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TWO CONFLICTING FILING PERIODS FOR A CONSTRUCTIVE DISCHARGE CLAIM: WHICH ONE IS A BETTER MEASURE?

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TWO CONFLICTING FILING PERIODS FOR A CONSTRUCTIVE DISCHARGE CLAIM:

WHICH ONE IS A BETTER MEASURE?

By Aditi Kumar¹

Abstract

Constructive discharge is a long-standing phenomenon. The doctrine emerged in the 1930s in the context of alleged unfair labor practices under the National Labor Relations Act (NLRA). Constructive discharge occurs when the working conditions are so intolerable that a reasonable employee feels that she has no choice but to quit her job. The Supreme Court brought the discussion of constructive discharge to light in Pennsylvania State Police v. Suders² where it discussed this principle in a hostile work environment context. Over the years, there has been much debate over the time period when a constructive discharge claim should begin. Since constructive discharge can occur without a discrete act – such as a firing or a demotion – the majority circuits have held that starting the statute of limitations period from the date of the employee’s resignation better serves the aggrieved employee and is a more reasonable measure.

On the contrary, a few minority circuits hold that the time period should begin from the date the employee learns of the employer’s discriminatory conduct. Recently, this issue came before the Tenth Circuit in Green v. Donahoe,³ where it held that a constructive discharge claim accrues on the date of the discriminatory employment action that forces the worker to quit, not when he or she resigns. This decision has deepened the split between the circuits, and the Supreme Court granted certiorari in Green on April 27, 2015. With the end of this debate in sight, this paper examines the split between the circuits, analyzes the existing conflicting periods, and proposes the measure that should be adopted by the Supreme Court.

¹ A third year law student at the American University Washington College of Law, graduating in May 2015.


³ Green v. Donahoe, 760 F.3d 1135 (10th Cir. 2014).
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I. Introduction

A claim for constructive discharge most often results from a series of discriminatory actions on the part of the employer.\(^4\) These actions are frequently in the nature of continuing violation, i.e., repeated acts of discrimination.\(^5\) 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.\(^6\) There is a distinct cause of action on the basis of constructive discharge when the employer discriminates against an employee and purposefully makes the employee's job conditions unendurable.\(^7\) Remedies under a constructive discharge claim can include reinstatement of employment and back-pay past the date of “discharge.”\(^8\)

Historically, in the context of employment discrimination cases, the claim starts to accrue, for statute of limitations purposes, on the date the employee learns of the employer’s discriminatory conduct.\(^9\) This rule generally means that a claim accrues when the disputed employment practice — the demotion, transfer, firing, refusal to hire, or the like — is first announced to the plaintiff.\(^10\) However, in a constructive discharge case, the actionable conduct is not a discrete, identifiable act on part of the defendant.\(^11\) Therefore, several courts have held that in cases of a constructive discharge, a claim accrues on the date the employee resigned (while

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\(^5\) Id.


\(^11\) See supra note 9, at 138.
others cling to the date the employee learns of the employer’s discriminatory conduct for filing a claim). Over time, there has been much debate surrounding the accrual of a constructive discharge claim. The Circuits are split over which of two conflicting rules governs when the filing window for a constructive discharge claim opens under federal employment discrimination law. A recent case from the Tenth Circuit, *Green v. Donahoe*, has raised this issue once again and has deepened the split.

In *Green*, the United States Court of Appeals for the Tenth Circuit held that under Title VII, a constructive discharge claim accrues on the date of the discriminatory employment action that forces the worker to quit, not when he or she resigns. Thus far, the majority of the circuits, in decisions dating between 1987-2000, have held that constructive discharge claims accrue on the date an employee resigns; however, the D.C. and Seventh circuits have agreed with the Tenth Circuit. The petitioner in *Green* filed a writ of certiorari on November 25, 2015, to resolve the issue of, “Whether, under federal employment discrimination law, 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.”

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12 See generally Flaherty, 235 F.3d at 138; Draper, 147 F.3d at 1111; Young v. Nat'l Center for Health Servs. Research, 828 F.2d 235 (4th Cir. 1987); Hukkanen v. Int'l Union of Operating Eng'r's, Hoisting & Portable Local No. 101, 3 F.3d 281, 285 (8th Cir. 1993); American Airlines, Inc. v. Cardoza-Rodriguez, 133 F.3d 111, 123 (1st Cir. 1998).

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

14 The majority circuits include: the First Circuit; the Second Circuit; the Fourth Circuit; the Eighth Circuit, and the Ninth Circuit.

filed a Reply on March 18, 2015. The Supreme Court granted the Writ of Certiorari on April 27, 2015.

The period when a claim accrues can make the difference between determining whether a claim is viable. As the issue of timeliness is now in front of the Supreme Court, this paper sets out to evaluate both positions to help set a uniform standard for constructive discharge cases under Title VII. This paper examines the issue as presented to the Supreme Court and argues for the measure that needs to be adopted for determining the beginning of the statute of limitations period. Part II briefly describes the purpose of Title VII, the history of constructive discharge, and the remedies that are available under a constructive discharge claim. Part III analyzes the cases that exist on this issue and the divide that has been created by the circuits. Finally, part IV argues that the date of resignation rule as applied by the First, Second, Fourth, Eighth, and Ninth Circuits is a fairer means of evaluating the timeliness of a constructive discharge claim because the date of resignation is more easily ascertainable, places less burden on the aggrieved party, and more readily furthers the objective of title VII and the constructive discharge rule.

II. Purpose of Title VII and Constructive Discharge

1. History

Section 703(a) of the Title VII of the Civil Rights Act of 1964 (“Title VII”) makes it unlawful for employers to discriminate against any individual on the basis of race, color, religion, sex, or national origin.\(^1^6\) A viable Title VII claim requires jurisdictional coverage of the plaintiff and the employer, compliance with the procedural prerequisites to the filing of a suit,

and existence of a prima facie case. The theory of constructive discharge has been long recognized in the U.S. history. The doctrine of constructive discharge emerged in the 1930s in the context of alleged unfair labor practices under the NLRA “in which employers coerced employees to resign,” rather than simply discharging them. *Pennsylvania State Police v. Suders* brought the discussion of constructive discharge in the Title VII context to light. *Suders* explored a constructive discharge claim stemming from hostile work environment, and held that constructive discharge claims are viable under Title VII. The *Suders* court also decided whether a constructive discharge, resulting from supervisor harassment, is a tangible employment action, precluding assertion of the *Ellerth/Faragher* defense. The court


The prima facie case has four elements:

1. The plaintiff is a member of the protected class
2. The plaintiff was subjected to an adverse employment action
3. There was a causal connection between (1) and (2)
4. Employer liability

*Id.* at 1-8.


19 *Id.* at 142.

20 *Id.* at 140.

21 In two companion cases, *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 759 (1998), the Supreme Court held that a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. The court emphasized that “no affirmative defense is available...when the supervisor’s harassment culminates in a tangible employment action, such as a discharge, demotion, or undesirable reassignment. *Ellerth*, 525 U.S. at 765.

22 *Suders*, 142 U.S. at 148.
concluded that the assertion of Ellerth/Faragher defense does not come into play when a supervisor’s official act precipitates the constructive discharge; however, absent a tangible employment action, the defense is available to the employer whose supervisors are charged with harassment.\(^{23}\) Note that this paper is concerned with the timeliness of constructive discharge claims, and the conflict between tangible and non-tangible employment actions and the existence of a hostile work environment is beyond the scope of this paper.\(^{24}\)

\(^{23}\) Id. at 140-41.

\(^{24}\) The difference between claims that involve discrete acts of discrimination and those that involve claims based on hostile work environment was explored in Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002). In Morgan, the Supreme Court determined whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside” of the requirements of 42 U.S.C. 2000e-5(e)(1) that a Title VII plaintiff file a charge with the EEOC within 180 or 300 days after the alleged unlawful employment practice occurred. Id. at 101, 105-05. The court concluded that the answer depends on whether the alleged discrimination consists of discrete discriminatory acts or a series of related acts creating a hostile work environment. Id. at 115. The court explained that “hostile environment claims are different in kind from discrete acts,” because “their very nature involves repeated conduct” and they “are based on the cumulative effect of individual acts.” Id. Where a series of related acts create an ongoing hostile work environment, a charge is timely if any act contributing to the hostile work environment occurred within the charge period. Id. at 117-118.

On the contrary, in another Supreme Court case, Delaware State Coll. v. Ricks, a college professor sued Delaware State College when he did not receive a tenured position in the education department after his 1-year contract term expired in June 30, 1975. Id. at 252-53. The Supreme Court held that Ricks’ complaint was untimely, id. at 256, and that Ricks argument that the limitations periods did not commence to run until his 1–year “terminal” contract expired cannot be squared with the allegations of the complaint. Id. at 257. The Supreme Court stated, “mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination.” Id. Note, however, that the discharge in Ricks was the inevitable result of the
2. **Statutory Requirements**

The issue of timeliness comes down to ensuring that the statutory requirements put in place to promote justice are met.

“Statutes of limitation ... promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.”

The statute of limitations for filing a claim under Title VII is somewhat different for federal employees and other workers. For private-sector employees, a charge of discrimination must be filed with the Equal Employment Opportunity Commission (EEOC) within 180 days, although the time can be extended to as much as 300 days if the claim is pursued initially with a state or local agency empowered to prosecute discriminatory employment practices. If the EEOC finds no discrimination or is unsuccessful at resolving the claim, the employee can then seek judicial review. Federal employees, however, must begin the process by contacting within

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employer’s tenure denial, which is unlike most constructive discharge cases. Further, the discussion in Morgan and Ricks proves that constructive discharge is not a new phenomenon and has been a long-standing theory.


45 days an EEO counselor in the employee's agency. If the counselor does not resolve the matter, the employee can file a charge with the employing agency. Once the agency has investigated and issued a final decision, the employee can either appeal to the EEOC and then pursue judicial review, or opt out of further administrative proceedings and file directly in court.

3. Remedy

In addition to affecting an employee’s ability to bring a claim, the timeliness factor affects the remedy available to the employee. The language of section 706(g) specifically provides for back-pay as an appropriate Title VII remedy. Several circuits have applied the

29 See Pre-Complaint Processing, 29 C.F.R. § 1614.105(a), which states that, “Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45–day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.”

30 See id.


32 “If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful
general rule that employees are entitled to awards such as back-pay past the date of resignation and reinstatement only if they were actually or constructively discharged from their employment. The rationale behind application of the rule has most often been that “society and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships,” a rationale first stated by the Fifth Circuit in *Bourque v. Powell Electrical Manufacturing Co.* The Ninth Circuit expanded on that principle in *Thorne v. City of El Segundo*, emphasizing that an employee “should not quit at the first sign of institutional discrimination.” The *Thorne* court also stated that restricting back-pay awards “encourages the employee to work with supervisors within the existing job setting and employment relationship in an effort to overcome resistance within that workplace and to eradicate the discrimination.”

As an incentive for employers to eliminate discriminatory practices, back-pay has a direct connection with Title VII's primary objective of achieving “equality of employment opportunities and [removing] barriers that have operated in the past...” Reinstatement, or

employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back-pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back-pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back-pay otherwise allowable.” 42 U.S.C. § 2000e-5(g) (2014).

33 *See generally Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61 (5th Cir. 1980)

34 *See generally Thorne v. City of El Segundo*, 802 F.2d 1131, 1134 (9th Cir. 1986)

35 *See id.*

alternatively front-pay, may also be appropriate Title VII remedies for returning a victim of discrimination to the position he or she would have occupied absent the discrimination. Several circuits have approved front pay as a means of making plaintiffs whole for losses caused by discrimination.\textsuperscript{37}

Additionally, the Supreme Court has instructed that a complete remedy “should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.” \textsuperscript{38} Remedy is only relevant if the employee is allowed to bring in a suit against discriminatory treatment in the first place. The analysis of the past and recent cases below attempts to shed light on the conflict involving the viability of constructive discharge claims.

\section*{III. Relevant Case Law and Analysis}

The recent Tenth Circuit case that stirred the discussion of the time limitation in constructive discharge cases involved a former postmaster, who claimed that the U.S. Postal Service retaliated against him after he made employment discrimination claims.\textsuperscript{39} The plaintiff was investigated, threatened with criminal prosecution, and put on unpaid leave.\textsuperscript{40} Shortly after being put on leave, the plaintiff signed a settlement agreement with the Postal Service that provided him paid leave for three and a half months, after which he could choose either to retire

\textsuperscript{37} See Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982) (citing United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 932 (10th Cir. 1979)).

\textsuperscript{38} Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

\textsuperscript{39} Green, 760 F.3d at 1136.

\textsuperscript{40} See id.
or to work in a position that paid much less and was about 300 miles away.\textsuperscript{41} Ultimately, the plaintiff decided to retire.\textsuperscript{42} The plaintiff then filed a complaint against Defendant Patrick Donahoe, the Postmaster General, in the United States District Court for the District of Colorado, alleging five retaliatory acts in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e \textit{et seq}, namely: (1) a letter notifying him to attend an investigative interview; (2) the investigative interview; (3) a threat of criminal charges against him; (4) his constructive discharge; and (5) his placement on unpaid leave (also known as emergency placement).\textsuperscript{43} The district court dismissed the first three claims for failure to exhaust administrative remedies. On the two remaining claims it granted summary judgment for Defendant, ruling that the constructive-discharge claim was untimely and that emergency placement was not a materially adverse action.\textsuperscript{44} An appeal followed, and the judgment below except for the emergency-placement claim was affirmed. The court of appeals reasoned that holding the date of resignation as a “discriminatory act” stretches the language of 29 C.F.R. § 1614.105(a)(1) too far, and “the proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful.”\textsuperscript{45} This is the case that is now in front of the Supreme Court, and has set up the scenario for the question of timeliness to be answered.

As the Court in \textit{Green} acknowledged, several circuits have weighed in on this issue in the past. The Fourth Circuit was the first to articulate the majority rule in constructive discharge

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} \textit{Id.}

\textsuperscript{45} \textit{Id.} at 1144 (quoting \textit{State Coll. v. Ricks}, 449 U.S. 250 (1980).
cases over twenty-five years ago.\textsuperscript{46} In \textit{Young}, the Fourth Circuit held that, in constructive discharge cases, periods of limitations begin to run on the date of the resignation.\textsuperscript{47} Plaintiff Dr. Young sued her former employer, the National Center for Health Services Research (NCHSR) under Title VII, alleging discrimination based on national origin.\textsuperscript{48} Dr. Young contacted an EEO counselor twenty-nine days after she resigned, complaining about the abusive treatment at work and arbitrary denial of leave, and stated that the continual harassment led her to feel sick and forced to resign.\textsuperscript{49} Two days after meeting with the counselor, Dr. Young filed a formal complaint with the EEOC, and later filed a \textit{pro se} complaint at the district court. The district court found that Dr. Young failed to bring her grievance to the EEO counselor within the requisite time period and dismissed the suit.\textsuperscript{50} The Fourth Circuit reversed the district court decision. The Fourth Circuit reasoned that:

“It is settled law that a federal employee must seek administrative review of her grievance before filing a suit for unlawful discrimination in employment. It is also settled that the applicable administrative deadlines run from the time of the discriminatory act, not from the time of a later, inevitable consequence of that act. 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

\textsuperscript{47} \textit{Id.} at 238.
\textsuperscript{48} \textit{Id.} at 236.
\textsuperscript{49} \textit{Id.} at 237. At the time, an aggrieved party had 30 days to bring a grievance to an EEO counselor under 29 C.F.R. \textsection 1613.214(a)(1)(i) (1986).
\textsuperscript{50} \textit{Id.}
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.\footnote{Id. at 237-38. (citing Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir.1985); EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 672 (4th Cir.1983)).}

As a result, the court held that there was evidence of continual harassment which could certainly make working conditions so intolerable that a reasonable person would feel forced to resign.\footnote{Id. The court also noted that Dr. Young did not use the word constructive discharge in her EEO complaint; however, as the complaint was pro se, the court stated that the complaint is to be construed liberally and the omission is not fatal. Id.}

The Ninth Circuit echoed the Fourth Circuit decision in Draper v. Coeur Rochester, Inc., holding that in constructive discharge cases the “periods of limitation begin to run on the date of the resignation.”\footnote{Draper v. Coeur Rochester Inc., 147 F.3d 1111 (1998).} In Draper, plaintiff Katie Draper appealed the district court’s grant of summary judgment in favor of her formal employer on the claim that the constructive discharge period began to run when the discriminatory acts occurred.\footnote{Id. at 1105.} Draper was a Hispanic woman who began to work for Coeur at its mining operation in November 1992.\footnote{Id.} For the first three months of her employment, she was a temporary laborer; thereafter, she was permanently assigned to Coeur’s “D” and was the only woman on the crew.\footnote{Id.} Joe Anelli was an equipment operator on

\footnote{51 Id. at 237-38. (citing Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir.1985); EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 672 (4th Cir.1983)).}

\footnote{52 Id. The court also noted that Dr. Young did not use the word constructive discharge in her EEO complaint; however, as the complaint was pro se, the court stated that the complaint is to be construed liberally and the omission is not fatal. Id.}

\footnote{53 Draper v. Coeur Rochester Inc., 147 F.3d 1111 (1998).}

\footnote{54 Id. at 1105.}

\footnote{55 Id.}

\footnote{56 Id.}
the crew and soon became Draper’s primary supervisor. Draper worked for Coeur for a period of two years, and throughout her employment, Anelli made sexual remarks that caused her to feel uncomfortable. On several occasions, Anelli made comments to Draper about his sex life, commented about Draper’s “ass” and joked to other members of the crew that “it would be fun to get into Draper’s pants,” made lewd comments about Draper on the loudspeaker, and forced Draper to eat lunch in his office. In June 1994, Draper complained to the management, but to no avail. In November 1994, Draper again complained but the harassment continued. On December 7, 1994, Draper went to Anelli’s office to complained, and while she was at the office, Anelli called his supervisor on the phone and laughed with him about Draper’s complaints. Draper concluded that there was no change that the harassment would stop and quit on the spot. Draper filed a charge of sexual harassment with the Nevada Equal Rights commission on July 5, 1995. On September 15, she filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). Coeur moved for summary judgment on the grounds that Draper failed to file her Title VII claims with the 300-day limitations period, and

57 Id.
58 Id.
59 Id. at 1105-06.
60 Id. at 1106.
61 Id.
62 Id.
63 Id.
64 Id.
65 Id. at 1106-07.
66 Although Title VII provides that a plaintiff seeking relief in a discrimination case must file a charge with the EEOC within 180 days of the alleged unlawful employment practice, the period is extended to 300 days if the
that there was no triable issue of material fact as to any of her discrimination claim. The district court granted the motion, and with respect to the constructive discharge claim held that, “though the termination of [her] employment may have resulted from some act of unlawful discrimination, discharge by itself is not an ‘act of discrimination’ under the statute.”

The Ninth Circuit reversed the district court’s decision on the constructive discharge claim and held that, “the date of discharge triggers the limitations period in a constructive discharge case, just as in all other wrongful discharge.” Therefore, “the date of Draper’s quitting falls within the relevant period of limitations, as it unquestionably does here, her claim is timely filed.” The court further noted that:

“Of course, Draper retains the burden of proving that her termination was a constructive discharge — that, in the view of a reasonable person, her conditions of employment had become intolerable. The frequency and freshness of the instances of harassment may enter into that determination. If the trier of fact finds, however, that under all of the circumstances the termination was a constructive discharge, then the discharge becomes the actionable event for purposes of the 300–day limitation. Our decision determines only when the claim arose, not whether its merits have been established; in reviewing the

plaintiff first institute proceedings with a state or local agency that has the authority to “grant or seek relief.” 42 U.S.C. § 2000e-5(e)(1). Moreover, like a statute of limitation, however, the limitation period contained in Title VII is “subject to waiver, estoppel, and equitable tolling.” Draper, 147 F.3d 1107 (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982)).

67 Draper, 147 F.3d at 1107.

68 Id. (emphasis in original).

69 Id. at 1110.

70 Id.
district court's summary judgment that the claim was time-barred, we necessarily assume that Draper can prove a constructive discharge.”

Expressly “agree[ing] with the Ninth Circuit,” the Second Circuit in Flaherty v. Metromail Corp., held that “the date of discharge triggers the limitations period in a constructive discharge cases, just as in all other cases of wrongful termination. In Flaherty, the plaintiff, Mary Flaherty, claimed that she experienced gender and age discrimination from her supervisors at work on an everyday basis for over four years. Through the period of discrimination, the employee claimed, she “continued to experience stress-related symptoms, both physical and emotional, allegedly [as a] result of the discrimination. In August 1996, Flaherty was told that she would be terminated if she did not meet certain budgetary requirements even though most of her accounts were being taken away from her. The discrimination continued, and Flaherty ultimately retired in June 1997. The district court determined that Flaherty’s cause of action accrued on the day she received notice of her looming termination, August 1996, and therefore held that her case was time-barred. In reversing its decision, the Second Circuit made clear that the filing period begins when an employee gives “definite notice of her intention to retire” – a rule, the court emphasized, “should be the same in all cases of constructive discharge.”

71 Id.
73 Id. at 135-36.
74 Id. at 136.
75 Id. at 135-136.
76 Id. at 136.
77 Id. at 137.
78 Id. at 138.
In addition to the aforementioned three circuits, the First and Eighth Circuits have adopted the same rule. In *Hukkanen v. International Union of Operating Engineers, Hoisting & Portable Local No. 101*, the Eighth Circuit held that an employee’s EEOC complaint was timely after concluding that her employer’s “last act of discrimination against [her] was her constructive discharge.” \(^{79}\) Hukkanen was subjected to sex discrimination through August 1984. \(^{80}\) She resigned in October and filed her EEOC charge in March 1985. \(^{81}\) Given the 180-day filing period, her charge was timely when measured from the date of resignation, but would have been untimely if measured from the employer’s alleged last act of discrimination, as the Tenth Circuit’s rule would have required. Similarly, the First Circuit has held that, for a constructive discharge claim, “the limitations period commenced when the employees elected to participate” in an early retirement program. \(^{82}\) In another case, *American Airlines v. Cardoza-Rodriguez*, as part of a workforce reduction program, employees were presented with a Voluntary Early Retirement Program (VERP) which allowed them a choice of retiring early (or risking involuntary termination) to all the employees on the same date, but it gave them roughly two months to decide whether to accept. \(^{83}\) The court used the various individual dates on which each employee submitted his or her formal resignation as the beginning of the filing periods. \(^{84}\)

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80 *Id.*

81 *Id.*


83 *Id.* at 114.

84 *Id.* at 123.
The Tenth Circuit’s analysis was faulty when it suggested that “perhaps” these decisions of our sister circuits could be distinguished on the ground that the last act of discrimination was within the limitations period. In Young, for example, Dr. Young’s claim was timely only because the Fourth Circuit measured the filing window from the date the employee officially resigned. Young filed her EEO claim thirty-seven days after her suspension, however, she resigned twenty-nine days before she filed, and, on that basis, the claim was timely. The Ninth Circuit expressly adopted the general rule established by the Fourth Circuit in Young. And the Second Circuit, as noted, stated that its date-of-resignation rule “should be the same in all cases of constructive discharge.” If Mr. Green had been employed in any of the circuits that have a date-of-resignation rule, his claim would have been held as being timely and precedent would require it to be resolved on its merits.

By contrast, in three circuits, employees like Mr. Green lose their claims before reaching the merits. The Seventh Circuit was the first to hold that the filing period for a claim of constructive discharge is triggered on the date that an employer “takes some adverse personnel action” against its employee. In Davidson v. Indiana-American Water Works, Plaintiff Vivian Davidson brought suit against her former employer, Indiana American Water Company (IAWC), alleging that a hostile work environment and a continuous pattern of retaliation led to her

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85 Green, 760 F.3d at 1144.
86 Young, 828 F.2d at 238.
87 Id. at 238. Note, at the time, federal employees like Young and Green had thirty days to contact an EEO counselor Id. at 237.
88 See Draper, 147 F.3d at 1111.
89 Flaherty, 235 F.3d at 138.
90 Davidson v. Indiana-American Water Works, 953 F.2d 1058, 1059 (7th Cir. 1992).
constructive discharge.\textsuperscript{91} The district dismissed her suit on the basis that Davidson’s claim was untimely, and the Seventh Circuit affirmed.\textsuperscript{92} Davidson, who worked for IAWC for twelve years began to experience harassment and discrimination against her from her supervisor beginning in January 1985.\textsuperscript{93} On October 3, 1985, Davidson filed the first of two charges with the EEOC, in which she alleged that the transfer from accounting to billing was discriminatory.\textsuperscript{94} The EEOC dismissed the charge because it was unable to substantiate her allegations.\textsuperscript{95} On July 9, 1986, Davidson filed her second EEOC charge, based on IAWC’s retaliation against her for filing the first charge and constructively discharged her.\textsuperscript{96} The court stated that, to be timely, the alleged discriminatory conduct of which Davidson complained had to occur on or after January 10, 1986, during the 180-day period preceding the filing of her July 9, 1986 charge.\textsuperscript{97} Davidson argued that the statute of limitations for constructive discharge claims begins to run on the last day that an employee appears at work, and therefore her July 9, 1986 complaint was timely, having been filed within the 180-day period following her constructive discharge on January 13, 1986.\textsuperscript{98} Nevertheless, the circuit court held that Davidson must prove the existence of a violation of

\textsuperscript{91} Id. at 1058-59.

\textsuperscript{92} Id. at 1059.

\textsuperscript{93} Id.

\textsuperscript{94} Id.

\textsuperscript{95} Id.

\textsuperscript{96} Id.

\textsuperscript{97} Id. at 1060.

\textsuperscript{98} Id.
discriminatory conduct which occurred within the statutory period, in order to recover on her claims, and absent such evidence, Davidson’s EEOC charge “was stale.” 99

Further, in *Mayers v. Laborers' Health & Safety Fund of Northern America*, the D.C. Circuit held that Plaintiff’s constructive discharge claim failed as a matter of law because she “failed to identify a single act of discrimination or retaliation within the 180–day period.” 100 Plaintiff Hazel Mayers worked for Defendant from November 1992 until January 2001, initially as a data entry clerk, and then, beginning in February 1996, assembling desktop publishing materials. 101 During the course of her employment Plaintiff developed rheumatoid arthritis, making her new responsibilities — cutting, stapling, and the like — painful and difficult to complete. 102 Plaintiff notified defendant of her disease soon after being diagnosed and requested accommodations such an electric stapler and cutter. 103 The defendant failed to provide plaintiff with the requested tools even a year later, when plaintiff was promoted and had twice the work. 104

In April 1999, plaintiff supplied a letter by her physician to the defendant stating that the plaintiff should be put on light duty. 105 The plaintiff was not put on light duty even after a year. 106 The breaking point for plaintiff was a project that she was forced to finish after returning

99 Id.


101 Id. at 366.

102 Id.

103 Id.

104 Id.

105 See id. at 366-67.

106 See id. at 367.
from her vacation.\textsuperscript{107} Plaintiff began one-week vacation on December 22, 2000, which happened to be in the middle of a 4,000–brochure project with a December 29 deadline.\textsuperscript{108} Plaintiff believed that the project would be finished by someone else in her absence, however, when she returned on January 2, 2001, the project had not been completed and she had to finish the project the next day, severely exacerbated her arthritis.\textsuperscript{109} Plaintiff resigned on January 19, 2001, effective January 26, 2001, and had applied for a position with another employer, even before the January incident, where she began work on January 29, 2001.\textsuperscript{110} On March 12, 2001, Mayers filed a complaint with the EEOC alleging that defendant failed to reasonably accommodate her arthritis, retaliated against her for requesting a reasonable accommodation, and constructively discharged her.\textsuperscript{111} The district court rejected plaintiff’s constructive discharge claim holding that plaintiff had “\emph{voluntarily} left her employment with [defendant],” and the D.C. Circuit affirmed because of its reliance on \emph{Morgan}'s second limiting principle which requires that Plaintiff show one offending act within the statutory period.\textsuperscript{112}

\textbf{Now, more recently, the Tenth Circuit has created a roadblock for the aggrieved employee to bring a suit on the claim of constructive discharge.}\textsuperscript{113} The Tenth Circuit correctly noted that a constructive-discharge charge cannot be submitted before the employee quits her

\begin{flushright}
\textsuperscript{107} \textit{Id.} \\
\textsuperscript{108} \textit{Id.} \\
\textsuperscript{109} \textit{Id.} \\
\textsuperscript{110} \textit{Id.} \\
\textsuperscript{111} \textit{id.} \\
\textsuperscript{112} \textit{Id.} \\
\textsuperscript{113} \textit{Green,} 760 F.3d at 1145.
\end{flushright}
job. However, it is incorrect in proposing that an employee who later decides to quit can simply amend a timely charge to include an allegation of constructive discharge. Since resignation is a required element of constructive discharge, it makes no sense for the filing period for a constructive discharge claim to begin before the employee has resigned. Further, amending the complaint, as proposed by the Tenth Circuit, only adds additional stress and complications to the aggrieved employee. It is imperative that we answer the question of how time limits apply to claims brought under the constructive discharge theory in a timely manner. Thousands of constructive discharge claims are brought each year. In 2014 alone, the EEOC received 1,487 constructive discharge cases on the basis of race, 2100 on the basis of sex, 2284 on the basis of retaliation, and 1,142 on the basis of ADA. The resolution to this deep and longstanding conflict among the circuits is on the horizon with the Tenth Circuit case.

IV. Conclusion

When resolving the conflict between the circuits in Green, the Supreme Court should favor the facts and the arguments presented by the majority circuits, and hold that the statute of limitations in a constructive discharge case should begin from the date of the resignation. Young held that a resignation can be a “discriminatory act” for the purpose of a constructive discharge claim as “continual harassment... could certainly make working conditions so ‘intolerable’ that a reasonable person would feel forced to resign.” There is definitely merit in Young’s argument. A resignation is not only a natural consequence of continual harassment, but it is the

114 Id.
115 Id.
117 Young, 828 F.2d at 238.
final straw that forces an aggrieved employee to file a suit. An employee cannot predict that the
totality of the discrimination against her will force her to resign. In addition, discriminatory acts
in most constructive discharge cases are not discrete or identifiable.118 It is only when the
conditions become “so intolerable”119 that the employee feels helpless and is ultimately forced to
resign. This “final straw” is different for each person and is utterly difficult to tie it to one event
or chains of event. Therefore, requiring an employee to be bound to an unmarked event in the
timeline confuses the issue and works against the employee and undermines the purpose of Title
VII.

Further, the Supreme Court recognized the continuing violation theory in Morgan when it
stated that the employee may challenge the “entire hostile work environment” as long as “any
act that is part of the hostile work environment” occurs within the statute of limitations period.120
The use of the words “any act” includes the final act of discrimination, which is the termination
itself.

Furthermore, the Tenth Circuit was incorrect in noting that “setting [discriminatory act]
at the date of resignation would run counter to an essential feature of limitations periods by
allowing the employee to extend the date of accrual indefinitely, thereby ‘placing the supposed
statute of repose in the sole hands of the party seeking relief.’” This analysis is faulty because
there is little reason to believe that delayed suits would materialize. In addition, this analysis
does not take into account the well-established proposition from Suders that “a constructive
discharge involves both an employee’s decision to leave and the precipitating conduct.”121 Both

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118 Supra note 9.
119 See Lockheed Martin Corp, 717 F.3d at 1133.
120 Morgan, 536 U.S. at 117-118 (emphasis added).
121 Suders, 542 U.S. at 148.
the reaction by the employee and the conduct of the employer are key facts, and one party, by itself, cannot “extend the date of the accrual indefinitely.”

Lastly, the McDonnell Douglas burden-shifting framework serves as a check to the employee’s claim on the basis of merit.\textsuperscript{122} Under this scheme, after the Plaintiff has filed a timely complaint, it then has the initial burden of establishing a \textit{prima facie} case of discriminatory practice.\textsuperscript{123} Doing so shifts the burden to Defendant to produce a legitimate, nondiscriminatory justification for taking the disputed employment action.\textsuperscript{124} If Defendant so provides the burden shifts back to Plaintiff to show that the proffered reason is a pretext for unlawful discrimination.\textsuperscript{125} The employee may demonstrate pretext “by showing the employer’s proffered reason was so inconsistent, implausible, incoherent, or contradictory that it is unworthy of belief.”\textsuperscript{126} A case should not be stifled before it has a chance to be decided on merits just because there are conflicting statutory periods in different jurisdictions.

As a result, the date of resignation should be adopted as the appropriate measure for constructive discharge claims, and the Tenth Circuit case on appeal should be decided accordingly.

\textsuperscript{122} See McDonnell Douglas Corp. v. Green, 411 U.S. 792,802 (1973).

\textsuperscript{123} Id.

\textsuperscript{124} Id.

\textsuperscript{125} Id.

\textsuperscript{126} Stover v. Martinez, 382 F.3d 1064, 1070 (10th Cir. 2004).