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EXPERT ANALYSIS

Under Construction: Supreme Court to Address 'Constructive Discharge' Claims

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Among the wide variety of claims asserted in employment litigation, constructive discharge claims can be some of the most frustrating for employers. It is not that those claims are more difficult to defend against than others. If anything, the high burden required to prove a constructive discharge — and establish the adverse action that typically is an element of a plaintiff's prima facie case — creates an additional hurdle for plaintiffs to clear and, often, another basis on which to defend the case.

The real risk is to employers who value careful risk management in their day-to-day decision-making.

In a traditional termination, the employer chooses to end the employment relationship and has the opportunity to evaluate the risks and benefits of doing so before proceeding. Constructive discharge claims, on the other hand, result from an employee's own decision to terminate the employment relationship, even though the employee will claim that affirmative acts of the employer left him with no choice.

For this reason, constructive discharge claims can create uncertainty for the employer, which may be asked by the Equal Employment Opportunity Commission or a court to defend an action that was taken by the employee.

Adding even more uncertainty to the litigation of constructive discharge claims has been a disagreement in the federal courts about when the limitations period on those claims begins to run.

The U.S. Supreme Court has taken up that question in the case *Green v. Brennan*, No. 14-613, which was argued Nov. 30 and will be decided during the high court's current term. The court's ultimate decision will provide some welcome clarity and is important to employers and employees alike. Although the case turns on a relatively mundane aspect of procedural law, given the proliferation of constructive discharge claims it may impact the timeliness of a substantial number of Title VII claims.

BACKGROUND ON *GREEN V. BRENNAN*

Marvin Green, who is a black, worked for 25 years as a manager with the U.S. Postal Service, including 14 years as a postmaster. He most recently served as a postmaster in Englewood, Colorado. In 2008, he filed a formal charge with the Postal Service Equal Employment Opportunity Office, alleging he was denied a postmaster position in Denver because of his race.

In May and July 2009, Green filed informal charges alleging that he had been retaliated against because of his report of race discrimination. Specifically, he alleged that he was harassed and demeaned by his supervisors.

In November 2009, Green was informed that he was the subject of a Postal Service investigation into claims that he had intentionally delayed the mail, failed to properly handle employee grievances,

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and sexually harassed a female employee. Intentionally delaying the mail is a federal crime, and Green was placed on leave during the investigation.

On Dec. 16, 2009, Green signed a settlement agreement, which provided that he would immediately give up his postmaster position in Englewood and remain on paid leave until March 31, 2010. At the end of the leave, he could retire or accept a position at significantly lower pay in Wamsutter, Wyoming, about 300 miles away.

In exchange, the Postal Service agreed not to pursue criminal charges against him. On Feb. 9, 2010, Green submitted his retirement papers, effective March 31, 2010. On March 22, 2010, he initiated counseling with the Postal Service's EEO office. On April 26, 2010, the EEO office advised Green that it had accepted three claims for investigation, including the claim that he had been constructively discharged.

Green subsequently filed a federal lawsuit in the U.S. District Court for the District of Colorado. He alleged, among other claims, that the Postal Service retaliated against him in violation of Title VII by constructively discharging him from employment.

A constructive discharge occurs when an employer unlawfully creates working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign. Green claimed that the alleged harassment and bullying by the Postal Service forced him to retire.

The court dismissed this claim as time-barred because Green had not contacted an EEO counselor about it within 45 days of Dec. 16, 2009, when he signed the settlement agreement. *Green v. Donohoe*, No. 10-cv-02201, 2013 WL 424777 (D. Colo. Feb. 4, 2013).

Unlike a private sector employee, who generally has 300 days to file a charge of discrimination with the EEOC, federal employees must begin the administrative process by contacting an EEO counselor in the employee's agency within 45 days of the matter alleged to be discriminatory. 29 C.F.R. § 1614.105(a)(1).

The 10th U.S. Circuit Court of Appeals affirmed this judgment. It held that the limitations period for the constructive discharge claim began to run Dec. 16, 2009, when Green entered into the settlement agreement — and not Feb. 9, 2010, when he tendered his resignation. *Green v. Donohoe*, 760 F.3d 1135 (10th Cir. 2014).

The 10th Circuit stated that "the start of the limitations period for constructive discharge claims is the same as for other claims of discrimination," which it explained was the date of the "last discriminatory act of the employer."

In rejecting a rule that would set the date as the date of the employee's resignation, the appeals court stated that it could not "endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer." As a result, Green's claim was untimely because he did not contact the EEO counselor within 45 days of the settlement agreement.

SUPREME COURT PROCEEDINGS

The U.S. Supreme Court granted certiorari to resolve the question of whether the filing period for a constructive discharge claim begins to run when an employee resigns or at the time of an employer's last allegedly discriminatory act giving rise to the resignation.

In arguments presented to the high court Nov. 30, the justices seemed skeptical of the "last discriminatory act" rule adopted by the 10th Circuit, both as a matter of doctrine and practicality.

That rule seems to ignore the concept that a constructive discharge is a distinct legal harm, apart from the underlying conduct that may be separately actionable (e.g., in a hostile-work-environment claim).

In addition, the cause of action does not accrue until the employee tenders his resignation; until he does, the employee has suffered no harm and there is no cause of action to pursue. Given that both parties to the lawsuit support this legal rule, the justices and the parties seemed fairly well aligned at the argument.

The justices were much more skeptical of arguments presented by amicus curiae in support of affirmance. They seemed most sympathetic to the argument that some discriminatory act — which cannot include the employee's decision to resign — must be committed within the limitations period.

At the end of the day, however, the tenor of the argument suggests that the high court is most likely to reverse the 10th Circuit and find that the cause of action does not accrue — and therefore the limitations period does not begin to run — until the employee resigns. A decision is expected by this spring.

IMPACT OF THE HIGH COURT'S DECISION

The Supreme Court's decision in *Green v. Brennan* will have a meaningful impact on future constructive discharge litigation for two key reasons.

First, although Green was a federal employee subject to a specific administrative process, both the parties and the high court recognized that the answers to the questions raised in the case should apply equally to the administrative exhaustion requirements for private sector employees, who in most cases are required to file a charge of discrimination within 300 days of the unlawful employment practice occurring. Therefore, the decision is likely to impact all Title VII constructive discharge claims and not just those brought by federal employees.

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Second, given the short time periods for filing administrative claims under Title VII, the Supreme Court's decision could place significant importance on an employee's decision of when to resign his employment and seek relief. While some of the arguments in the case suggested that the choice between the two rules was insignificant, because an employee's resignation often closely follows employer action in a constructive discharge case, Chief Justice John Roberts was skeptical of this argument:

> You say this isn't going to be a problem much. I think it's going to be a problem a lot of times. People are in jobs and they're, you know, suffering this particular type of adverse work environment or discrimination, but quitting your job is a very (big) deal. I think you have to plan out when that's going to be, and just because you can't take it anymore doesn't mean that you could quit work right away.

To be sure, an employee is in the best position to assert a constructive discharge claim if he resigns in close proximity to the underlying employer conduct. A prompt resignation makes it more likely that a jury would conclude that the environment was such that a reasonable person would feel that there was no choice but to resign.

As Chief Justice Roberts recognized, though, the practical realities of the situation may not always allow such a smooth path.

Going forward, employees would certainly be better served by a rule that allows for the statute to run from notice of resignation as opposed to the last discriminatory act. While it is unlikely that many employees are contemplating statutes of limitations at the time they are considering a resignation, given the relatively short periods of time for filing administrative claims, employees may be better served if they can defer consideration of those issues until after the employment relationship has ended.

Employers, on the other hand, would benefit from the last discriminatory act rule.

Most obviously, any rule that has the effect of shortening the limitations period will result in fewer claims. Furthermore, revisiting one of the ideas discussed at the beginning of the analysis, an employer often does not have the time to plan or consider risk when the employee controls the resignation decision.

What the employer does have the ability to control is its decision-making related to the alleged discriminatory acts that led to the resignation. The longer an employer is required to wait to fully understand the consequences of those decisions, the more uncertainty it will face regarding its ongoing risk exposure.

The tone and content of the high court's questioning, however, suggests that employers are likely to be disappointed. Absent an unforeseen turn, the high court seems poised to adopt a rule that the limitations period does not begin to run until the employee resigns or at a minimum announces his resignation.

This will no doubt bring greater certainty and ease of administration in determining the limitations period. It also will no doubt result in more constructive discharge claims.

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