

## CONSTRUCTIVE DISCHARGE

### Supreme Court Set to Decide Filing Time Start For Constructive Discharge Claims

By **Tricia Gorman**, Managing Editor, Westlaw Journals

The U.S. Supreme Court heard arguments Nov. 30 over whether the limitations period for a retired postmaster's constructive discharge claim against the U.S. Postal Service began when the parties agreed on his retirement date or when he submitted his retirement letter.

**Green v. Brennan, No. 14-613, oral argument held (U.S. Nov. 30, 2015).**

The high court is reviewing a 10th U.S. Circuit Court of Appeals ruling that the postmaster's constructive discharge claim was untimely because the clock for filing the claim started at the last discriminatory act by the employer, not with his resignation.

Constructive discharge occurs when an employee resigns because of a hostile work environment created by the employer.

The case presents a significant question, given the thousands of constructive discharge claims filed each year. A circuit split exists, as two other federal appeals courts have ruled like the 10th Circuit, while five circuit courts agree with the resignation date rule.

"Until this case is decided, the federal courts of appeals are intractably divided over when employees must initiate those proceedings," said **Doug Haloftis**, a partner at **Barnes & Thornburg**, who was not involved in the case. "Hopefully, the decision will end the debate and bring clarity."

**Evandro C. Gigante**, senior counsel with **Proskauer**, who also is not involved in the case, noted its importance and said he expects the high court to provide some much needed guidance on what constitutes an employee's resignation date: the date of notice or when the worker actual leaves.

"A high court decision on when a claim accrues will have significant implications for practitioners who must be mindful of the statute-of-limitations period, especially in the public sector," he said.

While the case involves a federal government employee, the decision will likely affect constructive discharge claims for both public- and private-sector workers, according to attorney **Ted Schroeder** of **Littler**, who was not involved in the case.

"Although the case turns on a relatively mundane piece of procedural law, given the proliferation of constructive discharge claims, it has the potential to impact the timeliness of a substantial number of Title VII claims," Schroeder said.

#### DISCRIMINATION AND RETALIATION

The plaintiff in the case is former U.S. Postal Service worker Marvin Green, who sued the USPS in September 2010 in Colorado federal court for violations of Title VII of the Civil Rights Act.



*Both sides said the 10th Circuit's ruling created an unnecessary complexity, contending that the date of notice of resignation is far easier to determine than an employer's last discriminatory act.*

Green, who is black, alleged the USPS retaliated against him for his complaints of racial discrimination and constructively discharged him by forcing him to retire, according to court filings.

Green worked for the USPS for 37 years, including 14 as postmaster in Englewood, Colo.

In 2008, Green filed race discrimination claims with the USPS Equal Employment Opportunity Office after being passed over for a new postmaster position in favor of a Hispanic worker, the court filings say.

He filed subsequent complaints with the EEO alleging retaliation for the discrimination claims.

In December 2009 his supervisors accused him of mismanagement, including delaying the mail, according to Green. The USPS quickly settled the EEO claims and placed him on off-duty status. Green was paid at his regular salary until March 31, 2010.

As part of the settlement, Green had to either retire or be placed in a lower-paying position, according to court filings. He submitted his resignation Feb. 9, 2010, effective at the end that March. On March 22, 2010, he contacted the EEO to complain that his retirement was forced and constituted constructive discharge.

Green filed his lawsuit six months later.

U.S. District Judge Lewis T. Babcock dismissed Green's claims and granted the USPS summary judgment. The judge said the constructive discharge claim was untimely. *Green v. Donohoe*, No. 10-cv-02201, 2013 WL 424777 (D. Colo. Feb. 4, 2013).

Green had failed to contact an EEO official about his constructive discharge complaint within 45 days after signing the settlement agreement, as required by federal anti-discrimination regulations, Judge Babcock said.

On appeal, the 10th Circuit partially affirmed Judge Babcock's ruling, agreeing that the constructive discharge claim had been filed too late. *Green v. Donohoe*, 760 F.3d 1135 (10th Cir. 2014).

According to the appeals court, the limitations period for Green to file his claim began in December 2009, when he and the USPS reached the settlement. This date constituted the USPS' last action against him, the panel said, but he did not file his constructive discharge complaint with the EEO until March 2010.

### CIRCUIT SPLIT

Green filed a *certiorari* petition in November 2014, asking the Supreme Court to decide when the limitations period for a constructive discharge claim begins.

The high court granted his petition in April.

Green said a circuit split exists over whether the period begins when the employee resigns or when the employer takes its final adverse action.

Five circuits say the former, while the 10th Circuit and two others say the latter, according to the petition.

Green said the high court's resolution of the circuit split will benefit both employees and employers.

"As long as the question presented remains unanswered by this court, thousands of employees and their employers operate in a legal environment lacking predictability and uniformity," the petition said.

## RESIGNATION NOTICE

After the high court had granted *certiorari*, the U.S. solicitor general notified the court that the government now agreed with Green that the limitations period began when notice of resignation is given, rather than at the last discriminatory act by the employer.

So, on Nov. 30, both Green's attorney, Brian Wolfman of Stanford Law School, and Justice Department attorney Curtis Gannon argued for the resignation date rule but disagreed whether that date here is when Green received notice of retirement as part of his settlement or when he submitted his retirement letter two months later.

Wolfman said the constructive discharge claim is "complete" upon resignation.

"Common sense will tell an employee that I cannot and certainly need not bring my claim that I was forced out before I was actually forced out," Wolfman said.

On behalf of the USPS, Gannon argued for a time limit based on "definitive notice" of resignation.

"We're trying to say that we think that the same rule should apply to actual and constructive discharges and it is a rule that is date of notification rather than date of separation," Gannon said. "And that's the rule that everybody applies on the termination side; it's the rule that most of the courts of appeals have applied."

Both Wolfman and Gannon said the 10th Circuit's ruling created an unnecessary complexity, contending that the date of notice of resignation is far easier to determine than an employer's last discriminatory act.

Attorney Catherine M.A. Carroll of Wilmer Cutler Pickering Hale & Dorr, who was appointed by the court to argue for 10th Circuit's ruling, said that while Green and the USPS claim the resignation date is easy to determine, they disagree on what that date is here.

Several justices, including Chief Justice John Roberts, questioned Carroll about the difficulty in determining the last discriminatory act of an employer.

"The justices seemed skeptical of the 'last discriminatory act' rule adopted by the 10th Circuit, both as a matter of doctrine and practicality," Littler's Schroeder said.

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