WHEN EMPLOYEES DIDN'T KNOW WHEN ENOUGH WAS ENOUGH: THE CIRCUIT SPLIT THAT CREATED THE DECISION

I. INTRODUCTION

Pat Jameson has begun a corporate job with new co-workers and a new supervisor. Pat has finally caught a break after months of searching and landed a good job that pays a minimal base salary with a commission on each sale. Six months into the job and everything is going well. Pat is finally able to pay the bills on time and even save a little extra on the side. One day at work, Pat is approached by a supervisor, Terry, who makes a sexual advancement. Pat brushes it off and pays no attention, because this was only the first time. Unfortunately, over the next few months Terry, and other co-workers, continue to harass Pat by making inappropriate jokes and sexual advances. Although Pat attempts to pay them no attention, the advances persist to the point that it becomes a daily event. In an attempt to cease the harassment Pat approaches Terry, the co-workers, and the human resources department and asks for the harassment to stop. Terry, as punishment for Pat's request, "relocates" all of Pat's current customers and gives them to Pat's co-workers. Over the following weeks the harassment increases to the point that Pat begins to have anxiety attacks, and Pat's work performance slips due to the constant barrage of harassment. Terry then demotes Pat because Pat will not acquiesce to the advances, but says that the demotion is due to poor work performance. Pat receives a reduction in pay because of the demotion and is now struggling to pay rent or provide for the family.

What can Pat do? Can Pat quit? The little money Pat receives is necessary for living expenses. It took Pat months to find this job, and Pat is concerned it may be months before another suitable position is available. After the harassment continues Pat finally says enough is enough and gives the

required two-week notice. Thereafter, Pat hears that there is a legal claim against employers for making working conditions so terrible that the worker feels compelled to resign—constructive discharge. Pat visits with an attorney who asks, "When do you think a reasonable employee in your case would have felt compelled to resign?" Pat stares at him blankly, having no idea at what point a "reasonable person" would have felt compelled to resign. It never crossed Pat's mind to quit until the harassment caused physical illness. How could Pat quit with all of the expenses of daily living? The attorney then politely tells Pat, "The date which a reasonable person would have felt compelled to resign matters, because when a reasonable person would have felt compelled to leave is when a constructive claim accrued. Unfortunately, if you do not take action within a certain period of time you may no longer have a claim." After further discussion, Pat discovers the bad news—Pat no longer has a constructive discharge claim. In order to bring a constructive discharge claim, Pat was supposed to quit when a reasonable person would have felt compelled to resign. Then Pat was supposed to contact the attorney and bring a constructive discharge claim within the appropriate amount of time. But how could Pat quit? Pat needed the money, and was afraid that another position would not be available.

This was the harsh reality of constructive discharge claims in some federal circuit courts. The focus of this Comment is to outline the circuit split which necessitated the Supreme Court's decision in *Green v. Brennan*. Specifically, this Comment explores why the Court's decision in *Green* was not only necessary but jurisprudentially accurate. The decision resolves a circuit split that negatively affected employees, employers, and courts.

This Comment first provides in Sections II and III a brief summary of the history of constructive discharge and the effect of discrimination in the workplace. Next, Section IV focuses on the general standard of proof for a constructive discharge claim today. Section V then discusses the previous circuit split as to when a constructive discharge claim accrues. Thereafter, the Comment analyzes when a constructive discharge claim accrues in Louisiana. Next, the Comment discusses the wavering Fifth Circuit; and finally, Section VI proposes why the Supreme correctly sided with the notice/resignation circuits.

II. THE ORIGIN OF CONSTRUCTIVE DISCHARGE: THE NATIONAL LABOR RELATIONS ACT

Constructive discharge was born in the early cases decided by the National Labor Relations Board (NLRB or the Board) under the National Labor Relations Act (NLRA).[1] The NLRA makes it an unlawful employment practice for an employer to, among other things, "interfere with, restrain, or coerce employees" in the exercise of their rights under the Act.[2] The NLRB developed constructive discharge claims to prevent employers from coercing employees to resign by creating intolerable working conditions, often in retaliation for employees engaging in collective activities in an attempt to unionize.[3] Specifically, constructive discharge developed under violations of § 8(a)(3) of the NLRA.[4] An employer violates § 8(a)(3) "when, for the purpose of discouraging union activity, [the employer] directly dismisses an employee, but also when it purposefully creates conditions so intolerable that the employee has no option but to resign—a so-called 'constructive discharge.'"[5] The NLRB currently holds that specific intent is required to prove

1. *See* National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (2012); *see also What We Do*, NLRB, http://www.nlrb.gov/resources/national-labor-relations-act (last visited Sept. 4, 2016) ("Congress enacted the National Labor Relations Act in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.").

2. *See* 29 U.S.C. § 158(a)(1) (2012). Under § 157 of the NLRA employees have the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment. *Id.* § 157.

3. Penn. State Police v. Suders, 542 U.S. 129, 141 (2004) (citing Roslyn C. Lieb, *Constructive Discharge under Section 8(a)(3) of the National Labor Relations Act: A Study in Undue Concerns Over Motives*, 7 INDUS. REL. L.J. 143, 146–148 (1985)).

4. Steven D. Underwood, *Constructive Discharge and the Employer's State of Mind: A Practical Standard*, 1 U. PA. LAB. & EMP. L. 343, 345 (1998) (citing Lieb, *supra* note 3, at 148–49) ("[I]t is an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . . When an actual discharge is alleged the Board must decide: (1) whether the employee was engaged in or sympathetic to union or protected activity; (2) whether the employer knew or suspected the employee's Section 7 activity; (3) whether the employer discharged the employee; and (4) whether the employer's conduct was motivated by an anti-union purpose.") (internal quotations omitted).

5. *Id.* at 345 (quoting Sure-Tan, Inc. v. Nat'l Labor Relations Bd., 467 U.S. 883, 894 (1984)).

constructive discharge;[6] however, it arguably remains unknown whether the U.S. Supreme Court requires specific intent in order to prove a constructive discharge claim.[7]

Although the NLRA did not originally contain the phrase "constructive discharge," the Board endorsed the concept as early as 1936,[8] and began to use the term as early as 1938.[9] Initially, the NLRB accepted the concept of constructive discharge claims, but federal circuit courts were more hesitant.[10] In fact, the Fifth Circuit was the first to hear a case on constructive discharge and held that, although employees who had left voluntarily had to be reinstated, they were not entitled to back pay.[11] Despite specific

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6. Cathy Shuck, Comment, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKELEY J. EMP. & LAB. L. 401, 411 n.52 (2002).

7. *See Suders*, 542 U.S. at 154 (Thomas, J., dissenting). Because it was not explicitly stated in the majority's opinion, Justice Thomas believed that under the majority's opinion specific intent of forcing an employee to quit was not required. *See id.* After *Suders*, some lower courts have also required that "the employer intended to force the employee to quit." MARLENE HEYSER, LITIGATING THE WORKPLACE HARASSMENT CASE 51 (2010) (quoting Tatum v. Ark. Dep't of Health, 411 F.3d 955, 960 (8th Cir. 2005)). Other courts do not require the plaintiff to prove that the employer intended to force the employee to resign, but rather require that resignation was a reasonably foreseeable response to the harassment. *Id.* (citing Brenneman v. Famous Dave's of Am., Inc., 507 F.3d 1139, 1144 n.3 (8th Cir. 2007)). However, Justice Thomas recognized that "a majority of Courts of Appeals have declined to impose a specific intent or reasonable foreseeability requirement" in Title VII constructive discharge cases. *Id.* (citing *Suders*, 542 U.S. at 153 (Thomas, J., dissenting)). For further analysis on the "intent requirement," see Allan A. Ryan, Jr., *Constructive Discharge—Employee's Resignation Due to Intolerable Working Conditions as Tantamount to Discharge*, 33 AM. JUR. PROOF OF FACTS 3D 235, § 10 (1995).

8. *See In re* Canvas Glove Mfg. Works, Inc., & Int'l Globe Makers Union, Local No. 88, 1 N.L.R.B. 519 (1936) (holding that although an employee quit, rather than being discharged, employer violated NLRA by changing working conditions and pressuring employee to withdraw from her union). For a detailed discussion on constructive discharge under the NLRA, see Lieb, *supra* note 3 (discussing the early stages of the NLRA, and the motive requirement by the NLRB to establish an unfair labor practice that violates § 8(a)(3) of the NLRA).

9. *See In re* Sterling Corset Co. & Universal Brassiere & Justrite Corset Co., 9 N.L.R.B. 858 (1938) (holding that, because employer made it known that union activities were not wanted and planned to make the store so hot that employees would be compelled to quit, employees had been constructively discharged).

10. Shuck, *supra* note 6, at 407.

11. *See* Nat'l Labor Relations Bd. v. Waples-Platter Co., 140 F.2d 228, 230 (5th Cir. 1944). There, the NLRB had found that officers of the Waples Corporation had attempted to "coerce, intimidate, and otherwise influence its employees in and about the organization of" two unions. *Id.* at 228–29. The Board further found that, through its officers, the Waples Corporation had discriminated against two of its employees by transferring them to undesirable positions in order to discourage union members,

instances in which the NLRB found constructive discharge, circuit courts refused to accept the concept, yet called it novel and ingenious.[12] It was not until *National Labor Relations Board v. Saxe-Glassman Shoe Corp.*, in 1953, that a circuit court upheld the Board's finding of constructive discharge.[13] While constructive discharge gained traction in the federal circuit courts in the 1960s, scholars argue that the courts mischaracterized the NLRB's original reasoning in constructive discharge cases.[14] By 1964 the doctrine was a well-recognized cause of action in the federal courts.[15]

III. WORKPLACE DISCRIMINATION AND ITS EFFECTS

In general, discrimination produces a wide range of deleterious physical and mental effects including anxiety, psychological distress, depression, cardiovascular complications,

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thus violating the employees' § 8(a)(3) rights under the NLRA. *Waples-Platter Co*., 140 F.2d at 229. The court refused to hold that the employees were "constructively discharged," finding that the employees "elected to quit the service of the Corporation and at a time when vacancies were occurring and when labor was sorely needed." *Id.* at 230. In fact, the employee told his supervisor he was going to quit, went into the office, drew his pay stub, and left the service on his own accord. *Id.*

12. *See* Shuck, *supra* note 6, at 407–08.

13. 201 F.2d 238 (1st Cir. 1953). There, the employer's president and "strongmen" interrogated employees and expressed disapproval about unionizing. *Id.* at 242. Furthermore, the president made threats and promised benefits to those who voted against unionization, and even stalked and intimidated those who engaged in pro-union activity. *Id.* One employee complained to her supervisor that the harassment was affecting her health, only to be told that the situation would be corrected after the union election. *Id.* The court held that this was "ample justification for the conclusion that [the employee] was forced to quit in the face of discriminatory treatment calculated to make her job unbearable." *Id.* at 243.

14. *See* Shuck, *supra* note 6 at 408–10. ("[T]he judicial doctrine applied by the courts was an inversion of the Board's original reasoning in constructive discharge cases. The Board originally framed the course of events as follows: first, the employer violated the Act by engaging in discriminatory conduct, and, second, the employee responds by justifiably resigning. The resignation, therefore, constitutes a constructive discharge. Courts, however, characterized the employee's resignation, rather than the employer's conduct as the violation. The distinction is important, because it shifted the focus from the employer's discrimination to the employee's response . . . . The circuit courts never adopted the NLRB's original theory that an employer's violation of the NLRA, standing alone, renders an employee's resignation reasonable and entitles the employee to back pay. Instead, the courts questioned whether the employee's resignation was a reasonable response to the particular discrimination . . . . Courts, unlike the early Board, have uniformly failed to recognize that an employer's mere discrimination is enough to warrant a finding of constructive discharge.").

15. Penn. State Police v. Suders, 542 U.S. 129, 142 (2004) (citing Shuck, *supra* note 6, at 410).

and more.[16] Similarly, exposure to workplace discrimination has been found to have adverse effects on personal health.[17] In addition to harming individual employees, discrimination also has negative consequences on companies or organizations as a whole.[18] Employees who perceive that they have been discriminated against at their workplace are more likely to leave the organization.[19] In turn, organizations incur a number of new expenses including acquiring and training new employees and lost productivity.[20] In fact, workplace discrimination is estimated to cost companies as much as $64 billion per year.[21] The EEOC's reported 88,778 discrimination charges filed in 2014 show that employment discrimination remains a persistent problem in the U.S.[22] More significantly for this Comment, in 2014 the EEOC reported more than 7,000 charges alleging constructive discharge.[23]

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16. PRAEGER, ABC-CLIO, 1 PRAEGER HANDBOOK ON UNDERSTANDING AND PREVENTING WORKPLACE DISCRIMINATION 143–144 (Michele A. Paludi, et al. eds., 2011).

17. *Id.* at 144 ("Regarding physical health, racial discrimination has been associated with increased mortality rates and elevated incidences of several chronic health conditions, such as high blood pressure, heart disease, cancer, and diabetes . . . .").

18. *See* PRAEGER, *supra* note 16, at 144 ("Research has shown that perceived workplace racial discrimination also is associated with negative work outcomes for targeted individuals. These harmful outcomes include generalized job stress, supervisor and co-worker dissatisfaction, increased perceived organizational tolerance of harassment . . . intentions to quit, and job withdrawal . . . .").

19. *See id.* ("Racial discrimination and harassment also have negative consequences. [One study] found that when employees perceive the organization and its policies to be discriminatory, or perceive that they have personally experienced discrimination from supervisors or co-workers, their job satisfaction, organizational commitment, and citizenship behavior in the workplace is negatively affected. In turn, these experiences and changes in organizational commitment increase the employee's intentions to leave the organization.").

20. *See id.* at 144–145.

21. LEVEL PLAYING FIELD INST.: THE CORPORATE LEAVERS SURVEY, THE COST OF EMPLOYEE TURNOVER DUE SOLELY TO UNFAIRNESS IN THE WORKPLACE, EXEC. SUMMARY (2007) *available at* http://www.lpfi.org/corporate-leavers-survey/.

22. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, CHARGE STATISTICS: FY 1997 THROUGH FY 2015*, available at* http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm. In 2014, the EEOC reported 31,073 race-based charges; 26,027 sex-based charges; 9,579 national origin-based charges; 3,549 religion-based charges; 2,756 color-based charges; 37,955 retaliation-based charges; 20,588 age-based charges; 25,369 disability-based charges; and 938 Equal Pay Act-based charges. *Id.*

23. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, BASES BY ISSUE: FY 2010–FY 2015, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/bases_by_issue.cfm. The number of total charges reflects the number of individual charge filings, after accounting for the fact that most individuals often file charges claiming multiple types of discrimination. *See id*.

IV. CONSTRUCTIVE DISCHARGE TODAY

Constructive discharge claims are not independent causes of action, and are typically brought along with other employment discrimination claims such as those under the Americans with Disabilities Act (ADA),[24] the Age Discrimination in Employment Act (ADEA),[25] and Title VII of the Civil Rights Act (Title VII),[26] among others.[27] In 2004, the U.S. Supreme Court established the standard for proving a constructive discharge claim, stating that a plaintiff "must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response."[28] Essentially, constructive discharge involves both an employee's decision to leave and an employer's discriminatory conduct,[29] and occurs when an employee resigns because her working conditions are so intolerable that a reasonable person would feel compelled to resign.[30] This reasonable person standard helps avoid the difficulties of delving into the employee's particular state of mind, and focuses on how a reasonable person

24. *See* Equal Emp't Opportunity Comm'n v. Kohl's Dep't Stores, Inc., 774 F.3d 127, 135 (1st Cir. 2014) (finding that the plaintiff could not prove a claim for ADA discrimination or constructive discharge when she quit following a discussion with her employer about other work arrangements for her).

25. Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 54 (1st Cir. 2000) (citations omitted) ("An employer cannot accomplish by indirection what the law prohibits it from doing directly. Just as the ADEA bars an employer from dismissing an employee because of his age, so too it bars an employer from engaging in a calculated, age-inspired effort to force an employee to quit. Accordingly, a constructive discharge can ground an employment discrimination claim.").

26. Raj v. La. State Univ., 714 F.3d 322, 330 (5th Cir. 2013) (finding that the plaintiff failed to state a claim under both constructive discharge theory and Title VII because he remained a tenured professor at LSU).

27. Plaintiffs generally bring other claims in addition to a claim for constructive discharge—i.e., a constructive discharge claim is usually accompanied by other forms of discrimination such as those prohibited by the ADA, ADEA, or Title VII.

28. Penn. State Police v. Suders, 542 U.S. 129, 133 (2004); *see* BARBARA T. LINDEMANN ET AL. 1 EMPLOYMENT DISCRIMINATION LAW § 21–35 (5th ed. BNA 2012) ("Prior to *Suders*, lower courts uniformly applied an objective test in constructive discharge cases—whether working conditions were so intolerable that a reasonable person in the employee's position would have felt compelled to resign under the circumstances."). However, in *Suders* the Court phrased the claim somewhat differently, writing that "[t]he inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Suders*, 542 U.S. at 141. In essence, there is little difference between the two, as long as the circuit court applies an objective test it is within the confines of the law.

29. *See Suders*, 542 U.S. at 148.

30. For the precise language used to define constructive discharge in each federal circuit see LINDEMANN, *supra* note 28, at §§ 21-35–37 n.88.

would have felt in a similar situation.[31] Whether an employee would feel compelled to resign is case and fact specific, but courts have considered the following factors:

> (1) Demotion; (2) Reduction in salary; (3) Reduction in job responsibilities; (4) Reassignment to menial or degrading work; (5) Reassignment to work under a younger, or less experienced/qualified supervisor; (6) Badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) Offers of early retirement or continued employment on terms less favorable than the employee's former status.[32]

Finally, an employee claiming constructive discharge must resign,[33] and the employee bears the burden of proving the claim.[34] If successful, a constructive discharge plaintiff is entitled to backpay[35] and front pay,[36] as well as those damages which can be awarded under the particular theory of discrimination.[37]

V. THE SPLIT: WHEN DOES A CONSTRUCTIVE DISCHARGE CLAIM ACCRUE?

Prior to *Green v. Brennan*, courts were divided as to when a constructive discharge claim accrued. The date of accrual is especially important in the employment law context, because certain employees must initiate proceedings with the EEOC prior to filing suit in federal court.[38] In particular, a federal employee

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31. *See* Ryan, *supra* note 7, at § 9.

32. Brown v. Kinney Shoe Corp., 237 F.3d 556, 566 (5th Cir. 2001).

33. *See* Raj v. La. State Univ., 714 F.3d 322, 330 (5th Cir. 2013) ("Because at the time of his complaint Raj remained a tenured professor at LSU, he has not stated a plausible claim for relief for constructive discharge.").

34. Jurgens v. Equal Emp't Opportunity Comm'n, 903 F.2d 386, 390 (5th Cir. 1990).

35. *Backpay*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The wages or salary that an employee should have received but did not because of an employer's unlawful action in setting or paying the wages or salary.").

36. Front pay is money awarded for lost compensation during the period between judgment and reinstatement, or if reinstatement is not feasible, the money awarded instead of reinstatement. *See* Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001).

37. Penn. State Police v. Suders, 542 U.S. 129, 147 n.8 (2004).

38. For a detailed view of the EEOC administrative process see BARBARA T. LINDEMANN ET AL. 2 EMPLOYMENT DISCRIMINATION LAW § 26 (5th ed. BNA 2012). The EEOC enforces Title VII, the ADEA, the Equal Pay Act, the ADA, the Lilly Ledbetter Fair Pay Act of 2009, and the Genetic Information Non-Discrimination Act of 2008. *Id.* at § 26-4–6; *see* Green v. Donahoe, 760 F.3d 1135, 1139–40 (10th Cir. 2014) ("For private-sector employees, a charge of discrimination must be filed with

"must initiate contact with [an Equal Employment Opportunity (EEO)] 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 action."[39] For private-sector employees, a charge of discrimination must generally be filed with the EEOC within 180 or 300 days depending on jurisdiction.[40] After the EEOC procedures, but before filing suit, a plaintiff must exhaust her administrative remedies.[41] The exhaustion requirement protects employers by putting them on notice of discrimination claims brought against them, and provides the EEOC or EEO office with an opportunity to conciliate the claims.[42] Failure to abide by these guidelines typically results in the dismissal of what may otherwise be a valid claim.[43]

An illustration of how this process works may be helpful. Let's take Pat Jameson, our imaginary friend, to show the importance of these time limitations. On January 1, 2000, Pat is denied a promotion by Terry, the supervisor. The denial occurred because of Pat's sex, and Pat knows this because of comments Terry made during the promotion meeting. Because of these comments, Pat likely has a claim for sex-based discrimination under Title VII. If Pat is a federal employee, Pat must contact an EEO counselor within forty-five days of the January 1 discriminatory act: February 15, 2001. On February 16, Pat's claim is no longer valid because it would be outside the forty-five-day limitation period. If Pat is a private-sector employee, Pat must file a charge of sex-based discrimination with the EEOC within 180 calendar days from the date the discrimination took

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the 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 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.") (citations omitted).

39. 29 C.F.R. § 1614.105(a)(1) (2015).

40. 42 U.S.C. § 2000e-5(e)(1) (2012).

41. The plaintiff must also submit the administrative charge in a timely fashion. *Green*, 760 F.3d at 1140 (citations omitted).

42. *Id.* (citations omitted).

43. *See id.* at 1141–42, 1145 (finding that the district court properly dismissed all discrimination claims for plaintiff's failure to follow statutory requirements).

place: June 29, 2000. Again, on June 30 Pat can no longer bring a claim as it would be outside the 180-day time period.

In general, no cause of action accrues before all of the claim's elements can be satisfied.[44] So, in the example above, Pat cannot bring a claim for sex-based discrimination before the denial of the promotion (the alleged discrimination), even if prior to the promotion meeting Pat knew that Terry would not give Pat the promotion specifically because of Pat's sex. Further, in constructive discharge cases, an employee is generally required to quit her job in order to succeed.[45] Thus, if Pat wanted to bring a constructive discharge claim, technically, Pat could not bring a claim until after resignation. Prior to *Green v. Brennan*, circuit courts were divided as to when a constructive discharge claim accrued. One side of the circuit split held that, in order to bring a constructive discharge claim, there must be some discriminatory act by the employer within the limitations period, and that a constructive discharge claim accrued on the date of the employer's last discriminatory act (Limitations Circuits). The other circuits held that the limitations period began upon notice of or actual resignation (Notice/Resignation Circuits). The first part of this section discusses the relevant Limitations Circuits' decisions. Part two of this section discusses the relevant Notice/Resignation Circuits' decisions along with similar state court decisions.

A. LIMITATIONS CIRCUITS: CONSTRUCTIVE DISCHARGE UPON LAST DISCRIMINATORY ACT

The U.S. Courts of Appeals for the Tenth Circuit, D.C. Circuit, Seventh Circuit, and First Circuit all agree that a constructive discharge claim accrues upon an employer's last discriminatory act, and that such act must occur within the limitations period.

1. THE TENTH CIRCUIT

In *Green v. Donahoe*, Marvin Green, an African-American male, worked for the postal service from 1973 until 2010 at the

44. *See* Wallace v. Kato, 549 U.S. 384, 388 (2007).

45. Mac's Shell Serv., Inc. v. Shell Oil Prods. Co., 559 U.S. 175, 184 (2010) (citations omitted). However, the main divide in circuit and state courts is whether the claim accrues upon the employee's notice of resignation/actual resignation, or whether some discriminatory act must occur within the limitations period. *See* Jeffery v. City of Nashua, 48 A.3d 931, 935–36 (N.H. 2012) (citations omitted); *see also Green*, 760 F.3d at 1143–44.

Englewood, Colorado post office.[46] In 2008, Green applied for a postmaster position in Boulder, Colorado, but was not hired.[47] Green subsequently filed a charge of discrimination with the Postal Service's EEO office, alleging that he had been denied the postmaster promotion because of his race.[48] The matter settled in November 2008, but in May 2009, Green filed another charge alleging that the Postal Service had retaliated against him for his previous charge in 2008.[49] Again, in July 2009, Green filed a similar charge.[50]

In August 2009, the Postal Service's EEO office completed its investigation of the May and July charges and informed Green that he could file a formal charge; Green elected not to do so.[51] After the investigative interview, two agents from the Postal Service Office of Inspector General (OIG) arrived.[52] Green was instructed to meet with the OIG because they had initiated their own investigation into the delay of the mail, which can be a federal crime.[53] After the OIG interview, Green was immediately placed on off-duty status for disrupting day-to-day postal operations.[54] Green's supervisor (Knight) ordered Green to surrender his Postal Service identification and cell phone, and further ordered Green not to return to the Englewood post office; however, unbeknownst to Green, the OIG agents had already concluded that Green had not intentionally delayed the mail.[55] On December 16, 2009, Green signed a settlement agreement stating that he would immediately give up his position as Englewood postmaster, and that he would use his accrued annual and sick leave to receive pay until March 31, 2010.[56] Thereafter, in exchange for either accepting a significantly lower-paying position or retiring, the Postal Service "agreed" that no charges would be pursued based on items reviewed during interviews conducted that December.[57]

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46. 760 F.3d at 1137.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Green*, 760 F.3d at 1138.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Green*, 760 F.3d at 1138.
57. *Id.*

On January 7, 2010, Green met with an EEO counselor and filed an informal charge alleging that he was retaliated against on December 11, 2009, the day of the investigative interview, and when he was removed from his postmaster position and put on emergency-placement.[58] In September 2010, Green filed a complaint alleging discrimination in violation of Title VII, including a constructive discharge claim.[59] The district court ruled that Green's constructive discharge claim was time-barred because he had not contacted an EEO counselor within forty-five days of December 16, 2009—the last day Green's employer had allegedly discriminated against him.[60] Green appealed, arguing that the forty-five-day limitations period for his constructive discharge claim had not begun to run until he announced his resignation, despite the fact that this was well after the last alleged discriminatory act against him.[61]

The Tenth Circuit was unpersuaded. The court stated that it could not "endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer."[62] The court first looked at the language of the federal statute, which stated that federal employees must initiate contact with an EEO counselor within forty-five days of the date of the alleged discriminatory act.[63] The court emphasized the phrase "the matter alleged to be discriminatory," and "focus[ed] upon the time of the discriminatory act."[64] The court further reasoned that the discriminatory act was not the employee's resignation, which was merely the consequence of the discriminatory act, but rather the employer's act that caused the resignation.[65] Specifically, the court reasoned that addressing employment discrimination claims within the employment relationship best suited "society and the policies underlying

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

59. *Id.* at 1138–39. The only relevant charge for the purpose of this Comment is the constructive discharge claim.

60. *Id.* at 1139.

61. *Id.* at 1142.

62. *Id.* at 1144.

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

64. *Id.* (citing Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980)).

65. *See id.* The court was also concerned about the possibility of employees delaying accrual past the date of the last discriminatory act 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." *Id.* at 1145 (quoting Wallace v. Kato, 549 U.S. 384, 391 (2007)) (internal quotations omitted).

[employment discrimination law] . . . ."[66] Joining the Limitations Circuits, the Tenth Circuit held that because Green could not show that his employer had discriminated against him within forty-five days of initiating contact with the EEO counselor, his constructive discharge claim was untimely and dismissed.[67]

2. THE D.C. CIRCUIT

Supporting the Tenth Circuit's decision, the D.C. Circuit came to a similar conclusion in *Mayers v. Laborers' Health & Safety Fund of North America* (LHSFNA).[68] In *Mayers*, Hazel Mayers worked for the LHSFNA from 1992 until January 2001.[69] Shortly after the beginning of her employment, Mayers developed rheumatoid arthritis, which made many of her day-to-day tasks painful and difficult to complete.[70] Due to the pain, Mayers requested an electric stapler and cutter, but LHSFNA failed to provide these tools.[71] A year later, Mayers' co-worker was promoted, leaving Mayers with twice the amount of work, but without electric tools to complete her tasks.[72] Shortly thereafter, LHSFNA promised electric tools, but again failed to fulfill its promise.[73] After completing a job which greatly exacerbated her arthritis, Mayers decided to resign.[74] On March 12, 2001, Mayers filed a complaint with the EEOC alleging that LHSFNA failed to reasonably accommodate her arthritis, retaliated against her for requesting a reasonable accommodation and constructively discharged her, all in violation of the ADA.[75] Mayers was issued a right-to-sue notice by the EEOC, and filed suit in the district court.[76]

The district court granted LHSFNA summary judgment on all of Mayers' claims, holding that Mayers' constructive discharge claim failed because she had "voluntarily left her employment with LHSFNA."[77] Similar to the court in *Green*, the D.C. Circuit

66. *Green*, 760 F.3d at 1145 (internal quotations & citations omitted).
67. *Id.*
68. *See* 478 F.3d 364 (D.C. Cir. 2007).
69. *Id.* at 366.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Mayers*, 478 F.3d at 366.
74. *Id.*
75. *Id.* at 367.
76. *Id.* at 368.
77. *Id.* at 367.

also held that Mayers' constructive discharge claim failed because Mayers had failed to identify a single act of discrimination or retaliation between March 12, 2001—the date of filing her charge of discrimination—and September 13, 2000—the date the 180-day statutory period began.[78] Thus, mirroring the Tenth Circuit's approach, the D.C. Circuit focused on the discriminatory acts of the employer.[79] Unlike the Tenth Circuit's decision, however, the D.C. Circuit did not discuss the possibility of the claim running from the time of Mayers' notice of resignation or her actual resignation.[80] In fact, the court simply dismissed the constructive discharge claim without addressing or recognizing that resignation is a necessary element of constructive discharge claims.[81]

3. THE SEVENTH CIRCUIT

Similarly, the Seventh Circuit's decision in *Davidson v. Indiana-American Water Works* also supports the Tenth Circuit's decision in *Green*.[82] In *Davidson*, Vivian Davidson brought a claim under the ADEA, alleging that she suffered from a hostile work environment and continuous retaliation, which led to her constructive discharge.[83] The district court concluded that Davidson's July 9, 1986 EEOC charge was untimely because it was filed more than 180 days after the last discriminatory act that allegedly occurred against her: a transfer into a different department.[84] On appeal, Davidson argued that her constructive discharge limitations period did not begin to run until the last day she appeared at work.[85] In other words, Davidson argued that her July 9 EEOC charge was filed within the requisite 180-day period following the day she last appeared at work on January 13, 1986.

The Seventh Circuit disagreed with Davidson's argument. Almost identical to the Tenth Circuit's reasoning in *Green*, the Seventh Circuit adopted the rule that "the limitations period

78. *See Mayers*, 478 F.3d at 368.

79. *See id.* at 369–71.

80. *See id.* at 370–71.

81. *Id.*

82. *See* 953 F.2d 1058, 1059 (7th Cir. 1992) ("Vivian Davidson [brought an age discrimination suit], alleging that a hostile work environment and a continuous pattern of retaliation led to her constructive discharge.").

83. *Id.*

84. *Id.*

85. *Id.*

begins to run on the date the employer takes some adverse personnel action against the plaintiff, and not when the full consequences of the action are felt."[86] Thus, to succeed, Davidson was required to show at least some discriminatory act within the limitations period. Much like the D.C. Circuit, the Seventh Circuit did not acknowledge that quitting is an element of constructive discharge, and held that Davidson's termination could not "give present effect to the past illegal acts and therefore perpetuate the consequences of forbidden discrimination."[87]

4. THE FIRST CIRCUIT

While not cited in any of the aforementioned opinions, the First Circuit appears to agree that the limitations period accrues from the last discriminatory act by the employer. [88] In *American Airlines, Inc. v. Cardoza-Rodriguez*, employees complained that American Airlines led them to believe they were faced with two choices—retire or face termination.[89] This is a classic example of constructive discharge under the ADEA.[90] American Airlines argued that the employees' claim was time barred, because it was filed outside of the 300-day time limit.[91] Furthermore, the court found that, at the latest, the statutory period began to run when each employee accepted the Voluntary Early Retirement Program (VERP).[92] The employees first argued that the statutory period did not begin until they left employment with American Airlines.[93] The court quickly dismissed this argument by focusing

86. *Davidson*, 953 F.2d 1059 (citing Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980)).

87. *Id.*

88. *See* Am. Airlines, Inc. v. Cardoza-Rodriguez, 133 F.3d 111 (1st Cir. 1998).

89. *Id.* at 122.

90. *See, e.g.*, Vega v. Kodak Caribbean, Ltd., 3 F.3d 476, 480 (1st Cir. 1993) ("To transform an offer of early retirement into a constructive discharge, a plaintiff must show that the offer was nothing more than a charade, that is, a subterfuge disguising the employer's desire to purge the plaintiff from the ranks because of his age . . . . [A] plaintiff who has accepted an employer's offer to retire can be said to have been constructively discharged when the offer presented was, at rock bottom, a choice between early retirement with benefits or discharge without benefit.").

91. *Cardoza-Rodriguez*, 133 F.3d at 122.

92. *See id.* at 114, 123 ("The VERP provided for the addition of five years to each employee's actual age for purposes of calculating retirements benefits, five years additional credited service, cash bridge payments of $400 per month until the employee became eligible to receive benefits, immediate retirement medical benefits and travel benefits. To be eligible to participate in the VERP an employee had to be at the maximum pay scale in their job classification and at least forty-five years of age.").

93. *Id.* at 123.

on the discriminatory acts of the employer—the VERP. Like the Seventh, Tenth, and D.C. Circuits, the First Circuit held that "because the allegedly unlawful act was the denial of tenure, the termination date itself was merely the 'inevitable consequence' of prior discrimination and thus did not trigger the statute of limitations."[94]

5. SUMMARY

In short, decisions from the Limitations Circuits all focus on the timing of the discriminatory acts of the employer. If the employer has not discriminated against the employee at any time within the statutory period, the plaintiff's constructive discharge claim fails as a matter of law. Further, these circuits find that the employees' resignation is simply a "consequence" of the discriminatory act, whereas the employer's actions are the actual discriminatory act.[95] In essence, these courts hold that an employer's discriminatory acts within the limitations period are conditions precedent to even considering whether the employee resigned. Interestingly, while the Tenth Circuit cited both the Seventh and D.C. Circuits in support,[96] the Tenth Circuit was the only circuit court to recognize, and arguably confront, the fact that resignation is a necessary element of a constructive discharge claim.[97]

So how would our friend Pat be affected in these jurisdictions? Let us say that Terry made four sexual advances against Pat: April 1, April 7, April 15, and May 1, 2016. Assuming that a reasonable person in Pat's position would feel compelled to resign, and that Pat is a private-sector employee,

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94. *Cardoza-Rodriguez*, 133 F.3d at 123.

95. *See* Davidson v. Indiana-American Water Works, 953 F.2d 1058, 1059 (7th Cir. 1992) (stating that the limitations period begins to run on the date that the defendant takes some adverse personnel action against the plaintiff, and not when the full consequences of the action are felt).

96. Green v. Donahoe, 760 F.3d 1135, 1145 (10th Cir. 2014) ("We therefore agree with the courts that have required some discriminatory act by the employer within the limitations period."). *See* Mayers v. Laborers' Health & Safety Fund of N. Am., 478 F.3d 364, 367, 370 (D.C. Cir. 2007) (finding that the notice of resignation was within limitations period but no discriminatory act of employer was); *Davidson*, 953 F.2d at 1059–60.

97. *Green*, 760 F.3d at 1143–44 (citing Mac's Shell Serv., Inc. v. Shell Oil Prods. Co., 559 U.S. 175, 184 (2010); Wallace v. Kato, 549 U.S. 384, 388 (2007)) ("The interesting issue here is whether the date of accrual can be postponed from the date of the employer's misconduct until the employee quits or announces his future departure. Supporting such postponement is that quitting is an element of the claim . . . .").

Pat must file a charge of discrimination with the EEOC within 180 days of the last discriminatory act, May 1, 2016.[98] Thus, Pat must file a charge of discrimination by October 28, 2016. This seems simple, but rarely are cases this simple. So, let's make things a little more complicated. Let us assume Terry made a sexual advance on April 1, took all of Pat's work away for not acquiescing to the sexual advance on April 7, an employee made a crude joke to Pat on April 15, and on May 1 Pat is denied a promotion by her boss (not Terry). Now, would a reasonable employee feel compelled to quit? If so, at which point would a reasonable employee feel compelled to quit? Not only must Pat guess at which point a reasonable employee would feel compelled to quit, but Pat must also follow the requisite EEOC requirements to ensure the limitations period does not run out.

B. NOTICE/RESIGNATION CIRCUITS: CONSTRUCTIVE DISCHARGE UPON NOTICE OF INTENT TO RESIGN OR ACTUAL RESIGNATION

The Notice/Resignation Circuits consist of the U.S. Courts of Appeals for the Fourth Circuit, Ninth Circuit, and Second Circuit. Further, this Comment has grouped several state supreme court decisions into the Notice/Resignation Circuits, along with the Fifth Circuit and its states. All of these courts, with the exclusion of Louisiana courts, hold that a constructive discharge claim accrues when an employee actually resigns, or gives definite notice of an intent to resign.

1. THE FOURTH CIRCUIT

One of the first federal circuit decisions to hold that a constructive discharge claim accrues on the date an employee resigns was *Young v. National Center for Health Services Research* (NCHSR).[99] Dr. Lih Young sued her former employer NCHSR for alleged discrimination on the basis that she was of Chinese national origin.[100] Like the courts in *Davidson* and *Green,* the district court held that Young's resignation was merely an "inevitable consequence" of prior acts of alleged discrimination and "not itself a discriminatory act."[101] However, the Fourth Circuit disagreed with the district court. While the Fourth

98. 42 U.S.C. § 2000e-5(e)(1) (2012); *see* Raj v. La. State Univ., 714 F.3d 322, 330 (5th Cir. 2013).

99. 828 F.2d 235, 239 (4th Cir. 1987).

100. *Id.* at 237.

101. *Id.*

Circuit recognized that a claim begins to "run from the time of the discriminatory act, not from the time of a later, inevitable consequence of that act,"[102] and that a resignation alone is not generally a "discriminatory act,"[103] the court stated that "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."[104] The Fourth Circuit held that if an employer discriminates against an employee for the purpose of making her conditions so terrible they feel forced to resign, then the resignation is a constructive discharge, which in and of itself constitutes a distinct discriminatory act for which there is a distinct cause of action.[105] In sum, the court established precedent holding that the limitations period runs from the date of an employee's resignation.

2. THE NINTH CIRCUIT

The next circuit to follow suit was the Ninth Circuit in *Draper v. Coeur Rochester, Inc.*[106] Draper brought an action alleging, among other things, constructive discharge. Again, like the courts in *Green*, *Davidson*, and *Mayers*, the district court held that Draper's claims were time-barred because no act of discrimination had occurred within the limitations period.[107] The Ninth Circuit disagreed with the district court and compared a constructive discharge to all other cases of wrongful discharge, stating "[c]onstructive discharge is, indeed, just one form of wrongful discharge."[108] The court found it immaterial that the employee, rather than the employer, initiated termination.[109]

The Ninth Circuit recognized that Draper's claim was for constructive discharge, and that Draper's termination was not a certain or inevitable consequence of the employer's actions.

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102. *Young*, 828 F.2d at 237 (citations omitted).

103. *Id.*

104. *Id.*

105. *See id.* at 238 ("We think 'continual harassment,' if it in fact occurred, could certainly make working conditions so 'intolerable' that a reasonable person would feel forced to resign.") (citations omitted).

106. *See* 147 F.3d 1104 (9th Cir. 1998) ("[W]e conclude that the limitations period on Draper's cause of action for constructive discharge began to run at the time she resigned her position.").

107. *Id.* at 1107 ("The district court reasoned 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.'").

108. *Id.* at 1110.

109. *Id.*

Further, the court explained that courts should take a totality of the circumstances approach and view the employer's conduct as a whole, rather than by one identifiable act, when dealing with a constructive discharge claim.[110] Concurring with the Fourth Circuit's holding in *Young*, the Ninth Circuit held that "in constructive discharge cases periods of limitation begin to run on the date of the resignation."[111]

3. THE SECOND CIRCUIT

Shortly thereafter, in *Flaherty v. Metromail Corp*., the Second Circuit followed the Fourth and Ninth Circuit and held:

> The date of discharge triggers the limitations period in constructive discharge cases, just as in all other cases of wrongful discharge. Constructive discharge is, indeed, just one form of wrongful discharge. The fact that the actual act of terminating employment is initiated by the employee directly does not change the fact that the employee has been discharged.[112]

Like the court in *Draper*, the Second Circuit agreed that constructive discharge occurs when an employer creates conditions where a reasonable person would feel forced to resign. In contrast to its predecessors, however, the Second Circuit held that the date of accrual begins upon definite notice of an intention to resign, rather than the employee's actual resignation.[113] While the difference is subtle, a definite notice of intent to resign is separate and distinct from actual resignation. For example, an employee who wishes to resign may give notice of an intent to resign on January 1, but effective January 9. Thus, for accrual purposes, the Second Circuit would hold that a constructive discharge claim accrues on January 1 rather than January 9.

This also leaves courts to interpret when "a definite intent to resign occurs." For example, an employee may have an argument with her boss and state that she is going to quit without giving an effective date. Courts are then left to determine whether this argument constitutes a definite intent to resign. While distinct from the other Notice/Resignation courts, the Second Circuit's decision follows the same analysis and provides employees and

110. *Draper*, 147 F.3d at 1110.
111. *Id.* at 1111.
112. 235 F.3d 133, 138–39 (2d Cir. 2009) (citing *Draper*, 147 F.3d at 1110).
113. *Id*. at 138.

employers a clearer date from which a constructive discharge claim accrues.

4. RECENT STATE COURT DECISIONS IN SUPPORT OF THE NOTICE/RESIGNATION CIRCUIT COURTS

The more recent state supreme court decisions on the accrual of constructive discharge from New Hampshire,[114] Kansas,[115] Idaho,[116] and New Jersey[117] all held that constructive discharge accrues upon notice of intent to resign. Specifically, in *Daniels v. Mutual Life Insurance Co.*, the New Jersey Superior Court opted for a "bright-line" accrual test.[118] There, the plaintiff's last day of work was December 8, 1995, but she tendered her notice of resignation on December 4, 1995.[119] The plaintiff filed her suit one year from her last day at work (December 8, 1995), which was one year and four days past her notice of resignation.[120] The New Jersey Superior Court said:

> The harm has been done when the employee feels compelled to resign. In short, in an actual termination situation, the retaliatory action which starts the running of the period of limitations is the separation from work. In a constructive discharge situation, the retaliatory action is the creation of intolerable conditions which a reasonable employee cannot accept. The conditions become intolerable when the employee tenders his or her resignation. Thus, by definition, the act of discrimination cannot occur any later than the date of resignation.[121]

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114. *See* Jeffery v. City of Nashua, 48 A.3d 931, 936 (N.H. 2012) (holding that a constructive discharge claim accrues when an employee tenders her resignation or retirement notice).

115. *See* Whye v. City Council for Topeka, 102 P.3d 384, 387 (Kan. 2004) (holding that a cause of action for constructive discharge accrues and the statute of limitations begins to run when the plaintiff tenders her resignation or announces a plan to retire).

116. *See* Patterson v. State Dep't of Health & Welfare, 256 P.3d 718, 725 (Idaho 2011) (holding that a cause of action for constructive discharge accrues when the employee "provide[s] unequivocal notice of her intent to resign").

117. *See* Daniels v. Mut. Life Ins. Co., 773 A.2d 718, 719 (N.J. Super. Ct. App. Div. 2001); *see also* Shepherd v. Hunterdon Developmental Ctr., 803 A.2d 611, 627 (N.J. 2002) (citing *Daniels*, 773 A.2d at 719, and stating that a constructive discharge accrues when the employee gives notice of resignation or retirement).

118. *Daniels*, 733 A.2d at 722–23.

119. *Id.* at 719.

120. *Id.* at 721.

121. *Id.* at 721.

In so holding, the court gave two convincing reasons why creating a "bright-line" test was advantageous in constructive discharge claims. First, the court reasoned that a "bright-line" test eliminates litigation and "hair-splitting" over when an employee knew or should have known that her termination was definite.[122] Second, having the limitations period run from the actual termination of employment conforms to the proposition that a cause of action accrues when a plaintiff has been injured.[123] Further, a constructive discharge complainant suffers an injury when he or she feels compelled to resign.[124] In short, the court held that the statutory period begins to run on the date the employee tenders her resignation.[125]

6. THE FIFTH CIRCUIT AND ITS STATES

Constructive Discharge in Texas

Texas falls into the Notice/Resignation group of courts and has held that a constructive discharge claim accrues when a plaintiff knew of her injury, i.e., the date she resigned, but not necessarily the last date of employment. While the standard for constructive discharge is the same in Texas as elsewhere, courts interpret a claim "as equivalent to when a plaintiff tenders her resignation 'because, by that date, [she] had decided that conditions were so intolerable that she felt compelled to resign.'"[126] In *Davila v. Lockwood*, an employee injured his shoulder while on the job, and shortly thereafter informed his employer that he was going resign due to the injury.[127] On May 20, 1991, seven days after his injury, the employee tendered his notice of resignation.[128] On May 25, 1993, the employee filed suit alleging he had been constructively discharged in retaliation for filing a worker's compensation claim due to his shoulder injury.[129] In holding that the employee's constructive discharge claim was outside of the one-year limitations period, the court upheld Texas precedent that an employee's cause of action for constructive

122. *Daniels*, 733 A.2d at 721.

123. *Id.*

124. *Id.*

125. *Id.* at 719.

126. Davila v. Lockwood, 933 S.W.2d 628, 630 (Tex. App. 1996). *See* Lewis v. San Jacinto Cty. Appraisal Dist., No. H-09-2339 2010, WL 3784492, at *3 (S.D. Tex. 2010) (citations omitted).

127. *Davila*, 933 S.W.2d at 629.

128. *Id.*

129. *Id.*

discharge accrues on the day that the employee gives notice of resignation, even if the employee continues to work.[130]

Constructive Discharge in Mississippi

Mississippi follows the Notice/Resignation Circuits and provides a bright-line rule for potential plaintiffs. In *Songcharoen v. Plastic & Hand Surgery Associates, PLLC* (PHSA), Dr. Songcharoen, a plastic surgeon, gave written notice of his intent to resign on January 18, 2007, effective December 31, 2007.[131] Immediately after his resignation, Dr. Songcharoen began practicing with another plastic surgery center in Mississippi.[132] On December 30, 2010, Dr. Songcharoen filed a lawsuit against PHSA alleging that he was constructively discharged because he was placed on an "un-referred call schedule."[133] Specifically, Dr. Songcharoen argued that by placing him on the un-referred call schedule this created an intolerable and oppressive working environment to a surgeon of his experience and status in the medical community.[134] In holding that Dr. Songcharoen's claim was time-barred, the court reasoned that his constructive discharge claim accrued on January 18, 2007—the date Dr. Songcharoen gave written notice of his intent to resign.[135] Because Dr. Songcharoen did not file suit until almost three years after filing his intent to resign, the court found that his claim was time-barred.[136]

Constructive Discharge in Louisiana

The Supreme Court of Louisiana, in *King v. Phelps Dunbar, L.L.P.*, faced the issue of whether a claim for constructive discharge was prescribed.[137] Mr. King was an African-American attorney who was employed by the defendant, Phelps Dunbar, L.L.P. (Phelps). He alleged that he was assigned to work on the files of the defendant's African-American clients and that he was asked to transfer departments within the firm because of his

130. *Davila*, 933 S.W.2d at 630.

131. 3:11cv-308-WHB-LRA, 2012 WL 4480746, at *1 (S.D. Miss. 2012) *rev'd on other grounds*, 561 Fed. Appx. 327 (5th Cir. 2014).

132. *Id.*

133. *Id.* at *4.

134. *Id.* at *3.

135. *Id.* at *4 ("[T]he Court finds there does not exist a genuine issue of material fact with regard to the date on which Songcharoen's constructive discharge claim accrued, and that date was January 18, 2007.").

136. *Songcharoen*, 3:11cv-308-WHB-LRA, 2012 WL 4480746, at *4.

137. 98-1805 (La. 6/4/99); 743 So. 2d 181.

race.[138] When Mr. King refused to transfer departments, he claimed that it led to a hostile work environment and retaliatory tactics.[139] On January 20, 1995, King underwent an associate evaluation where he was informed that his chances of becoming a partner at the firm were "nonexistent and that he should consider a career change."[140] King remained as an associate at Phelps, but alleged that the hostility of the work environment increased when he refused to resign.[141] On March 10, 1995, Mr. King tendered his resignation to be effective March 24, 1995, stating that the hostile work environment had become unbearable.[142]

King filed suit on March 11, 1996, alleging intentional infliction of emotional distress, loss of earning capacity, damage to his reputation, and that Phelps had discriminated against him on the basis of race under Louisiana law.[143] The trial court ruled that Mr. King's constructive discharge claim was untimely and granted Phelps' motion for summary judgment.[144] On appeal, the Louisiana Court of Appeal, Fourth Circuit found no error in the summary judgment dismissal and held that Mr. King's claim was prescribed.[145] King appealed to the Louisiana Supreme Court.

On appeal, the Louisiana Supreme Court began its prescriptive analysis by recognizing that claims under Louisiana's antidiscrimination statute are subject to a one-year prescriptive period.[146] While not using the explicit terminology, the court recognized that Mr. King's claim was for constructive discharge.[147] Generally, the one-year prescriptive period for

138. *King*, 98-1805, pp. 1–2; 743 So. 2d 181, 183.

139. *Id.* Specifically, Mr. King alleged that because he refused to transfer departments he received unwarranted criticism of his work, he was refused the grant of work assignments, and was accused of being overly sensitive to racial matters. Mr. King alleged that after he refused he had to beg for work assignments, even from younger associates, which had an adverse effect on his income and billable hours. *See id.*

140. *Id.* at p. 2; 743 So. 2d at 184.

141. *Id.*

142. *Id.*

143. *King*, 98-1805, p. 2; 743 So. 2d 181, 183.

144. *Id.*

145. *Id.*

146. *Id.* at p. 7; 743 So. 2d at 187 (citing Williams v. Conoco, Inc., 860 F.2d 1306 (5th Cir. 1988) (holding that Louisiana's antidiscrimination statute is subject to a one-year prescriptive period).

147. *Id.* at p. 3; 743 So. 2d at 193 (Knoll, J., dissenting in part) (recognizing that the majority's opinion said: "Plaintiff alleges that following his unfavorable performance review, he was subjected to a series of discriminatory violations, and that the increasingly hostile work environment became unbearable at the point when

discrimination claims begins to run from the day an injury or damage is sustained.[148] Here, however, the court recognized that Mr. King was subjected to a continuing hostile work environment, and noted that when an employee is subjected to these conditions, the prescriptive period does not commence until the conduct causing the damage is abated.[149] The court held that Mr. King's injury was not abated until the effective date of his resignation, March 24, 1995.[150] In effect, the majority's holding is in line with the Notice/Resignation Circuits, i.e., that the prescriptive period in constructive discharge claims does not commence until the employee actually quits.[151] Therefore, Mr. King's constructive discharge claim was not time-barred.[152]

Justice Kimball's concurrence and Justice Knoll's dissent show just how divided the Louisiana Supreme Court was on the prescription issue. Justice Kimball concurred in the majority's decision, but took a different approach on the prescription issue. Analyzing the U.S. Supreme Court decision in *Delaware State College v. Ricks*,[153] Justice Kimball disagreed that the U.S. Supreme Court's holding was even applicable to the present case.[154] Rather, Justice Kimball agreed with the Second Circuit's decision in *Miller v. International Telephone and Telegraph Corp.*,[155] and opined that the limitation period begins to run when

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he was forced to resign").

148. *King*, 98-1805 at p. 3; 743 So. 2d at 193 (Knoll, J., dissenting in part) (citing LA. CIV. CODE. ANN. art. 3492).

149. *See id.* at pp. 8–9; 743 So. 2d at 188. (citing Bustamento v. Tucker, 607 So. 2d 532, 542 (La. 1992)).

150. *Id.*

151. *Id.* at p. 3; 743 So. 2d at 193 (Knoll, J., dissenting in part).

152. *See* King v. Phelps Dunbar, L.L.P., 01-1735, pp. 1–2 (La. App. 4 Cir. 4/2/03); 844 So. 2d 1012, 1015. Although disputed by the dissent, it seems as though the majority could have stated their holding more simply by following the direction of the Louisiana appellate courts which had decided that prescription began to run from either the actual date of termination or the date of official notice of termination. *See* Harris v. Home Sav. & Loan Ass'n, 95-223 (La. App. 3 Cir. 7/27/95); 663 So. 2d 92 (holding that prescription runs from date of actual termination); Brunett v. Dept. of Wildlife & Fisheries, 96-0535 (La. App. 1 Cir. 12/20/96); 685 So. 2d 618 (holding cause of action commenced on date of plaintiff's termination).

153. 449 U.S. 250 (1980).

154. It is unclear why Justice Kimball mentions his disagreement with *Ricks* in his concurrence, because the majority did not cite *Ricks* in its holding. In *Ricks*, the Court held that the filing limitation period for employment discrimination claims commences on the date the allegedly discriminatory decision "was made and communicated" to the employee. *King*, 98-1805, p. 3; 743 So. 2d at 191 (Kimball, J., concurring) (citing *Ricks*, 449 U.S. at 258).

155. 755 F.2d 20, 23 (2d Cir. 1985) ("[The prescriptive period] starts running on

the employee receives definite notice of termination.[156] Thus, in *King*, Justice Kimball believed that a more appropriate interpretation for prescriptive commencement was when an adverse employment action was taken against King.[157] However, prior to this decision, the Fifth Circuit held that a resignation is an adverse employment action if the resignation qualifies as a constructive discharge.[158] Therefore, it follows that Justice Kimball would arguably agree that the prescriptive period began to run, at the earliest, upon King's notice of resignation, and at the latest upon King's effective date of resignation, because the resignation constituted a constructive discharge, which in turn is an adverse employment action.

In contrast, Justice Knoll dissented from the majority's decision on the prescription issue. Citing Louisiana case law, Justice Knoll stated that "[a] constructive discharge occurs when the trier of fact is satisfied that the working conditions to which the employee is subjected are so intolerable that a reasonable person would feel compelled to resign, not when he necessarily does so."[159] In favor of the prescriptive period running from the last discriminatory act of the employer, Justice Knoll stated that the prescriptive period began to run on the date of Mr. King's performance evaluation because Mr. King believed he would be fired after that.[160] Justice Knoll argued that the effect of the majority's opinion is that, in constructive discharge cases, prescriptive periods will not begin until the employee quits, which makes "subjective continuing torts imprescriptible despite the presence of objective defining events that belie that position."[161] Thus, Justice Knoll's analysis is congruent with the Limitations Circuits, and she would likely hold that the prescriptive period should have commenced from the moment a reasonable employee would have felt compelled to resign.[162]

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the date when the employee receives a definite notice of termination, not upon his discharge.").

156. *King*, 98-1805, p. 4; 743 So. 2d at 191 (Kimball, J., concurring).

157. *Id.*

158. Brown v. Kinney Shoe Corp., 237 F.3d 556, 566 (5th Cir. 2001).

159. *King*, 98-1805; p. 3; 743 So. 2d at 193 (Knoll, J., dissenting) (holding that the limitations period for an employment discrimination claim based on Title VII and 42 U.S.C. § 1981 commenced on the date the alleged unlawful decision was made and the plaintiff was given notice and noting that "continuity of employment, without more, is insufficient to prolong the life" of the action).

160. *Id.*

161. *Id.*

162. *Id.* at p. 4; 743 So. 2d at 194.

Later, while upholding its decision in *King*, the Louisiana Supreme Court clarified its ruling on prescriptive periods in *Eastin v. Entergy Corp*. There, former employees brought an action against their former employer for age discrimination under the Louisiana Age Discrimination Act (LADEA).[163] Reviewing the relevant standard of law on prescription, though oddly omitting its own holding in *King*, the Louisiana Supreme Court held that the plaintiffs' claims were prescribed. The court stated that age discrimination was subject to a one-year prescription period which commenced the day an injury was sustained.[164] Adopting what it called the "*Ricks/Chardon*" rule, the court held that the prescriptive period in a discriminatory termination case begins either when the employee is informed of his termination or upon his actual termination from employment, whichever is earlier, despite the fact that employment may not cease until a future date.[165] Thus, the plaintiffs' claims were all prescribed because they each waited more than one year from when their termination was communicated to them before filing suit.[166]

The court's holding in *Eastin* seems to clarify its previous decision in *King*, held that the prescriptive period began when the employee quit. The date an employee quits is definite and puts her on notice that she may have a claim for constructive discharge. Similarly, in *Eastin*, the court was again clearly concerned about an employee being on notice of a claim because it stated that the prescriptive period does not begin to run until there is clear notice by the employer or there is actual termination of the employee, whichever is earlier.[167] Both clear notice by the employer and actual termination provide an exact date by which an employee should be aware she may have a claim.[168] The Louisiana Supreme Court's conclusions in *King* and

163. Eastin v. Entergy Corp., 03-3366, p. 1 (La. 2/3/04); 865 So. 2d 49, 51.

164. *Id.* at p. 4; 865 So. 2d at 53.

165. *Id.* at p. 5; 865 So. 2d at 54 (citing Chardon v. Fernandez, 454 U.S. 6, 8 (1981); Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980)) (other citations omitted).

166. *Id.* ("Therefore, the claims of all Eleven Plaintiffs are prescribed on the face of the petition as they each waited more than one year from the date the allegedly discriminatory decisions were made and communicated to them before joining the suit.").

167. *See id.* at p. 1; 865 So. 2d at 57 (Kimball, J., concurring).

168. A Louisiana appellate court recently applied the "clear notice" principles established in *King* and *Eastin*. *See* Pilie v. Shaw Envtl. & Infrastructure, Inc., 13-1105 (La. App. 1 Cir. 6/5/14); No. 2013-CA-1105, 2014 WL 3555966, at *5 (holding that the prescriptive period for constructive discharge began when plaintiff received e-mail correspondence indicating he was in fact terminated) *writ denied*, 2014-1414 (La. 10/3/14); 149 So. 3d 801.

Eastin are compatible with the Notice/Resignation Circuits, which hold that a claim for constructive discharge begins either when the employee quits, or when the employee is given notice from her employer of her termination.

7. UNCERTAINTY IN THE FIFTH CIRCUIT

The Fifth Circuit's decision in *Montgomery v. Louisiana ex rel. Louisiana Department of Public Safety & Corrections*[169] helps shed light on which side of the circuit split the court may fall. Montgomery was a Major in the Louisiana State Police, and alleged that his superintendent continually harassed, humiliated, and intimidated Montgomery to force him into retirement.[170] According to Montgomery, the harassment began on April 21, 1997, when he was the target of a grand jury investigation.[171] Later, while on sick leave, Montgomery's supervisor asked him to surrender his state-issued sidearm and his badge, and then issued Montgomery an unsatisfactory service rating—despite the fact that he was still on sick leave.[172] In response, Montgomery never returned to work and retired on August 2, 1999.[173] On May 16, 2000, Montgomery filed suit. The district court granted the defendants' motion for summary judgment, concluding that the one-year prescription period commenced, at the latest, in 1997 during the grand jury investigation.[174] Montgomery appealed, arguing that the district court incorrectly concluded that his constructive discharge claim was time-barred.[175]

From the beginning, the court recognized that "[the Fifth Circuit] has never defined the precise moment at which a cause of action for constructive discharge accrues."[176] Realizing the lack of constructive discharge precedent, the court analyzed previous prescriptive precedent in prior decisions. In *Christopher v. Mobil Oil Corp.*, three plaintiffs selected early retirement packages from

169. No. 01-31458, 2002 WL 1973820 (5th Cir. Aug. 2, 2002). It must be noted that *Montgomery* may not be binding precedent because it is subject to the Fifth Circuit's rules 47.5.3 and 47.5.4. *See Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit,* 42–43 (Dec. 2013) *available at* http://www.ca5.uscourts.gov/clerk/docs/5thcir-iop.pdf.

170. *Montgomery*, 2002 WL 1973820, at *1.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Montgomery*, 2002 WL 1973820, at *2.

176. *Id.* at *2.

Mobil Oil and later brought a claim for constructive discharge under the ADEA.[177] There, the Fifth Circuit held that the statute of limitations began to run on the date the employees gave notice of retirement, not the later effective date.[178] Again, in *Kline v. North Texas State University*,[179] the plaintiff alleged that his employer forced him to resign due to continual harassment.[180] The court noted that the statute of limitations for Kline's claim began on the date he knew he would not resume his employment.[181] These decisions instructed the court in *Montgomery* that the date upon which a constructive discharge claim accrues "is not necessarily the date of one's official resignation."[182] Accordingly, the court held that, because the last act of discrimination occurred on September 8, 1999, Montgomery's constructive discharge claim accrued at that point.[183] At times, the Fifth Circuit has followed the *Montgomery* decision, focused on the employer's actions, and held that the prescription period begins when a person should have known they had a cause of action,[184] which falls in line with the decisions from the Limitations Circuits.

In contrast, the Fifth Circuit has also recognized that a "claim accrues when [a] plaintiff is given unequivocal notice of

177. 950 F.2d 1209, 1212–13 (5th Cir. 1992).

178. *Id.* at 1217.

179. 782 F.2d 1229 (5th Cir. 1986).

180. *Id.* at 1232.

181. *Id.* at 1233 n.6 ("If Kline knew that he would not resume [his] position at the end of his leave of absence, the statute of limitations on any claims relating to the chairmanship position began running in August of 1979.").

182. Montgomery v. Louisiana *ex rel.* La. Dep't of Pub. Safety & Corr., No. 01-31458, 2002 WL 1973820, at *3 (5th Cir. Aug. 2, 2002).

183. *Id.* at *4.

184. *See* Ikossi-Anastasiou v. Bd. of Supervisors of La. State Univ., 579 F.3d 546, 550 (5th Cir. 2009) (holding that plaintiff's Title VII claim accrued when she received university's letter denying request for unpaid leave because the letter put the professor on notice that she would be terminated if she failed to return to work); *see also* Frame v. City of Arlington, 657 F.3d 215, 240 (5th Cir. 2011) (holding that plaintiffs' ADA and Rehabilitation Act claims accrued when the disabled residents knew or should have known they were being denied benefits of newly built or altered sidewalks); Ramirez v. City of San Antonio, 312 F.3d 178, 181 (5th Cir. 2002) (holding that the limitations period for employment discrimination claims "begins to run from the time the complainant knows or reasonably should have known that the challenged act occurred") (citations omitted); Benkert v. Tex. Dep't of Criminal Justice, No. 02-20437, 2002 WL 31049461, at *1 (5th Cir. Sept. 3, 2002) (citing Hunt v. Rapides Healthcare Sys., LLC, 277 F.3d 757, 771 (5th Cir. 2001) ("[A]ny claim of constructive discharge accrued when [plaintiff] left the TDCJ on leave and did not return, not when he formally resigned.").

[an] adverse employment decision."[185] Further, a resignation is considered an adverse employment action "if the resignation qualifies as a constructive discharge."[186] Moreover, a plaintiff must file suit within one year of the adverse employment action.[187] Logically, it follows that if a resignation is alleged to be a constructive discharge, then the claim should accrue from the date of resignation.

In sum, it appears that the Fifth Circuit's case law is at odds with itself: in some cases it holds that the claim accrues on the last discriminatory act of the employer,[188] while in other cases it holds that a plaintiff must file suit within one year from an adverse employment action,[189] and that a resignation can be an adverse employment action if it stems from a constructive discharge claim.[190] Unfortunately, this means that a constructive discharge claim may accrue, and the prescriptive/limitations period begins to run, either at one of two dates: on the last discriminatory act of the employer, or when the employee decides to resign. The lack of guidance is troublesome as these time periods are extremely important to potential plaintiffs and attorneys, and it leaves all parties to simply guess at the date of accrual.

8. SUMMARY

In short, the Notice/Resignation Circuits, except arguably the Fifth Circuit, all define constructive discharge as a distinct discriminatory act which does not accrue until the employee gives definite notice of resignation or in fact resigns. This is distinct from the Limitations Circuits' reasoning, as those courts do not view resignation as a discriminatory act, but merely as a

185. Avena v. Tex. Dep't of Human Servs., 2003 WL 147738, at *2 (5th Cir. Jan. 7, 2003) (citing Del. State. Coll. v. Ricks, 449 U.S. 250, 258 (1980); Vadie v. Miss. State Univ., 218 F.3d 365, 371 (5th Cir. 2000)).

186. Brown v. Kinney Shoe Corp., 237 F.3d 556, 566 (5th Cir. 2001) ("A resignation is actionable under Title VII, allowing the plaintiff to seek compensatory damages for events after the resignation, only if the resignation qualifies as a constructive discharge.").

187. *See* Jay v. Int'l Salt Co., 868 F.2d 179, 181 (5th Cir. 1989).

188. *See Montgomery*, 2002 WL 1973820, at *4.

189. *See Jay*, 868 F.2d at 181 ("Accordingly, we affirm the conclusion of the district court that the prescriptive period for Jay's age discrimination claim under the LADEA began to run in May, 1985, and that Jay's *failure to bring suit within one year* from that date warranted summary judgment in favor of [the defendant].") (emphasis added).

190. *See Brown*, 237 F.3d at 566.

consequence of the employer's previous discriminatory acts.[191] Moreover, the Notice/Resignation courts view constructive discharge as similar to a wrongful termination, and recognize that resignation is an element that must be satisfied before a cause of action accrues.[192] In doing so, these courts agree that a resignation is not typically a discriminatory act;[193] but when the employer makes conditions so bad that a reasonable employee would want to quit, then the resignation is a constructive discharge which constitutes a distinct discriminatory act for which there is a distinct cause of action.[194]

Again, let us see how our friend Pat would fare in these jurisdictions. Let us say that Terry made four sexual advances against Pat: April 1, April 7, April 15, and May 1, 2016. On May 2, Pat gives a notice of resignation effective immediately. Assuming that a reasonable person in Pat's position would feel compelled to resign, and that Pat is a private-sector employee, Pat must file a charge of discrimination with the EEOC within 180 days of May 2, 2016.[195] Thus, Pat must file a charge of discrimination by October 29, 2016. This seems simple, but rarely are cases this simple. So, let's make things a little more complicated. Let us assume that Terry made a sexual advance on April 1, took all of Pat's work away for not acquiescing to the sexual advance on April 7, an employee made a crude joke to Pat on April 15, and on May 1 Pat is denied a promotion by her boss (not Terry). On May 2, Pat gives a notice of resignation effective immediately. In Notice/Resignation Circuits Pat's constructive discharge claim accrues on May 2. This bright-line rule gives employees a definite date of accrual, which helps employees know from exactly which date they must file a charge of discrimination in order to preserve a claim.

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191. *See* Davidson v. Indiana-American Water Works, 953 F.2d 1058, 1059 (7th Cir. 1992) ("This limitations period begins to run on the date that the defendant takes some adverse personnel action against the plaintiff, and *not when the full consequences of the action are felt*.") (emphasis added).

192. *See supra*, Section V.B.

193. *See* Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980).

194. Young v. Nat'l Ctr. for Health Servs. Research, 828 F.2d 235, 238 (4th Cir. 1987).

195. Pat may have 300 days to file a charge of discrimination depending on the jurisdiction. 42 U.S.C. § 2000e-5(e)(1)(2012); *see* Raj v. La. State Univ., 714 F.3d 322, 330 (5th Cir. 2013).

VI. THE ADOPTION OF THE NOTICE/RESIGNATION HOLDINGS

Due to the circuit split as to when a constructive discharge claim accrues, and the date upon which the prescriptive period begins to run, this section explains why a bright-line rule was necessary. Specifically, this section discusses why the Supreme Court's adoption of the Notice/Resignation Circuits' holdings was jurisprudentially accurate and advantageous. First, this section will discuss Congress's passing of the Lilly Ledbetter Fair Pay Act (Ledbetter Act).[196] The section then shows how the same concerns that were present in the *Ledbetter* decision were present in many constructive discharge claims. This section then shows that the Notice/Resignation decisions are prudentially accurate.

A. CONGRESS'S RESPONSE TO *LEDBETTER V. GOODYEAR TIRE*

The Ledbetter Act was passed in response to the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co*.[197] There, the Court addressed a compensation discrimination claim that arose from a continuing violation from disparate payment due to Ledbetter's sex. Mrs. Ledbetter filed suit after discovering that, during her time at Goodyear Tire, she had been paid significantly less than her male counterparts simply because she was a female.[198] The Supreme Court held that, when a plaintiff challenges an employer's discriminatory pay practices, the time for filing relates to when that incident occurred, and that the period does not start over each time the employer issues a new paycheck.[199] In essence, the Court held that Mrs. Ledbetter's

196. *See* Lilly Ledbetter Fair Pay Act of 2009, U.S. Pub. L. No. 111-2, 111th Cong. (2009) *available at* https://www.congress.gov/111/plaws/publ2/PLAW-111publ2.pdf. The purpose of the Lilly Ledbetter Fair Pay act was "[t]o amend title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, and to modify the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes." *Id.*

197. *See id*. ("The Supreme Court [decision] in Ledbetter v. Goodyear Tire . . . significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades."); *see also* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

198. *See* Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1175–1176 (11th Cir. 2005) ("[T]he jury . . . returned a verdict in favor of Ledbetter on the Title VII pay claim, finding, in a special verdict, that it was 'more likely than not that Defendant paid [Ledbetter] an unequal salary because of her sex.'").

199. *Ledbetter*, 550 U.S. at 628–29.

claim arose when she received the first paycheck that was less than that of her male counterparts. In response, Congress quickly abrogated the Supreme Court's decision by passing the Ledbetter Act.[200]

During the Senate hearing discussing the proposed Ledbetter Act, senators, scholars, practitioners, and even Mrs. Ledbetter herself spoke to address concerns over the Supreme Court's decision. Strikingly, many problems that women and minorities faced due to the filing restraints of the Supreme Court's holding in *Ledbetter* are the same problems constructive discharge plaintiffs face today. One concern raised by Senator Patty Murray with the *Ledbetter* decision was that if a plaintiff filed too early she would run the risk of alienating her employer and not have all the facts necessary to prove their case. However, if the plaintiff filed too late she would miss her opportunity due to the strict 180-day time limit established by *Ledbetter*.[201] Further, Senator Murray recognized that it may take months for an employee to realize, much less prove, that they are being underpaid because of their gender, color, or national origin.[202]

Margot Dorfman, the Chief Executive Officer of the United States Women's Chamber of Commerce, also expressed concern with the *Ledbetter* decision. Specifically, she believed that the 180-day time limit created detrimental incentives for employees and employers, because it encouraged employees to file quickly in fear of filing too late, rather than giving the employee time to consider their situation and confirm they have been discriminated against.[203] Moreover, by having a rule that the employee must file a complaint following the first discriminatory act of the employer, this incentivizes the employers to be less vigilant about pay discrimination, because they know after the 180 days they will be free from any potential challenges. In other words, Ms. Dorfman was concerned that an employer would discriminately pay women without any second thought, because the employer knew the claim was difficult to discover and would disappear in 180 days as the statute of limitations would run.

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200. *See* LINDEMANN, *supra* note 28, at § 19-74.

201. *Ensuring Reasonable Rules in Pay Discrimination Cases: Hearing on S. 1843 Before the S. Comm. on Health, Educ., Labor, and Pensions*, 110th Cong. 5 (2009) (statement of Sen. Edward Kennedy, Chairman, S. Comm. on Health, Educ., Labor, and Pensions) *available at* http://www.gpoaccess.gov/congress/senate.

202. *Id.* at 7 (statement of Sen. Patty Murray).

203. *Id.* at 16 (statement of Margot Dorfman, CEO, U.S. Women's Chamber of Commerce).

In support of the Act, Samuel R. Bagenstos, a professor and associate dean at Washington University in St. Louis School of Law, proposed that the Ledbetter Act would create uniformity and create a simple rule to govern the timeliness of pay discrimination claims.[204] The rule that each paycheck would re-trigger the limitations period would also rid the courts of wasteful litigation over disputes about when the limitations period began, and would refocus the courts efforts on the actual dispute—pay discrimination.[205] Significantly, Professor Bagenstos recognized that, because an employee can bring a claim does not mean the employee will be successful, and that by creating a more bright-line rule the court was not simply passing favors to employees.[206] Finally, Congress stated that the Act was intended to overrule the *Ledbetter* decision as "[it] undermines . . . statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress."[207]

B. THE "LEDBETTER CONCERNS" ARE PRESENT IN CONSTRUCTIVE DISCHARGE CASES

Many of the same concerns raised by the senators and scholars in the Senate hearing are also concerns facing constructive discharge plaintiffs today. Again, a constructive discharge claim includes two main requirements: (1) a constructive discharge occurs when an employee resigns because her working conditions have become so intolerable that a reasonable person would have felt compelled to resign; and (2) in

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204. *Ensuring Reasonable Rules in Pay Discrimination Cases: Hearing on S. 1843 Before the S. Comm. on Health, Educ., Labor, and Pensions*, 110th Cong. 20 (2009) (statement of Samuel Bagenstos, Professor of Law and Associate Dean, Washington University in St. Louis School of Law) *available at* http://www.gpoaccess.gov/congress/senate.

205. *Id.* at 21.

206. *Id.*

207. Lilly Ledbetter Fair Pay Act of 2009, U.S. Pub. L. No. 111-2, 111th Cong. (2009) *available at* https://www.congress.gov/111/plaws/publ2/PLAW-111publ2.pdf. Congress passed the Ledbetter Act in 2009, and it reads in pertinent part:

> An 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 decisions 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.

42 U.S.C. § 2000e-5(3)(A) (2012).

order to have a constructive discharge claim an employee usually must be exposed to numerous occasions of severe harassment, demotions, or reductions in pay or job responsibilities.[208] However, this begs the question: When was the right time? Was the fourth time Pat Jameson, our imaginary friend, was harassed enough, or was the third time?

The difference between the fourth harassment and the third harassment may be significant, as the third may have triggered the limitations period, and the fourth may fall outside of the limitations period. Remember how Pat was sexually harassed by Terry, the supervisor, and the other co-workers on a daily basis for an extended period of time? It seems unfair for Pat to have to decide when a reasonable person would have felt compelled to quit. Should Pat have quit during the third week of the harassment? The difficulty of knowing when a constructive discharge claim actually occurs or accrues, much like the difficulty of discovering when an employer is discriminately paying an employee based on her sex, puts employees at an extreme disadvantage. Employees are forced to either subject themselves to more discrimination in hopes of being able to seek recourse, or quit too early and have a court hold that "a reasonable employee" would have quit at some earlier point in time.

Other concerns that the Ledbetter Act addressed are also present in constructive discharge claims. Congress found that the *Ledbetter* decision undermined the statutory protections by unduly restricting the time period which victims of discrimination could challenge and for which they could recover.[209] Further, Congress found that the limitation imposed by the *Ledbetter* decision ignored the reality of wage discrimination, and the difficulty of an employee knowing or discovering he or she is suffering from pay discrimination.[210] Similarly, as the example above demonstrates, employees in Limitation Circuit jurisdictions face the difficult task of deciding to quit early to preserve their constructive discharge claim, in hopes that a court will find they quit at the right time. Alternatively, the employee may remain employed in fear that her working conditions are not yet "unbearable or intolerable." This places employees and

208. *See* Penn. State Police v. Suders, 542 U.S. 129, 146–47 (2004).

209. *See* Lilly Ledbetter Fair Pay Act of 2009, U.S. Pub. L. No. 111-2, 111th Cong. (2009) *available at* https://www.congress.gov/111/plaws/publ2/PLAW-111publ2.pdf.

210. *Id.*

employers in a guessing game as to when an employee may have a constructive discharge claim. Further, the Limitation Circuits' holdings actually incentivize employers to discriminate against employees in order to get them to quit.

For example, an employer can take the "slow roast" approach in order to make an employee quit by subjecting them to intermediate levels of discrimination—crude jokes, sexual innuendos, etc.—over an extended period of time. Employers may choose to discriminate in this manner, as it may be more difficult to prove a discrimination claim when an employee voluntarily leaves. Further, if an employee quits the employer is not required to provide a severance package. Congress passed the Ledbetter Act in an attempt to create a more bright line rule for pay discrimination claims and to resolve the same issues seen in constructive discharge claims. The Court's decision in *Green v. Brennan* alleviates the need for Congress to respond as it directly addresses these issues.

C. *GREEN V. BRENNAN*: THE SUPREME COURT

1. PRECEDENTIAL BACKGROUND

Prior to *Green v. Brennan*, the Supreme Court had never expressly defined when a constructive discharge claim accrues or when the limitations period begins. It had, however, shed light on similar "constructive-type" issues. Particularly, in *Mac's Shell Service, Inc. v. Shell Oil Products Co., LLC*, the Court held that franchisees must abandon their franchise before claiming constructive termination.[211] Although dicta, the Court found that constructive termination was analogous to the "long recognized . . . theory of constructive discharge."[212] Specifically, the Court explained that "[t]o recover for constructive discharge, however, an employee generally is required to quit his or her job."[213] Here, the Court focused on the date of termination, and because the Court focused on the date of actual termination in this context, it foreshadowed the Court's decision in *Green v. Brennan*. The Court also found landlord tenant law to be analogous. In constructive eviction cases, the Court recognized the general rule that a tenant must actually move out in order to

211. Mac's Shell Serv., Inc. v. Shell Oil Prods. Co., 559 U.S. 175, 184 (2010).

212. *Id.* (citations omitted); *see* Jeffery v. City of Nashua, 48 A.3d 931, 936 (N.H. 2012) (refusing to hold that constructive discharge accrues upon actual termination, but rather when the "employee tenders the resignation or retirement notice").

213. *Mac's Shell Serv. Inc.*, 559 U.S. at 184.

claim constructive eviction.[214] Moreover, the Court agreed that "courts have long required plaintiffs asserting [a constructive-type claim] to show an actual severance of the relevant legal relationship."[215] From this holding, it appeared predictable that the Court would side with the Notice/Resignation Circuits and focus on the date of resignation.

However, the Supreme Court's holding in *Delaware State College v. Ricks* created doubt.[216] In *Ricks*, the Court held that a wrongful discharge claim due to a professor's denial of tenure was time-barred.[217] The Third Circuit had held that Ricks' Title VII filing requirement, and the statute of limitations for his § 1981 claim, did not commence until Ricks' contract expired, and thus were timely.[218] The Third Circuit explained that a rule focusing on the last day of employment would provide "a bright line guide both for the courts and for the victims of discrimination."[219] This view fell directly in line with those federal circuit courts that held constructive discharge claims accrue when an employee actually resigns.

The Supreme Court reversed the Third Circuit's decision and held that Ricks' Title VII and § 1981 claims were untimely.[220] The Court reasoned that Ricks' termination was simply an "inevitable consequence of the denial of tenure."[221]

The Court held that the limitations periods commenced when the tenure decision was made *and Ricks was notified*.[222] This decision raised questions as to which side of the circuit split the Court would join.

In short, these two Supreme Court decisions shed conflicting light as to which side of the circuit split the Court would join. *Mac's Shell* clearly stated that generally an employee is required to quit to recover on a constructive discharge claim.[223] Conversely, *Ricks* focused on the employer's discriminatory acts

214. *Mac's Shell Serv. Inc.*, 559 U.S. at 184.

215. *Id.* at 185.

216. *See* Del. State Coll. v. Ricks, 449 U.S. 250, 250 (1980) ("Respondent's Title VII and § 1981 claims were untimely.").

217. *Id.* at 258, 262.

218. *See id.* at 255.

219. *Id.* at 256.

220. *Id.*

221. *Ricks*, 449 U.S. at 257–58.

222. *Id.* at 259.

223. *See* Mac's Shell Serv., Inc. v. Shell Oil Prods. Co., 559 U.S. 175, 184 (2010).

for accrual, but at the same time stated the limitations period commenced when "Ricks was notified."[224] From these decisions, however, it followed that to recover for constructive discharge an employee generally is required to quit her job. [225] Further, a constructive discharge claim does not accrue until definite notice of termination.[226] Because the Court had previously held that accrual generally occurs when a plaintiff has a complete and present cause of action,[227] then a constructive discharge claim cannot accrue until the employee resigns, or, at the earliest, upon definite notice of termination. *Green v. Brennan* confirmed this reasoning.

2. *GREEN V. BRENNAN*

The Supreme Court granted writ[228] in *Green v. Brennan*[229] to decide when a constructive discharge claim accrues. The Court rightly began its inquiry by examining Title VII's regulatory text, which provides that Green initiate contact with an EEO Counselor within "45 days of the date of the matter alleged to be discriminatory."[230] In its inquiry, the Court noted that "the text [of the regulation] in this case is not particularly helpful" as the regulation does not indicate whether "a matter alleged to be discriminatory" in a constructive-discharge claim includes an employee's resignation.[231] With little help, the Court turned to the "standard rule" for interpreting limitations periods.[232] The standard rule dictates that a claim's limitation period does not commence until the plaintiff has a complete and present cause of action.[233] Further, a cause of action is not complete for limitations purposes until the plaintiff may file suit and obtain

224. *Ricks*, 449 U.S. at 259.

225. *Mac's Shell Serv. Inc.*, 559 U.S. at 184. While dicta, the Court's explicit statement that constructive discharge generally requires an employee to quit shows that the Court would stand firm to this statement if faced with a constructive discharge accrual case. *See id.*

226. *See Ricks*, 449 U.S. at 259.

227. *See* Wallace v. Kato, 549 U.S. 384, 388 (2007) ("[I]t is the standard rule that [accrual occurs] when the plaintiff has a complete and present cause of action.") (internal quotations omitted).

228. Green v. Donahoe, 135 S. Ct. 1892 (2015).

229. 136 S. Ct. 1769 (2016).

230. *Id.* at 1774.

231. *Id.* at 1776.

232. *Id.* (quoting Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 545 U.S. 409, 418 (2005)).

233. *Id.* (quoting *Graham Cty. Soil & Water Conservation Dist.*, 545 U.S. at 418).

relief.[234]

Deeming the standard rule applicable in this case, the Court found that "'the matter alleged to be discriminatory' in a constructive discharge claim necessarily includes the employee's resignation . . . ."[235] The Court pointed to three main reasons why the "matter alleged to be discriminatory" includes an employee's resignation: (1) resignation is necessary for a "complete and present cause of action"; (2) nothing in the text of the regulation indicates an intent to displace the "standard rule"; and (3) "practical considerations confirm the merit of applying the 'standard rule' here."[236]

a. Resignation Is a Necessary Element of a Constructive Discharge Claim

Reciting the necessary elements for a constructive discharge claim, the Court noted that there are two basic requirements: (1) discrimination against an employee by his employer "to the point where a reasonable person in his position would have felt compelled to resign," and (2) actual resignation.[237] It follows that only once both elements are satisfied can an employee file suit to obtain relief.[238] Such an interpretation, the Court held, is congruent with the standard rule for limitations periods, and that the limitations period should begin to run for a constructive discharge claim only after a plaintiff resigns.[239] The Court thus

234. *Green*, 136 S. Ct. 1776 (citing Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 201 (1997)). The Court noted that there is an exception to the standard rule, and that limitations periods may begin to run before a plaintiff can file suit, but refused to infer this rule within the regulatory text, finding it an "odd result in the absence of any such indication in the text of the limitations period." *Id.* (quoting Reiter v. Cooper, 507 U.S. 258, 267 (1993)) (internal quotation marks omitted).

235. *Id.*

236. *Id.*

237. *Id.* at 1777 (citing Penn. State Police v. Suders, 542 U.S. 129, 148 (2004)).

238. *Id.* Interestingly, the Court cited to *Mac's Shell* for a contrasting comparison that the limitations period for a constructive termination of a franchise agreement starts running when the agreement is constructively terminated. *Id.* at 1776. However, the Court's holding in *Mac's Shell* was that franchisees must abandon their franchise before claiming constructive termination. *See* Mac's Shell Serv., Inc. v. Shell Oil Prods. Co., 559 U.S. 175, 184 (2010). Further, although dicta, the Court found that such constructive termination was analogous to constructive discharge and that an employee is generally required to quit in order to succeed. *Id.* It seems inapposite for the Court to choose this case to contrast its holding in *Green v. Brennan*.

239. *Green*, 136 S. Ct. at 1777.

interpreted the "matter alleged to be discriminatory" to refer to all of the elements necessary to make up a constructive discharge claim—including an employee's resignation.

The exception to the general rule occurs when the text creating the limitations period clearly indicates that the limitations period should commence prior to a claim's accrual.[240] However, the Court found that nothing in the text of Title VII or the regulation suggests that the standard rule should be displaced here. Rather, the Court ruled that the text confirms the application of the default rule.[241] The word "matter" is "an allegation forming the basis of a claim or defense."[242] Thus, the "natural reading of 'matter alleged to be discriminatory' refers to the allegation forming the basis of the discrimination claim," which here, is a constructive discharge claim.[243] The Court went on to explain that as long as the discriminatory conduct by the employer that leads to the resignation of the employee are part of the same, single claim under consideration, they are part of the "matter alleged to be discriminatory."[244]

b. Practical Considerations Confirm the Merit of Applying the Standard Rule

The Court noted that starting the limitations period before a plaintiff can sue for constructive discharge did not serve to further the goals of a limitation period and, in fact, negated Title VII's remedial structure.[245] If this were the case, an employee would be in the difficult situation where she may force herself to tolerate discrimination until she can afford to leave. In a more practical situation, the Court depicted the schoolteacher who waits until the end of the school year to quit.[246] Further, Supreme Court precedent dictates that "the limitations period should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes."[247]

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240. *Green*, 136 S. Ct. at 1777 (citing Dodd v. United States, 545 U.S. 353, 360 (2005)).

241. *Id.*

242. *Id.* (citing *Matter*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

243. *Id.*

244. *Id.* at 1778.

245. *Green*, 136 S. Ct. at 1778.

246. *Id.* at 1777.

247. *Id.* 1778 (quoting Del. State Coll. v. Ricks, 449 U.S. 250, 262 n.16 (1980)) (internal quotation marks omitted).

c. When Does an Employee Resign?

The final issue before the Court was to determine exactly when an employee resigns.[248] The majority announced a "notice rule," which is supported by its precedent in *Ricks* and *Chardon v. Fernandez*.[249] There, the Court explained that an ordinary wrongful-discharge claim accrues, and the limitations period begins to run, "when the employer notifies the employee he is fired, not on the last day of his employment."[250] Likewise, here, the Court held that a "constructive discharge claim accrues—and the limitations period begins to run—when the employee gives notice of his resignation, not on the effective date of resignation."[251]

The "notice rule," as explained throughout this Comment, is the most advantageous rule for all parties involved. Specifically, by announcing a notice rule, courts will now only have to focus on the date when an employee gave a notice of intent to resign. Courts will no longer need to focus on the exact point at which a reasonable employee would feel compelled to leave, which is subject to several interpretations. Instead, a notice of intent to resign, or actual resignation on the spot, will provide a more "bright-line" test. While the "notice rule" leaves some factual discussion, this rule is more workable and less fact intensive than the alternatives.

d. Addressing the Dissent

The dissent read "matter alleged to be discriminatory" as having a clear meaning to displace the standard rule for limitations periods.[252] The dissent urged that "matter" is not the same as "claim," or "cause of action;" therefore, the "matter alleged to be discriminatory" was sufficiently clear to render the standard rule inapplicable.[253] In essence, the majority summarized the dissent's argument: "matter" refers only to the discriminatory acts of the employer.[254]

In support, the dissent and amici curiae pointed to

248. *Green*, 136 S. Ct. at 1782.
249. *Id.* (citations omitted).
250. *Id.* (citations omitted).
251. *Id.*
252. *Id.* at 1778.
253. *Green*, 136 S. Ct. at 1778.
254. *Id.*

Pennsylvania State Police v. Suders,[255] which provided that "[u]nder the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge *for remedial purposes*."[256] The majority disagreed, finding that under *Suders*, "[C]onstructive discharge is a claim distinct from the underlying discriminatory act."[257]

e. Addressing the Concurrence

According to the concurrence, there are two theories of constructive discharge for purposes of the limitations period: (1) Specific Intent Claims; and (2) Non-Specific Intent Claims.[258] Under the Specific Intent Theory, a constructive discharge occurs when the employer "makes conditions intolerable with the specific discriminatory intent of forcing the employee to resign."[259] Under the "Non-Specific" Intent Theory, the "employer does not intend to force the employee to quit, but the discriminatory conditions of employment are so intolerable that the employee quits anyway."[260]

While the majority recognized that Justice Alito's concurrence was novel, it found that such a framework was contrary to the constructive discharge doctrine.[261] Forcing an employee to come forth with the ever-elusive proof of intent would be overly difficult, if not impossible, to prove.[262] One of the more persuasive arguments the majority was forced to tackle was the concurrence's valid argument that, under long-standing precedent, a discriminatory act must typically occur within the limitations period.[263] As explained above, in *Ricks*, the Court held that a wrongful discharge claim due to denial of tenure was time-barred.[264] The Court stated that it had to identify the precise employment practice of which Ricks complained.[265]

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255. 542 U.S. 129 (2004).
256. *Green*, 136 S. Ct. at 1779 (quoting *Suders*, 542 U.S. at 141).
257. *Id.*
258. *Id.* (J. Alito concurring).
259. *Id.*
260. *Id.*
261. *Green*, 136 S. Ct. at 1779.
262. *Id.*
263. *Id.* at 1780.
264. Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980).
265. *Id.*

While the Court focused on the discriminatory acts of the employer in *Ricks*, its decision in *Green* simply clarifies that constructive discharge claims are somewhat unique. In constructive discharge claims, the resignation is essentially an imputed discriminatory act by the employer. Importantly, the Court held that the limitations period commenced when Ricks was notified.[266] Again, this decision helped leave the door open for the Court in *Green*. It may be seen that the Court is focusing on the "precise unlawful employment practice" of which Ricks complained, which supports the dissent's argument that a discriminatory act must occur within the limitations period. However, the Court also explains how Ricks' being "on notice" of the termination falls squarely in line with its holding in *Green*.[267] While hindsight is always 20/20, it is clear that the Court's ambiguous holding in *Ricks* lended a helping hand in its decision in *Green*.

Further, Justice Alito's concurrence gives discriminatory employers a slap on the wrist when a more severe punishment is appropriate. The Justice's novel approach, regardless of intent, concedes that discrimination has occurred. Thus, what policy would the Court be furthering by allowing employers to, most of the time, get off easy? The specific intent of an employer's discrimination may be nearly impossible to prove. Moreover, the Justice gave little instruction as to what evidence may be necessary to prove such a claim. This "intent" approach only distorts the already blurry line of limitation commencement in constructive discharge claims.

D. NOTICE/RESIGNATION ACCRUAL IS ADVANTAGEOUS TO COURTS, EMPLOYERS, AND EMPLOYEES

The Limitations Circuits were historically unwilling to hold that an employee's notice of resignation, or actual resignation, starts the limitations period in part because of the Supreme Court's holding in *Ricks*. In determining the timeliness of Ricks' complaint, the Court stated that it had to determine the precise unlawful employment practice.[268] Further, the Court stated that, in order to determine the timeliness of a claim in employment discrimination cases, generally "[t]he proper focus is upon the time of the [employer's] discriminatory acts . . . not when the full

266. *Ricks*, 449 U.S. at 259.
267. *Green*, 136 S. Ct. at 1780.
268. *Ricks*, 449 U.S. at 257.

consequences of the action are felt."[269] However, determining constructive discharge claims solely by the "precise unlawful employment practice" is shallow because it fails to consider both elements of a constructive discharge claim and the complexity the claim presents. In constructive discharge cases the discriminatory conduct is not one discrete and identifiable act by the employer.[270]

Rather, a constructive discharge occurs over a series of acts by an employer which makes working conditions intolerable, essentially causing an employee to quit involuntarily.[271] Thus, focusing solely on the employer's actions makes courts sift through the various discriminatory acts to determine at which point a reasonable person would have felt compelled to resign. But this fails to consider that resignation is a requisite element of a constructive discharge claim, and strains courts and juries to define the exact discriminatory act at which point a reasonable employee would feel compelled to resign.

Alternatively, the Notice/Resignation courts' decisions are not only jurisprudentially accurate, but they are advantageous to courts, employees, and employers. By holding that a potential constructive discharge claim accrues on definite notice to resign or actual resignation, the Fifth Circuit will give courts, employees, and employers a fixed period of time from which to calculate the limitations period. Doing so defeats any argument that an employee or employer was not on notice of a potential claim, and eliminates any dispute over when the claim accrues.[272]

Some courts argue that by setting the accrual date from the notice or actual resignation an employee can essentially establish her own accrual date,[273] allowing employees to recover for years of

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269. Green v. Donahoe, 760 F.3d 1135, 1144 (10th Cir. 2014); *see* Davidson v. Indiana-American Water Works, 953 F.2d 1058, 1059 (7th Cir. 1992) (citing *Ricks*, 449 U.S. at 258).

270. *See* Flaherty v. Metromail Corp., 235 F.3d 133, 138 (2d Cir. 2009).

271. *See id.*

272. *See* Daniels v. Mut. Life Ins. Co., 773 A.2d 718, 721 (N.J. Super. Ct. App. Div. 2001).

273. *See, e.g.*, *Green*, 760 F.3d at 1144–45 (quoting Wallace v. Kato, 549 U.S. 384, 391 (2007)) ("Of particular concern is that delaying accrual past the date of the last discriminatory act and setting it at the date of notice 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.'").

potentially discriminatory activity.[274] However, doing so would be against an employee's best interest. If an employee believes he or she has a constructive discharge claim, delaying resignation or notice of resignation will make the employer's actions look less discriminatory and more tolerable. Further, it becomes more difficult to prove a constructive discharge claim if the last discriminatory act that "forced" the employee to resign occurred a year or two prior.[275] Alternatively, by giving notice of resignation or actually resigning immediately after the conditions become intolerable, an employer's actions look more unbearable. Moreover, by definitively placing an employer on notice of a potential claim, an employer is more likely to attempt to reconcile any differences in-house rather than allowing the claim to go to court. In short, by holding that accrual runs from definite notice of intent to resign or the actual resignation date, the Supreme Court has placed all interested parties clearly on notice of a potential claim, reducing any dispute over when a claim accrues, and promoting more conciliatory actions between employers and employees.

VII. CONCLUSION

The foregoing Comment shows the guessing game employees, employers, and the courts faced prior to the Supreme Court's decision in *Green*. In all, *Green* will be seen as a win for employees and a bridge to unify the divide among lower courts. But more importantly, the Court has established a bright-line rule which is not only supported by Supreme Court precedent, but is a common sense solution for all parties involved. Here forward, the only key issue remaining for courts to tackle is what constitutes "notice" of an intent to resign. However, solving this factual dispute will be much easier than the job courts faced prior to this decision.

R. Blake Crohan

274. *See* Matt Huffman, *Constructive Discharge: Drawing the Line*, U. OF CINCINNATI L. REV. (Feb. 12, 2015), http://uclawreview.org/2015/02/12/constructive-discharge-drawing-the-line/ (last visited Sept. 4, 2016).

275. *See id.*