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Federal Employment Law: Debating *Green v. Brennan*

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Editor's note: Employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate) are back to debate the May 23, 2016, decision of the US Supreme Court in Green v. Brennan, which held that under Title VII of the Civil Rights Act of 1964, as amended, the statute of limitations for constructive discharge/termination cases begins to run when the employee gives notice of resignation, not at the time of the employer's last act of alleged discrimination.

Nancy: The statue of limitations under Title VII has undergone significant change in recent years, including under *National Railroad Passenger Corporation v. Morgan* (2002), which announced different counting rules for termination cases (counting from the date of the termination) and harassment cases (counting from the date of the last harassing act). "Constructive discharge" or "constructive termination" is when the employee quits because really, really bad stuff happened at work, with no reasonable hope of repair.

Deb: For employer advocates, *Green v. Brennan* means that the employee gets to quit whenever the employee wants, thus controlling the statute of limitations and unfairly surprising the employer and manipulating management prerogative. Worse, while this is a Title VII case involving a federal employee working for the US Postal Service under federal EEO rules (that require federal employees to contact an EEO officer within 45 days of the discrimination), the holding will apply to all private employees suing under Title VII with its 180/300-day deadlines. The federal courts are likely to apply its reasoning to all other federal employment statutes.

Previously, cases under Title VII law held that the statute of limitations began to run upon occurrence of the "matter alleged to be discriminatory." In *Green*, the Supreme Court held that the "matter alleged to be discriminatory" is the employee's resignation, and not the employer's act that (allegedly) triggered the resignation. This will allow employees to manipulate the judicial calendar and likely result in fewer successful motions to dismiss on statute of limitations grounds.

Nancy: It's about time that employees get to use the calendar to their strategic benefit, especially because under federal law, filing deadlines are short. In most decisions for "regular" terminations initiated by the employer, the statute of limitation is held to begin to run *when the employer fires (or demotes or transfers)* the employee, not when the employee later stumbles on information by which it can reasonably be concluded that illegal discrimination was taking place, even though in 2007 the Supreme Court left open the discovery rule door in *Ledbetter v. Goodyear Tire & Rubber Co.* The New Hampshire Supreme Court has not ruled on whether the discovery rule of RSA 508:4 or its common law predecessor applies to statutory discrimination claims under RSA 354-A.

Deb: The NH Commission for Human Rights and the New Hampshire Supreme Court tend to follow federal court interpretations of federal employment law when interpreting our state anti-discrimination statute.

Nancy: Well, I hope they follow the holding in *Green*!

Deb: The *Green* court explained that the statute of limitations begins to run "when the plaintiff has a complete and present cause of action," and that a wrongful termination/wrongful discharge case can't occur until the employee resigns: "A plaintiff must prove first that he was discriminated against by his employer to the point where a reasonable person in his position would have felt compelled to resign... But he must also show that he actually resigned..." (A constructive discharge involves both an employee's decision to leave and precipitating conduct).

In other words, an employee cannot bring a

constructive-discharge claim until he is constructively discharged. Only after both elements are satisfied can he file suit to obtain relief.

Nancy: Well, of course! Otherwise, the plaintiff would have to file a charge of discrimination before resigning, perhaps before even anticipating the resignation, thus forcing an early filing, which if not earlier dismissed, would have to be amended upon termination. I remember learning in law school (although in my practice, it is a rule more often broken than followed): "The law does not require useless acts."

I thought it was funny that the court cited the first sentence of footnote 16 in *Delaware State College v. Ricks* (1980) for the proposition that a "limitations perio[d] should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes."

Deb: I agree! In *Deleware State College*, the professor-plaintiff was found to be too late in filing his claims because he failed to file within the limitations period, after being notified of his impending job loss. Instead, he waited to file after he received the employer's decision on his (unsuccessful) internal appeal. That first sentence of footnote 16 was just about the only pro-employee statement in that case.

In *Green*, the court bent over backwards for the employee, holding that requiring him to file a complaint before his resignation would ignore that he may not have been in a position to leave the job immediately. That is a different issue than whether the "working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign."

Nancy: I have many clients who go to work under conditions that no reasonable person could be expected to endure, but they soldier on in order to feed their kids and stay insured. The "reasonably expected to endure" standard doesn't require a near-death experience to precede the resignation, although the federal courts generally require more onerous facts to support constructive discharge.

Deb: Federal courts have become much friendlier to employment plaintiffs.

Nancy: Well, dismissals based on heightened pleading requirements and orders on motions for summary judgment are uniquely (and statistically) concentrated in employment discrimination cases compared to other federal civil actions.

Deb: *Green*, however, is a gift to employees. Previously, under *Ellerth* and *Farragher*, failure to invoke internal complaint procedures could be fatal to sexual harassment claims brought because of a supervisor's harassment, absent a tangible job action. Fear of retaliatory termination was not a valid excuse for not reporting the harassment before suing, absent evidence such as actual knowledge of others who were fired after reporting harassment.

But in Green, the court credits fear of termination as a valid reason for not making an internal complaint while employed: "... forcing an employee to lodge a complaint before he can bring a claim for constructive discharge places that employee in a difficult situation. An employee who suffered discrimination severe enough that a reasonable person in his shoes would resign might nevertheless force himself to tolerate that discrimination for a period of time. He might delay his resignation until he can afford to leave. Or he might delay in light of other circumstances, as in the case of a teacher waiting until the end of the school year to resign." Tr. 17. *"And, if he feels he must stay for a period of time, he may be reluctant to complain about discrimination while still employed. A complaint could risk termination – an additional adverse consequence that he may have to disclose in future job applications.* (Emphasis added)

Nancy: Yes, Deb. That is the not-so-hidden-gem of *Green*.