposes of the time trigger because the resignation is attributed to the employer's conduct and thus is an essential part of the “matter” about which the plaintiff is complaining.

Finally, the Court was persuaded that this rule makes practical sense. It is not logical or useful to apply a rule that the time for filing a complaint begins to run before the plaintiff could actually file a suit, and such a rule would put employees in a difficult situation of filing a complaint after the underlying discrimination and then amending it to add the constructive discharge claim after he decides to resign. The Court did not see that approach as serving the remedial purposes of the anti-discrimination and anti-retaliation provisions of the law.

When Does a Resignation Occur?

The Court's rule that the limitations period is triggered by the employee's resignation does not dispose of this case, or perhaps others, because there may be factual disputes about just when the employee has actually resigned. For example, a resignation could occur when the employee gives notice or on the last day he works. The Court squarely held that the date of the resignation is the date when the employee gives notice to his employer of his intent to resign (not his last day on the job). But that still does not finally answer the question for Green, because the government has argued he gave that notice on Dec. 16, 2009, when he signed the agreement to resign by March 31, 2010, or transfer to Wyoming. Mr. Green has argued that, since he still had a choice not to resign but instead to transfer, his intent to resign was not clear until he gave notice on Feb. 9, 2010, and submitted his retirement paperwork. The Court left it to the lower courts to resolve that factual dispute.

Lessons Learned

The Court has adopted a clear, bright-line rule that an employee claiming constructive discharge should file any necessary administrative complaint within the applicable statutory period based on the date he submits his or her notice of intent to resign. Employers should be careful not to create ambiguity by giving an employee a choice of resigning or accepting another disadvantageous employment condition, such as the transfer offered to Green. In such a case there is a strong argument that the trigger date for the cause of action, and thus for the statute of limitations, will be the date the employee chooses to submit his resignation and not the date he agreed to the either-or option.

Constructive discharges are rarer than straightforward terminations but do often arise in the context of underlying hostile environment and retaliatory harassment claims. Employees in such situations should benefit from this rule that gives them the option to file a complaint after they decide to resign, rather than being forced to jump the gun and complain before they are really sure resignation is their only option.