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## Green v. Donahoe

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GERARD QUINN

*Green v. Donahoe*

60 N.Y.L. SCH. L. REV. 251 (2015–2016)

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Early in Franz Kafka's novella *The Metamorphosis*, Gregor Samsa, whose overnight transformation into a giant insect has made him late for work, receives a visit from his office's chief clerk.<sup>1</sup> As Samsa hides in his room and attempts to explain himself, the chief clerk, who professes to speak in the name of the office's chief, berates him for his sub-par work performance and warns that Samsa's "position in the firm is not so unassailable."<sup>2</sup> Kafka's work often explored the notion that the workings of powerful institutions are inaccessible, even inscrutable, to the individual.<sup>3</sup> Almost a century later, his satiric jabs at bureaucracy and the power imbalance between employer and employee continue to resonate in numerous employment discrimination actions filed under Title VII of the Civil Rights Act of 1964 ("Title VII").<sup>4</sup>

One complicated sphere of employment discrimination law is the doctrine of constructive discharge.<sup>5</sup> An employee is constructively discharged when intolerable working conditions force her to resign.<sup>6</sup> Constructive-discharge claims occupy an important position among other Title VII discrimination claims. Although the doctrine is especially helpful to employees who experience sexual harassment in the workplace,<sup>7</sup> constructive-discharge cases arise in a variety of contexts.<sup>8</sup> Since anti-discrimination laws do not expressly prevent employers from creating a work environment in which an employee would have no other choice but to quit, courts have developed the doctrine of constructive discharge to serve as a means of relief for employees who feel that they have been forced to leave their jobs.<sup>9</sup> Under Title VII, employees are required to avail themselves of all administrative remedies before filing their claims in federal court.<sup>10</sup> The administrative exhaustion requirement, which

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1. FRANZ KAFKA, *The Metamorphosis*, in THE COMPLETE STORIES 89, 89, 94–98 (Nahum N. Glatzer ed., 1971).
  2. *Id.* at 97.
  3. See generally FRANZ KAFKA, THE TRIAL (David Wyllie trans., Dover Publications 2012) (1925).
  4. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–718, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e–2000e-17 (2015)). Under Title VII, an employer may not discriminate against an employee based upon that employee's "race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(1).
  5. See *Green v. Donahoe*, 760 F.3d 1135, 1143 (10th Cir. 2014) (noting that the unique nature of constructive-discharge claims raises issues as to when such claims should accrue).
  6. Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 309–10 (2004).
  7. See *id.* at 310–11 ("Employment discrimination lawyers know that employees are reluctant to sue their current employer and will often file a claim only after they have left their job. Constructive discharge claims are thus one important vehicle by which sexual harassment is challenged by employees and scrutinized in the courts.")
  8. See, e.g., *Green*, 760 F.3d at 1137 (examining discriminatory conduct based on race); *Flaherty v. Metromail Corp.*, 235 F.3d 133, 136 (2d Cir. 2000) (examining discriminatory conduct based partly on age).
  9. Cathy Shuck, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKELEY J. EMP. & LAB. L. 401, 402–03 (2002).
  10. Benjamin J. Morris, *A Door Left Open? National Railroad Passenger Corporation v. Morgan and Its Effect on Post-Filing Discrete Acts in Employment Discrimination Suits*, 43 CAL. W. L. REV. 497, 502 (2007).

provides that the employee must notify the Equal Employment Opportunity Commission (EEOC) of the claim by the applicable deadline, is intended to promote out-of-court settlements of employee grievances.<sup>11</sup> Since constructive discharge is unique among other Title VII actions, courts have adopted disparate positions as to when a constructive-discharge claim should accrue.<sup>12</sup> The Tenth Circuit's holding in a recent constructive-discharge case, *Green v. Donahoe*,<sup>13</sup> threatens to exacerbate some of the difficulties faced by employees in preserving their claims and leave them even more vulnerable to employer misconduct.

In *Green*, the United States Court of Appeals for the Tenth Circuit held that postmaster Marvin Green's constructive-discharge claim against his employer, the United States Postal Service, was time-barred because the forty-five-day statute of limitations had expired.<sup>14</sup> Green argued that the limitations period did not begin until he provided notice of resignation.<sup>15</sup> The court, however, found that the limitations period began on the date of his employer's last alleged discriminatory act<sup>16</sup> and not the date when Green announced that he would resign from his position.<sup>17</sup> This case comment contends that the Tenth Circuit erred in holding that constructive-discharge claims accrue at the last identifiable act of employer misconduct instead of the date that the employee provides resignation notice. The Tenth Circuit failed to consider instructive precedent on continuous discriminatory acts. In addition, the court's logic in reaching its holding was similar to the Supreme Court's logic in the overruled case *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>18</sup> The holding was also based on the flawed reasoning that setting the date of accrual at the time that the employee decides to resign grants the employee full control over the start of the limitations period.<sup>19</sup> Finally, the decision creates a public policy issue by pressuring employees to file discrimination claims immediately after they receive discriminatory treatment from their employers or else lose the opportunity to pursue a remedy later.

Plaintiff Marvin Green, an African American postmaster, had worked for the Postal Service since 1973.<sup>20</sup> In 2008, Green's supervisor, Gregory Christ, promoted a

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11. *Id.*

12. *See Green*, 760 F.3d at 1144.

13. 760 F.3d 1135 (10th Cir. 2014).

14. *Id.* at 1142.

15. *Id.*

16. This piece uses the term "discriminatory act" to refer to any act by the employer that demonstrates discriminatory intent. The term encompasses both discrete and continuous discriminatory acts.

17. *Green*, 760 F.3d at 1145 ("Green does not claim that the Postal Service did anything more to him after December 16, 2009, the day he signed the settlement agreement. He first initiated EEO counseling on his constructive-discharge claim on March 22, 2010, well beyond 45 days later. That was too late.").

18. 550 U.S. 618 (2007).

19. *Green*, 760 F.3d at 1144–45.

20. *Id.* at 1137.

Hispanic employee to a postmaster position in Boulder, Colorado instead of Green.<sup>21</sup> In response, Green filed a discrimination charge with the Postal Service's Equal Employment Opportunity (EEO) office claiming that Christ passed over him for the position because of his race.<sup>22</sup> After the EEO investigation concluded, Green requested a hearing with the EEOC, which settled the matter.<sup>23</sup> Green filed two more charges a year later, claiming that Christ and his replacement, Jarman Smith, had harassed and threatened him because of his race and the discrimination charge he filed.<sup>24</sup>

In November 2009, four months after he filed his third charge, Green was summoned to an investigative interview for allegedly delaying the mail and neglecting his duty to handle employee grievances.<sup>25</sup> An interview with the Postal Service Office of the Inspector General (OIG) concerning allegations that Green had delayed the mail immediately followed.<sup>26</sup> After the OIG meeting, Charmaine Ehrenshaft, the Postal Service's Manager of Labor Relations, and David Knight, the Manager of Human Resources, informed Green that he would be placed on unpaid "off-duty status" for interfering with the Postal Service's daily functions.<sup>27</sup> Although the OIG concluded after the interview that Green had not purposefully delayed the mail, Knight contacted Green's lawyer and claimed that the OIG was continuing its investigation and that criminal charges for delay of the mail "could be a life changer."<sup>28</sup>

Green signed a settlement agreement with the Postal Service on December 16, 2009.<sup>29</sup> Under the agreement, Green would relinquish his postmaster job and receive his accrued annual and sick leave as pay until March 31, 2010, at which time he could choose to either retire or assume a lower-paying postmaster position in Wamsutter, Wyoming, 300 miles away from his place of employment in Colorado.<sup>30</sup> In turn, the Postal Service agreed not to pursue any charges based on the investigations conducted by its Human Resources staff and by the OIG.<sup>31</sup>

After filing a charge alleging that he had faced employer retaliation in the form of investigatory interviews, Green announced his resignation on February 9, 2010.<sup>32</sup> On March 22, 2010, Green contacted an employment counselor, claiming that he had

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 1138.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

been constructively discharged from his job.<sup>33</sup> Green brought a lawsuit against his employer in September 2010.<sup>34</sup> Among the retaliatory employment acts alleged in the complaint was his constructive discharge.<sup>35</sup> Federal regulations required Green, a federal employee, to “initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory.”<sup>36</sup> The district court held that Green’s constructive-discharge claim was time-barred because he had not initiated counseling within forty-five days of December 16, 2009, the date on which he signed the settlement agreement with the Postal Service.<sup>37</sup> On appeal, the Tenth Circuit affirmed the district court’s grant of summary judgment to the defendant on Green’s constructive-discharge claim.<sup>38</sup>

Green argued that the limitations period on his constructive-discharge claim did not begin to run until he provided notice of his resignation.<sup>39</sup> The Tenth Circuit, however, held that the limitations period on a constructive-discharge claim begins at the time of the last alleged discriminatory act of the employer.<sup>40</sup> The court concluded that an employee’s notice of resignation was not a discriminatory act that could trigger the limitations period.<sup>41</sup> In reaching its decision that the limitations period began, at the latest, when Green signed the settlement agreement, the court first considered the reasons for recognizing constructive discharge as an actionable claim.<sup>42</sup> According to the court’s reasoning, constructive-discharge claims serve as a means of recourse for employees who are forced to resign by their employers’ efforts to create an intolerable work atmosphere.<sup>43</sup>

The Tenth Circuit looked to several authorities to determine when a constructive-discharge claim should accrue. According to another Tenth Circuit case, most federal limitations periods begin when a plaintiff has actual or constructive knowledge of her injury.<sup>44</sup> In employment discrimination cases, the Tenth Circuit has held that the start of the limitations period usually coincides with the moment the plaintiff is informed of the disputed employer action.<sup>45</sup>

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33. *Id.*

34. *Id.*

35. *Id.* at 1138–39.

36. 29 C.F.R. § 1614.105(a)(1) (2015).

37. *Green*, 760 F.3d at 1139.

38. *Id.* at 1137.

39. *Id.* at 1142.

40. *Id.*

41. *Id.* at 1142–44.

42. *Id.* at 1142.

43. *Id.* at 1142–43.

44. *Id.* at 1143 (citing *Almond v. Unified Sch. Dist. No. 501*, 665 F.3d 1174, 1176 (10th Cir. 2011)).

45. *Id.* (citing *Almond*, 665 F.3d at 1177).

The court in *Green*, however, observed that Supreme Court precedent has distinguished constructive discharge from formal, employer-initiated discharge in that constructive discharge consists of both the employee's resignation and the employer's discriminatory conduct.<sup>46</sup> Later Supreme Court decisions would reinforce the notion that a constructive discharge has not taken place until the employee actually resigns because resignation is a required element of the claim.<sup>47</sup> As the Tenth Circuit noted, the Supreme Court has held that a limitations period begins to toll when the plaintiff's cause of action is complete.<sup>48</sup> The Tenth Circuit held that for practical reasons, these Supreme Court holdings should not be read to set the date of accrual at the date the employee announces resignation.<sup>49</sup>

In deciding when a constructive-discharge claim begins to accrue, the Tenth Circuit adopted a position that contradicted the Second, Ninth, and Fourth Circuits, all of which measure the start of the limitations period on constructive discharges from the date that the employee decides to quit.<sup>50</sup> The court in *Green* distinguished the other circuits' decisions on the ground that in each of those cases, the employer's last discriminatory act took place within the time frame imposed by the applicable statute of limitations.<sup>51</sup> In addition, the Tenth Circuit argued that the language of 29 C.F.R. § 1614.105(a)(1) would not permit the conclusion that the employee's resignation or notice of resignation was a "discriminatory act" of the employer.<sup>52</sup> The opinion cited *Delaware State College v. Ricks*<sup>53</sup> to support its position that the employee's notice of resignation does not amount to a discriminatory act by the employer.<sup>54</sup>

The Tenth Circuit also did not recognize any practical reasons to start the limitations period after the employee's notice of resignation. The court stated that taking such a stance would effectively allow the employee to decide when the period should begin by delaying the date of resignation.<sup>55</sup> The court noted that limitations periods already afford employees time to decide whether their jobs have become intolerable and whether the appropriate course is to resign.<sup>56</sup> The court also noted that

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46. *Id.* (citing *Pa. State Police v. Suders*, 542 U.S. 129, 148 (2004)).

47. *Id.* ("To recover for constructive discharge, . . . an employee generally is required to quit his or her job." (quoting *Mac's Shell Serv., Inc. v. Shell Oil Prods. Co.*, 559 U.S. 175, 184 (2010))).

48. *Id.* at 1143–44 (citing *Wallace v. Kato*, 549 U.S. 384, 388 (2007)).

49. *See infra* notes 51–55 and accompanying text.

50. *Green*, 760 F.3d at 1144 (citing *Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1111 (9th Cir. 1998); *Young v. Nat'l Ctr. for Health Servs. Research*, 828 F.2d 235, 237–38 (4th Cir. 1987)).

51. *Id.*

52. *Id.*

53. 449 U.S. 250 (1980).

54. *Green*, 760 F.3d at 1144 ("[T]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." (quoting *Ricks*, 449 U.S. at 258)).

55. *Id.* at 1144–45.

56. *Id.* at 1145.

the plaintiff in *Green* had the option of filing a discrimination claim based on his employer's precipitating conduct instead of a constructive discharge, and could later amend the complaint to include the constructive-discharge claim.<sup>57</sup> Green did not allege that any discriminatory acts had taken place after December 16, 2009, and he did not contact an employment counselor as to the constructive discharge within forty-five days of that date.<sup>58</sup> For the above reasons, the Tenth Circuit held that the plaintiff's constructive-discharge claim was time-barred.<sup>59</sup>

The Tenth Circuit erred in holding that the limitations period on a constructive-discharge claim does not begin when the employee decides to quit because the court (1) overlooked instructive precedent on continuous discriminatory acts, (2) utilized faulty logic similar to that in the Supreme Court's *Ledbetter* decision, (3) falsely assumed that the employee is in complete control of the date of resignation, and (4) set a standard that will confuse both employees and employers as to the appropriate filing deadline for constructive-discharge claims.

While instructive Supreme Court precedent on continuous discriminatory acts exists, the Tenth Circuit in *Green* was narrowly focused on discrete discriminatory acts.<sup>60</sup> In reaching its conclusion that the limitations period should begin after the last discriminatory act of the employer, the Tenth Circuit relied on the Supreme Court's decision in *Ricks*.<sup>61</sup> The plaintiff in *Ricks*, a Liberian college professor, filed a lawsuit alleging that he had been denied tenure because of his nationality.<sup>62</sup> His employer offered him a contract to teach for another year, and he filed a discrimination charge with the EEOC about nine months after signing the terminal contract.<sup>63</sup> *Ricks*, however, is not applicable precedent in a constructive-discharge case. The discriminatory act at issue in *Ricks* was not a constructive discharge. Whereas Green alleged that he was constructively discharged for discriminatory reasons, the plaintiff in *Ricks* only alleged that he was denied tenure for discriminatory reasons.<sup>64</sup> *Ricks*'s discharge was an inevitable result of the employer's discriminatory act, the denial of tenure, but not the discriminatory act itself.<sup>65</sup> The Supreme Court held that *Ricks*'s receiving notice of the denial of tenure, not *Ricks*'s consequent departure, tolled the

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57. *Id.*

58. *Id.*

59. *Id.*

60. *See id.* (holding that Green's constructive-discharge claim was time-barred because it was filed more than forty-five days after Green signed the settlement agreement). Continuous discriminatory acts take place over a span of time, whereas discrete discriminatory acts occur in isolated instances. *See* discussion *infra* pp. 258–59.

61. *Green*, 760 F.3d at 1144.

62. *Del. State Coll. v. Ricks*, 449 U.S. 250, 252–54 (1980).

63. *Id.* at 253–54.

64. *Id.* at 254–55; *see also* *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1110 (9th Cir. 1998) (pointing out the difference between the discriminatory act alleged in *Ricks* and a constructive discharge).

65. *Draper*, 147 F.3d at 1110; *see also* Kara M. Farina, *When Does Discrimination "Occur?": The Supreme Court's Limitation on an Employee's Ability to Challenge Discriminatory Pay Under Title VII*, 38 GOLDEN



statute of limitations.<sup>66</sup> Some courts, however, have reasoned that a constructive discharge, although initiated by the employee, should begin to accrue at the same time as other discriminatory discharges.

The Fourth Circuit, in *Young v. National Center for Health Services Research*, held that although an employee's resignation is not normally a "discriminatory act" for purposes of *Ricks*, the resignation is a discriminatory act in the context of a constructive discharge.<sup>67</sup> The *Young* opinion supports the conclusion that constructive-discharge claims should not begin to accrue at the same time as other employment discrimination actions. Under a standard that does not include resignation as part of the discriminatory act, employees looking to preserve constructive-discharge claims will feel pressured to notify their employment counselors each time they face adverse treatment in the workplace and possibly before a constructive-discharge claim has ripened. Past Supreme Court cases have considered the cumulative impact of discriminatory acts. Since constructive discharges include the employee's involuntary resignation and all of the contributory employer misconduct,<sup>68</sup> they are closer to hostile work environments, in which the employer's misconduct occurs over a span of time and not only in one instance.

The Supreme Court's treatment of continuous discriminatory acts such as a hostile work environment in *National Railroad Passenger Corp. v. Morgan*<sup>69</sup> could have served as a useful guide for the Tenth Circuit. A constructive discharge is often analogous to a hostile work environment,<sup>70</sup> a discriminatory act consisting of component parts.<sup>71</sup> In dealing with cases involving ongoing acts of employer misconduct, the Supreme Court has set a useful precedent that the Tenth Circuit overlooked. The plaintiff in *Morgan*, who had allegedly been subjected to harassment and uncommonly harsh discipline due to his race, sued his employer for creating a hostile work environment.<sup>72</sup> As evidence of the negative environment, the plaintiff alleged numerous incidents of his supervisors

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GATE U. L. REV. 249, 257–58 (2008) (characterizing the holding of *Ricks* as barring claims where the relevant employment action, such as termination, is not discriminatory on its face).

66. *Ricks*, 449 U.S. at 261–62.

67. 828 F.2d 235, 237–38 (4th Cir. 1987) ("Whether an employer's action is a 'discriminatory act' or merely an 'inevitable consequence' of prior discrimination depends on the particular facts of the case. . . . A resignation is not itself a 'discriminatory act' if it is merely the consequence of past discrimination, but if the employer discriminates against an employee and purposely makes the employee's job conditions so intolerable that a reasonable person would feel forced to resign, then the resignation is a constructive discharge—a distinct discriminatory 'act' for which there is a distinct cause of action.").

68. *Pa. State Police v. Suders*, 542 U.S. 129, 148 (2004).

69. 536 U.S. 101 (2002).

70. *See Suders*, 542 U.S. at 133–34 ("To establish hostile work environment, plaintiffs . . . must show harassing behavior 'sufficiently severe or pervasive to alter the conditions of [their] employment.' . . . Beyond that, we hold, to establish 'constructive discharge,' the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response." (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986))).

71. *See infra* notes 75–76 and accompanying text.

72. *Morgan*, 536 U.S. at 104–05.

using racial slurs.<sup>73</sup> Although some of the acts that contributed to the hostile work environment fell outside the applicable limitations period of 300 days, the Supreme Court held that those acts could still be considered as part of the same claim.<sup>74</sup>

Although *Morgan*, like *Ricks*, did not deal with a constructive-discharge claim, it offers guidance for courts examining continuous discrimination claims. Most illuminating is *Morgan's* distinction between discrete employment acts such as termination or failure to promote and those that involve “repeated conduct,” such as hostile work environments.<sup>75</sup> Green’s constructive-discharge claim fell in the latter category because it consisted of component parts that amounted to one discriminatory act. The repeated conduct that occurs in hostile work environment claims often spans days or even years and can culminate in the employee’s resignation.<sup>76</sup> Before resigning, Green was harassed with threats of criminal prosecution and received a settlement offer that forced him to quit or accept a lower-paying position 300 miles away.<sup>77</sup> Constructive-discharge cases generally follow this pattern of repeated conduct. For example, in *Fierro v. New York City Department of Education*, the plaintiff, a substitute teacher, alleged that her employer, a principal, had written poor performance evaluations of her work, held unnecessary meetings to discuss her performance, falsely accused her of using corporal punishment, and ordered her to receive a psychiatric evaluation.<sup>78</sup> The court in that case held that the constructive-discharge claim was timely because it accrued on the day the plaintiff announced her resignation.<sup>79</sup>

Although it did not resolve the issue of whether an employee’s resignation is a “discriminatory act,” the Supreme Court’s holding in *Morgan* stands for the notion that each component in an ongoing discriminatory act builds upon those that preceded it and places it in a context in which it would not belong independently.<sup>80</sup>

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73. *Id.* at 120.

74. *Id.* at 120–21. The relevant statute required that the plaintiff “file a charge with the Equal Employment Opportunity Commission (EEOC) either 180 or 300 days ‘after the alleged unlawful employment practice occurred.’” *Id.* at 104–05 (quoting 42 U.S.C. § 2000e-5(e)(1) (2015)).

75. *Id.* at 114–15 (“Discrete acts . . . are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable ‘unlawful employment practice.’ . . . Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct.”); *cf.* Chamallas, *supra* note 6, at 315 (noting that constructive-discharge cases are often factually similar to hostile environment claims and distinguishing them in the sense that in a constructive discharge, the employee quits in response to the hostile environment and “what would otherwise be regarded as a voluntary resignation should be treated as an involuntary termination.”).

76. *Morgan*, 536 U.S. at 115.

77. *Green v. Donahoe*, 760 F.3d 1135, 1137–38 (10th Cir. 2014).

78. 994 F. Supp. 2d 581, 584 (S.D.N.Y. 2014).

79. *Id.* at 586 (holding that the constructive-discharge claim accrued when plaintiff announced her resignation because *Flaherty v. Metromail Corp.*, 235 F.3d 133 (2d Cir. 2000), was the controlling standard in the jurisdiction).

80. *Morgan*, 536 U.S. at 115 (“The ‘unlawful employment practice’ therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.”); *see also* Kyle Graham, *The Continuing Violations Doctrine*, 43 *GONZ. L. REV.* 271, 303 (2007–2008) (arguing that plaintiffs face difficulty in

The resignation in a constructive discharge is different from resignations under other circumstances because it is a reaction to a pattern of mistreatment by the employer.<sup>81</sup> In failing to consider whether Green's notice of resignation was a component part in one recurring discriminatory act, the Tenth Circuit neglected the Supreme Court's treatment of an analogous issue. If the court had looked to *Morgan* instead of *Ricks* for guidance, it would have recognized that, just as one act of harassment is one component of a hostile work environment, an employee's resignation is a necessary element that helps to form a constructive discharge. From a public policy standpoint, setting the accrual date at the time that the employee decides that the job has become unbearable would ensure that the employee appreciates the scope of the employer's discriminatory conduct and the appropriate claim to file in response.

One recent Supreme Court decision employed a logic similar to that in *Green*. In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court held that an employment discrimination claim could not accrue upon the issuance of a paycheck that was reduced as the result of past discrimination.<sup>82</sup> Under Goodyear's policy, employees were awarded or denied raises based on performance evaluations.<sup>83</sup> Employees were not aware of these pay decisions because Goodyear did not disclose its employees' salaries.<sup>84</sup> Ledbetter claimed that she had received negative performance evaluations because of her sex and that she did not receive a fair pay raise because of those evaluations.<sup>85</sup> The majority held that Ledbetter's claim accrued on the date that she received notice of the last discriminatory pay decision that reduced her salary, not the later date on which she received a paycheck that was reduced as a result of that decision.<sup>86</sup> In her highly-influential dissent in the case, Justice Ruth Bader Ginsburg criticized the majority's failure to consider the cumulative effect of the defendant employer's discriminatory pay decisions and its narrow focus on the individual pay decisions that affected the defendant's paychecks.<sup>87</sup> By marking the start of the limitations period at the time that the employers made their discriminatory decisions, the Supreme Court was allowing the employers to lawfully "[carry] past pay

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determining when their claims have accrued because of the ongoing, cumulative nature of hostile work environments).

81. See Kenneth J. Vanko, "You're Fired! And Don't Forget Your Non-Compete...": *The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COMM. L.J. 1, 34-35 (2002) ("In [constructive-discharge] cases, the employee charges that her former employer behaved in a manner that made the work environment so intolerable or unbearable that she had no choice but to quit - that in effect, she was discharged. Quite simply, if an employee proves that she was constructively terminated, the separation is a 'hybrid' termination-resignation and most likely a termination without cause.")

82. 550 U.S. 618, 637 (2007).

83. *Id.* at 621.

84. *Id.* at 650 (Ginsburg, J., dissenting).

85. *Id.* at 622.

86. *Id.* at 627-28.

87. *Id.* at 660 (Ginsburg, J., dissenting).

discrimination forward.”<sup>88</sup> The Court’s holding in *Ledbetter* was quickly overruled by the Lilly Ledbetter Fair Pay Act of 2009.<sup>89</sup> The Tenth Circuit in *Green* quickly dismissed the proposition that an employee’s resignation could be categorized as a discriminatory act.<sup>90</sup> Similar to the Supreme Court in *Ledbetter*, its focus was improperly narrow because it failed to consider the possibility that later events may represent the recurrence of a past discriminatory act.

Both *Ledbetter* and *Green*, in their focus on those acts in which employers are directly involved and not the later consequences of the acts, failed to appreciate the burden on employees in preserving their discrimination claims and contributed to a policy problem that will pressure employees to report claims prematurely. The difficulty that an employee faces in choosing an appropriate moment to contact an employment counselor is compounded by the fact that the overall effect or intent of an employer’s actions is rarely immediately evident.<sup>91</sup> Victims of pay discrimination, as Justice Ginsburg noted in her *Ledbetter* dissent, are not always privy to their supervisors’ individual decisions to reduce their paychecks.<sup>92</sup> Goodyear, the defendant employer in the case, did not disclose employee salaries.<sup>93</sup> Although the OIG concluded that Green did not intentionally delay the mail, Green’s attorney was led to believe that the investigation was ongoing and that Green might be subject to criminal charges.<sup>94</sup> The discriminatory conduct in *Green* echoed that in *Ledbetter* in the sense that crucial information weighing on Green’s employment status was withheld from Green. Constructive-discharge claims, which typically consist of a series of discriminatory acts, are difficult to identify for purposes of contacting an

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88. *Id.*

89. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6 (codified at 42 U.S.C. § 2000e-5(e)(3)(A)–(B) (2012)) (“[A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.”).

90. *Green v. Donahoe*, 760 F.3d 1135, 1144 (10th Cir. 2014).

91. See Evan D. H. White, Note, *A Hostile Environment: How the “Severe or Pervasive” Requirement and the Employer’s Affirmative Defense Trap Sexual Harassment Plaintiffs in a Catch-22*, 47 B.C. L. REV. 853, 878 (2006) (discussing hostile work environment claims in a sexual harassment context and pointing out that “[a]lthough courts have the luxury of viewing the whole record of harassment, victims cannot predict what the cumulative effect of the harassment will be after only experiencing the first of what could develop into a series of incidents.”).

92. *Ledbetter*, 550 U.S. at 649 (Ginsburg, J., dissenting) (“When an employer makes a decision of such open and definitive character, an employee can immediately seek out an explanation and evaluate it for pretext. Compensation disparities, in contrast, are often hidden from sight.”); see also Amalia Goldvaser, *Inflating Goodyear’s Bottom Line: Paying Women Less and Getting Away with It*, 15 CARDOZO J.L. & GENDER 99, 112 (2008) (discussing *Ledbetter* and noting that pay discrimination is “close to impossible” to report to an EEO counselor because it is concealed from employees).

93. *Ledbetter*, 550 U.S. at 650 (Ginsburg, J., dissenting).

94. *Green*, 760 F.3d at 1138.

employment counselor, especially when potentially-discriminatory acts transpire without the employee's knowledge. In addition, the discriminatory acts that lead to a constructive discharge often take the form of performance evaluations, disciplinary sanctions, and other measures that are not overtly discriminatory.<sup>95</sup> The Tenth Circuit's precedent in *Green* will only serve to penalize employees who honestly fail to perceive that they have been forced into retirement until the limitations period has already elapsed.

The Tenth Circuit also exhibited flawed reasoning when it argued that measuring the start of the limitations period from the date of the employee's notice of resignation would afford the employee full control of the claim's accrual.<sup>96</sup> An employee's resignation due to constructive discharge is the equivalent of an involuntary discharge.<sup>97</sup> The court's argument dismisses the possibility that factors outside the employee's control may weigh on the ultimate decision to resign. Green's settlement agreement, for example, required Green to decide whether to retire or to accept a highly-inconvenient alternate job by a specific date, March 31, 2010.<sup>98</sup> The *Green* opinion implies that the decision to resign is reached entirely at the employee's convenience.<sup>99</sup> Other constructive-discharge cases demonstrate that a plaintiff does not consciously decide the most opportune time to resign but rather reacts to the employer's repeated acts of misconduct by resigning. In *Draper v. Coeur Rochester, Inc.*, for example, the plaintiff resigned after her claims of repeated acts of sexual harassment were received with derisive laughter from her supervisor.<sup>100</sup> The plaintiff in *Flaherty v. Metromail Corp.* was subjected to sexist remarks by her supervisor, who commented that women should be "barefoot and pregnant," not employed.<sup>101</sup> A subsequent supervisor agreed to meet with his male employees' customers but not with Flaherty's, thereby placing Flaherty's ability to generate business at a disadvantage.<sup>102</sup> Flaherty later discovered that the same supervisor referred to her as an "old bag" and planned to transfer her accounts to a younger, male account

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95. *See id.* at 1137 (stating that Green was called to an investigative interview for delaying the mail); *Fierro v. New York City Dep't of Educ.*, 994 F. Supp. 2d 581, 584 (S.D.N.Y. 2014) (stating that employer held unnecessary disciplinary meetings regarding plaintiff's work); *Gerhart v. Boyertown Area Sch. Dist.*, No. 00-CV-5914, 2002 U.S. Dist. LEXIS 11935, at \*2-4 (E.D. Pa. March 4, 2002) (stating that plaintiff schoolteacher rejected her principal's sexual advances and was assigned an inconvenient work schedule, purportedly because of "low enrollment," and that the same principal later gave the plaintiff a zero for "Personality" on an evaluation).

96. *Green*, 760 F.3d at 1144-45.

97. BARBARA T. LINDEMANN & DAVID D. KADUE, *WORKPLACE HARASSMENT LAW* 20-2 (2012) (noting that a resignation in response to intolerable working conditions is a constructive discharge and that "[t]he employee can thus treat the resignation as a formal discharge.").

98. *Green*, 760 F.3d at 1138.

99. *See id.* at 1144-45.

100. 147 F.3d 1104, 1106 (9th Cir. 1998).

101. 235 F.3d 133, 135 (2d Cir. 2000).

102. *Id.*

executive.<sup>103</sup> After suffering physical and emotional stress-related symptoms, Flaherty provided notice of her intent to retire.<sup>104</sup> The workplace only becomes intolerable so as to prompt the employee's resignation as a result of the employer's discriminatory actions, not the employee's caprices.<sup>105</sup>

An employee is often not in control of her date of resignation. In fact, particular instances of constructive discharge have resulted in the employee's physical sickness. In *Young*, for example, the plaintiff's employer abused the plaintiff during work, denied her annual and sick leave, and blocked her access to training facilities.<sup>106</sup> Young's complaint to her EEO counselor alleged that the pattern of abusive treatment caused her to feel sick and finally to resign.<sup>107</sup> If, under similar abusive conditions, a person chooses to resign, the decision is often made under significant emotional strain, not at the employee's leisure. Plus, in anticipating issues that may arise during litigation of the claim, an employee is sometimes forced to perform a difficult balancing act when judging the proper time to resign.<sup>108</sup>

The precedent set by *Green v. Donahoe* could also contribute to a significant public policy issue. Due to the nebulous nature of constructive-discharge claims, employees will want to file discrimination claims early in order to ensure that their grievances fall within the limitations period. A strict standard such as that set by *Green* would pressure employees to file discrimination claims after virtually every act of discriminatory conduct by their employers. Justice Ginsburg's dissent in *Ledbetter* seemingly anticipated this potential problem when it pointed out that under the majority's holding, each discriminatory pay reduction that the plaintiff "did not immediately challenge wiped the slate clean."<sup>109</sup> When an employee such as Green is expected to notify a counselor after a discrete discriminatory act but before that employee has realized the cumulative impact of the employer's actions, that employee will naturally want to file a complaint for every negative interaction with the employer, however minor.<sup>110</sup> Most problematic is the possibility that merited

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103. *Id.* at 136.

104. *Id.*

105. *See id.* at 138 (arguing that only the employee can judge when an employer's discriminatory conduct has made the work environment intolerable).

106. 828 F.2d 235, 237 (4th Cir. 1987).

107. *Id.*; *see also* Shuck, *supra* note 9, at 408 (citing *NLRB v. Saxe-Glassman Shoe*, 201 F.2d 238 (1st Cir. 1953) and noting that the female employee's discriminatory treatment at the hands of her employer was accompanied by health problems).

108. *See* RAYMOND F. GREGORY, UNLAWFUL AND UNWELCOME: SEXUAL HARASSMENT IN THE AMERICAN WORKPLACE 163 (2004) (observing that if an employee resigns too late, a court may find that her resignation was not a result of employer harassment and that if she resigns too early, "the court may conclude that the employer, given sufficient time, would have resolved those problems.").

109. 550 U.S. 618, 660 (2007) (Ginsburg, J., dissenting).

110. The problem is further complicated if a plaintiff lacks knowledge as to what constitutes a legally-actionable claim. *See* White, *supra* note 91, at 878 ("[M]any sexual harassment victims do not possess the legal expertise to know what types of harassment are serious enough to warrant or require a formal complaint.").

constructive-discharge claims will be lost if the employee does not act within the narrow window imposed by the Tenth Circuit's decision. Beginning the limitations period for constructive-discharge claims with the employee's resignation would solve this problem by establishing a specific event that triggers the administrative deadline.

When employees fall victim to mistreatment by their employers, they depend upon institutional remedies for relief. Constructive discharge is one field where courts have the opportunity to refine the law so as to best suit employment-discrimination plaintiffs' needs. Measuring the start of the limitations period in constructive-discharge cases from the time the employee decides to leave would guarantee that the employee has considered the full nature and effect of the employer's discriminatory behavior and filed an appropriate claim. The Tenth Circuit's holding in *Green* was inconsistent with case law dealing with continuing violations. The court's reasoning recalled *Ledbetter* in its preoccupation with employer acts instead of the reverberations of those acts. The opinion's assertion that setting the accrual date at the time the employee quits would place the statute of limitations within the employee's sole control ignored the realities of constructive discharges. Forcing employees to report discrimination every time it occurs instead of allowing them to appraise the full impact of their mistreatment will lead to a greater number of unnecessary EEO reports and therefore an impractical policy. If federal courts can appreciate the disadvantages faced by Title VII plaintiffs in bringing their claims, they will strive toward a more considered standard.