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Top court assesses timing of job bias claims, settles circuit split

In a 7-1 decision in May, the U.S. Supreme Court held that when an employee brings a discrimination claim and alleges constructive discharge, the statute of limitations period begins to run after the employee resigns — not after the employer's last discriminatory act.

Before federal civil servants can sue their employers under Title VII of the Civil Rights Act of 1964 — as was the case in *Green v. Brennan, Postmaster General*, No. 14-613 (May 23, 2016) — they must “initiate contact” with an equal employment opportunity counselor in their agency “within 45 days of the date of the matter alleged to be discriminatory.”

When an employee is fired (as opposed to resigning), the “matter alleged to be discriminatory” includes the discharge decision, and the 45-day limitations period begins running only after the employee is fired.

In *Green*, however, the employee resigned and alleged that he was constructively discharged. Therefore, the issue in *Green* was whether the 45-day limitations period for federal civil servant employees begins to run when they resign and allege that they were constructively discharged. The court held that, in those circumstances, the “matter alleged to be discriminatory” includes the employee's resignation and that the 45-day limitations period for a constructive discharge claim begins running only after the employee resigns.

Plaintiff Marvin Green worked for the U.S. Postal Service for 35 years. In 2008, Green was serving as the postmaster in Englewood, Colo. At that time, he applied for a promotion to the vacant postmaster position in Boulder, Colo. Green was not selected for the promotion. Shortly thereafter, he complained that he was denied the promotion because of his race (African-American).

On Dec. 11, 2009, shortly after Green initiated his discrimination complaint, two of his supervisors accused him of intentionally delaying the mail, which is a federal crime. Agents from the postal service's Office of the Inspector Gen-

eral investigated the allegations against Green and reported to his supervisors that no further investigation was warranted. Nevertheless, Green's supervisors told him that “the OIG is all over this” and that a “criminal” charge “could be a life-changer.”

On Dec. 16, 2009, Green and the postal service entered into an agreement. The postal service promised not to pursue criminal charges against Green in exchange for his promise to resign from his post in Englewood.

Further, the agreement provided Green with the choice of either retiring or reporting for duty in Wamsutter, Wyo., (population 451) — at a considerably lower salary. Green decided to retire and submitted his resignation on Feb. 9, 2010, effective March 31, 2010.

On March 22, 2010, Green contacted an Equal Employment Opportunity counselor at the postal service and alleged that he was constructively discharged. He alleged that his supervisors threatened criminal charges and negotiated the settlement agreement in retaliation for his discrimination complaint.

Green initiated this contact with the counselor 41 days after submitting his resignation and 96 days after signing the settlement agreement.

Green eventually filed suit in federal court, alleging that the postal service constructively discharged him. The postal service moved for summary judgment, arguing that Green did not timely initiate contact with the EEO counselor within 45 days of the “matter alleged to be discriminatory,” meaning when the parties signed the settlement agreement.

The U.S. District Court for the District of Colorado granted the postal service's summary judgment motion.

On appeal, the 10th U.S. Circuit Court of Appeals affirmed, holding that the “matter alleged to be discriminatory” included only the postal service's alleged discriminatory actions, not Green's decision to resign.

According to the 10th Circuit, Green's 45-day limitations period began running when both parties



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signed the settlement agreement on Dec. 16, 2009, which meant that Green failed to timely initiate contact with the EEO counselor. Green's discrimination claim, therefore, was time-barred.

The 10th Circuit's holding was in line with rulings from the 7th Circuit and D.C. Circuit, which both have held that the limitations period for a constructive discharge claim begins to run after the employer's last alleged discriminatory act.

Adopting the opposite view, the 2nd, 4th, 8th and 9th Circuits have held that the limitations period for constructive discharge claims does not begin to run until the employee resigns.

The Supreme Court agreed with the latter circuits and held that the limitations period for constructive discharge claims begins to run only after the employee resigns.

In reaching this holding, the court relied on the “standard rule” for limitations periods, which is that a “limitations period commences when the plaintiff has a complete and present cause of action” and “a cause of action does not become ‘complete and present’ for limitations purposes until the plaintiff can file suit and obtain relief.”

Applying that default rule, the court stated that the “matter alleged to be discriminatory” in a constructive discharge claim includes the employee's resignation for three reasons.

First, a resignation is part of the “complete and present cause of ac-

tion” necessary before a limitations period begins to run. Indeed, an employee must prove that he or she resigned to establish a constructive discharge claim. Therefore, Green could not establish his constructive discharge claim, if at all, until after he resigned.

Second, the applicable federal regulation that created the 45-day limitations period did not indicate any intent to displace the general limitations rule on which the court relied.

Third, practical considerations supported the court's ruling. According to the court, if the limitations period began to run before the employee resigned, the employee would be forced to file a discrimination complaint after the alleged discriminatory conduct and then later amend the complaint to allege constructive discharge after the employee resigns.

The regulation does not suggest, the court stated, that a layperson should be forced to follow this complex two-step approach.

Notably, the court further held that the limitations period for a constructive discharge claim begins to run when the employee provides notice of the resignation, not the effective date of the resignation.

While the court's ruling applied to the 45-day limitations period governing discrimination claims of federal civil servant employees, it likely applies generally to non-federal civil servant employees who bring suit under Title VII.

In fact, the court recognized the potentially broad application of its ruling by referencing Title VII's requirement that employees file administrative charges within 180 or 300 days “after the alleged unlawful employment practice occurred.”

Therefore, the *Green* decision likely can be construed to mean that the limitations period for constructive discharge claims brought under Title VII (by any covered employee) will begin to run only after the employee resigns, not the earlier date of the employer's last alleged discriminatory action.

— *Matthew P. Kellam, an attorney at Laner, Muchin Ltd., contributed to this column.*