



KD Employment Law Alert: The Supreme Court Resolves Circuit Split by Determining that Limitations Period for Constructive Discharge Claims Runs From the Date of Discharge, Not From Date of Last Discriminatory Act

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On May 23, 2016, the Supreme Court of the United States issued a decision in *Green v. Brennan*, Postmaster General, 578 U.S. ____ (2016), in which it held that the statute of limitations for a constructive discharge claim begins to run on the date that the employee resigns from his or her position. In reaching this decision, the Supreme Court resolved a split among the federal Circuit Courts of Appeal regarding whether the limitations period begins to run from the date of an employee's resignation or from the date of the final discriminatory act to which the employee was allegedly subjected.

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §2000e et seq. prohibits employers from discriminating against their employees on the basis of race, color, religion, sex, or national origin, or retaliating against their employees for opposing or seeking relief from such discrimination. Before a federal employee can sue his or her employer for violating Title VII, he or she must "initiate contact" with an Equal Employment Opportunity ("EEO") counselor at his agency "within 45 days of the date of the matter alleged to be discriminatory." 29 CFR § 1614.105(a)(1)(2015). Similar rules apply for private sector employees. However, the timeframe for initiating a complaint is much longer, as a discrimination charge must be filed within either 180 or 300 days^[1] "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000(e)-5(e)(1). The Supreme Court noted that if an employee is fired for allegedly discriminatory reasons, the "matter alleged to be discriminatory" includes the termination itself, and the 45 day limitations period begins to run from the date of the termination. The Court reasoned that when an employee feels compelled to resign as a result of experiencing allegedly discriminatory treatment, the "matter alleged to be discriminatory" should also include the employee's resignation, and as such, the Court held that the limitations period on such a "constructive discharge" claim begins to run from the date of the resignation.

In *Green v. Brennan*, Marvin Green complained to his employer, the United States Postal Service, that he was denied a promotion because he was African-American, and his supervisors later accused him of committing the crime of intentionally delaying the delivery of mail. The parties signed an agreement on December 16, 2009 in which the US Postal Service agreed not to pursue criminal charges against Green, and Green in turn agreed to either retire or accept a position in a remote location, earning much less than his current salary. Green chose to retire and submitted his resignation paperwork on February 9, 2010, with his resignation becoming effective on March 31, 2010. On March 22, 2010, 41 days after he tendered his resignation and 96 days after he signed the agreement, Green reported an unlawful constructive discharge claim to an EEO counselor, as required by Title VII. He eventually filed a lawsuit in Federal District Court for the District of Colorado, which dismissed his lawsuit as untimely because he had not contacted the counselor within 45 days of the "matter alleged to be discriminatory," i.e., being forced to choose between retiring or being relocated to a rural office with a significant decrease in salary. The Tenth Circuit Court of Appeals, following the minority rule that the filing period runs from the employer's final alleged discriminatory act, affirmed the District Court's decision on the grounds that the 45 day period began to run on December 16, 2016, the date upon which Green signed the agreement.

In resolving this circuit split, the Supreme Court analogized a claim for constructive discharge to one for wrongful termination, concluding that whether the discharge was constructive or actual, the indispensable element of the employee's claim was the discharge itself. The Court reasoned that the employee's resignation is an essential part of the "complete and present cause of action," which requires that the limitations period not begin to run until such time as the discharge occurs. This development represents a change in existing law in the Seventh and Tenth Circuits, which include Illinois and Colorado, respectively. These circuits had previously held that the last discriminatory act was the event that triggered the running of the limitations period.

Private employers should be aware that the law on this point is now settled and that once an employee resigns, the employer may still be subject to a constructive termination claim if the employee files a discrimination charge with the EEOC within 180 or 300 days from the date of his or her resignation. Employers should also note that it is the date of the employee's resignation that starts the clock running on the expiration of the limitations period (i.e. it is not the last date of employment or the effective date of resignation). Employers should carefully document significant events and conversations with employees regarding their employment status in order to

avoid questions that may arise later regarding an employee's resignation date.

[1] The usual 180 calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis. For age discrimination claims, the deadline is extended to 300 calendar days only if a state agency enforces a state law prohibiting age discrimination in employment.