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Justices Offer Clarity For Constructive Discharge Timeline

By **Vin Gurrieri**

Law360, New York (May 23, 2016, 9:55 PM ET) -- The U.S. Supreme Court on Monday pegged the start date of a worker's constructive discharge claim to the time they resign rather than the last alleged act of discrimination they endured, a benchmark that attorneys say eliminates uncertainty for both employers and workers in litigating such claims.

Led by Justice Sonia Sotomayor, a seven-justice majority ruled that the clock for a claim of constructive discharge — when an employer creates an environment so adversarial that an employee feels forced to resign — starts running when an employee tenders their resignation.

The ruling vacated a Tenth Circuit ruling that the 45-day clock for public-sector employees should start at the time of an employer's last alleged act of discrimination that forces the worker to quit, and sent back to the appellate court the case of former U.S. Postal Service worker Marvin Green, who claimed he was forced to quit after he filed a racial bias complaint with the Postal Service Equal Employment Opportunity Office.

Douglas D. Haloftis of Barnes & Thornburg LLP noted that the case was unusual in that both Green and the federal government were arguing in favor of the same rule, which ultimately benefits both sides by offering them a practical system for approaching constructive discharge claims.

"It doesn't benefit one side of the bar but [instead] serves them both well," Haloftis said.

Here, Law360 looks at four key takeaways from the high court's decision.

There's a Clear Standard

By setting a standard that the timer on legal claims in constructive discharge cases starts ticking when an employee gives notice, concluding in part that an employee's resignation is part of the "complete and present cause of action" for a constructive discharge claim that is necessary before a limitations period can begin to run.

In Green's case, the majority said that his resignation wasn't merely an inevitable consequence of the discrimination he suffered, but rather an essential part of his constructive discharge claim. That is, Green could not sue for constructive discharge until he actually resigned, the majority said.

Brian D. Netter, who co-heads Mayer Brown LLP's Supreme Court and appellate practice, said that the

case involved a narrow issue of timing, but that "nothing about the case changes what constitutes constructive discharge."

But even though the constructive discharge standard remains unchanged, Haloftis said the ruling provides plaintiffs with clarity over how much time they have to file a constructive discharge claim, while employers gain clear knowledge the length of time they have before any potential risks associated with such a claim have been put to rest.

"Having definitive benchmarks is beneficial to both sides," Haloftis said.

Kimberly A. Yourchock of Honigman Miller Schwartz and Cohn LLP said that that even though issues concerning the timing of constructive discharge claims don't arise often, the high court's ruling does "make the line clearer."

"It takes the guesswork out of [determining] when is the operative date of the last discriminatory act," Yourchock said.

Meanwhile, R. Scott Oswald, managing principal of plaintiffs firm The Employment Law Group PC, said the ruling results in "an easy to follow rule" that is easy for people without legal backgrounds to understand.

"This is the Supreme Court at its best: Delivering justice while keeping it real," Oswald said. "What's especially heartening about Justice Sotomayor's decision is that it is rooted in the real world of work. She uses compelling illustrations to show why the Tenth Circuit was wrong, as with a teacher who would be denied justice if she suffered intolerable bias yet waited until the end of the school year to resign."

Both Yourchock and Oswald noted however that lower courts will now have to flesh out exactly what constitutes a notice of resignation.

"The one question that the Supreme Court didn't resolve is what constitutes notice," Yourchock said. "It'll be interesting to see how the Tenth Circuit resolves that issue."

There May Be Similar Effects for Private Employers

Although Green's case concerned a public employee taking on federal employer, the precedent set by the Supreme Court could ultimately extend beyond just the public sector and set a standard for private employers as well.

In a footnote, Justice Sotomayor wrote that the federal regulation at issue that outlines the process for a federal employee to sue his employer for Title VII discrimination has a parallel for private employers.

The private-sector regulation, according to the ruling, allows for either a 180-day or 300-day time period for filing a charge of discrimination with the U.S. Equal Employment Opportunity Commission.

Although the language in the two regulations is different, the high court said the EEOC treats the federal and private-sector employee limitations periods as identical in operation.

"The important takeaway is that the court was clear that the same rule is going to apply to the private sector," Ted Schroeder of Littler Mendelson PC said, noting the high court offered no indication that it

would impose a different rule on private-sector employers.

The Justices' Alternatives Were Inadequate

In choosing the approach it did when it started the limitations period at the point of an employee's resignation, the high court took what some attorneys say was the most practical approach.

In a concurring opinion, Justice Samuel Alito offered a more nuanced proposal, arguing that there are actually two distinct types of constructive discharges — one that includes discriminatory intent by an employer to force a worker to quit, and one that lacks that intent.

Justice Alito opined that an employee's resignation should trigger a fresh limitations period if the resignation itself constitutes an "intentionally discriminatory" act by the employer that is designed to force an employee to quit.

But if the employer lacks that intent, the limitations period should run from the discriminatory act that precipitated the resignation, Justice Alito said.

Justice Sotomayor, however, rejected Justice Alito's proposed framework in the majority opinion.

"This sometimes-a-claim, sometimes-not theory of constructive discharge is novel and contrary to the constructive discharge doctrine," Justice Sotomayor wrote in reference to her colleague's concurrence.

Justice Sotomayor added that Justice Alito's proposed framework would necessarily have to include both that not only was the discrimination so bad the employee had to quit and that was the employer's plan all along — requirements that high court precedent doesn't currently demand.

For Haloftis, going the route of Justice Alito "would have amplified uncertainty," while Schroeder said Justice Alito's concurrence "would be a nightmare to implement."

"Lower courts would have to create an entire framework for how [Justice Alito's proposed standard] is administered," Schroeder said. "In the big picture, it would create years of litigation and uncertainty to answer those questions."

Employees Shouldn't Wait to Quit

In a dissent, Justice Clarence Thomas expressed concern that under the majority's rule, an employee could choose to indefinitely extend the limitations period on a constructive discharge claim by simply waiting to resign.

But the majority called Justice Thomas' concern "overblown," while adding that an employee isn't likely to stay in an intolerable environment just to add a little time to their limitations period.

If anything, the majority said that employees who want to win a constructive discharge claim are incentivized to quit as soon as possible since the claim requires proof of a causal link between the allegedly intolerable conditions and the resignation.

But while the high court's ruling theoretically means employees can preserve a constructive discharge claim by delaying their resignation, attorneys say most workers aren't likely to wait very long and could

encounter trouble if they do.

"I don't believe there's a whole lot of incentive for employees to extend things," Schroeder said, adding that most employees don't have the legal sophistication to know the nuances of the law when deciding whether to quit a job where they allegedly face discrimination.

Additionally, the standard for proving constructive discharge is high and remains unchanged as a result of Monday's ruling.

That standard requires that a plaintiff show a reasonable person would have felt they had no choice but to resign to prove constructive discharge. But a plaintiff who waits too long to quit could undermine the merits of their actual constructive discharge claim, Schroeder said.

"I don't see employees waiting months on end and still being able to present a viable [constructive discharge] claim," Schroeder said.

Haloftis for one said that any employee who decides to wait a long period of time before resigning "does so at their own peril" because they are potentially endangering any underlying discrimination claims.

"Employees could foreclose the ability to accrue damages because the time period [on underlying discrimination claims] is going to run," Haloftis said. "The ruling doesn't encourage plaintiffs to wait."

--Editing by Katherine Rautenberg and Kelly Duncan.
