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

By Aditi Kumar¹

I. INTRODUCTION

A claim for constructive discharge most often results from a series of discriminatory actions on the part of the employer.² These actions are frequently in the nature of continuing violations, *i.e.*, repeated acts of discrimination.³ Constructive discharge occurs when an employer unlawfully creates working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign.⁴ There is a distinct cause of action on the basis of constructive discharge when the employer discriminates against an employee and purposefully makes the employee's job conditions unendurable.⁵ Remedies under a constructive discharge claim can include reinstatement of employment and back-pay past the date of "discharge."⁶

Historically, in the context of employment discrimination cases, the claim starts to accrue, for statute of limitations purposes, on the date the employee learns of the employer's discriminatory conduct.⁷ This rule generally means that a claim accrues when the disputed employment practice - the demotion, transfer, firing, refusal to hire, or the like - is first announced to the plaintiff.⁸ However, in a constructive discharge case, the actionable conduct is not a discrete, identifiable act on part of the defendant.⁹ Therefore, several courts have held that in cases of a constructive discharge, a claim accrues on the date the employee resigned, while other courts cling to the date the employee learns of the employer's discriminatory conduct for filing a claim.¹⁰ Over time, there has been much debate surrounding the accrual of a constructive discharge claim. The cir-

¹ J.D. 2015, American University Washington College of Law.

² *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1110 (9th Cir. 1998).

³ *Id.*

⁴ *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1133 (10th Cir. 2013).

⁵ *Young v. Nat'l Ctr. for Health Servs. Research*, 828 F.2d 235, 237-38 (4th Cir. 1987).

⁶ *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 758 F. Supp. 303, 307 (E.D. Pa. 1991).

⁷ *Flaherty v. Metromail Corp.*, 235 F.3d 113, 137 (2d Cir. 2000).

⁸ *Almond v. Unified Sch. Dist. No. 501*, 665 F.3d 1174, 1177 (10th Cir. 2011).

⁹ *See Flaherty*, 235 F.3d at 138.

¹⁰ *See generally id.*; *Am. Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 123 (1st Cir. 1998); *Draper*, 147 F.3d at 1111; *Hukkanen v. Int'l Union of Operating Eng'rs. Hoisting & Portable Local No. 101*, 3 F.3d 281, 285 (8th Cir. 1993); *Young*, 828 F.2d at 235.

cuits are split over which of two conflicting rules governs when the filing window for a constructive discharge claim opens under federal employment discrimination law. A recent case from the Tenth Circuit, *Green v. Donahoe*,¹¹ has raised the issue once again and has deepened the split.

In *Green*, the United States Court of Appeals for the Tenth Circuit held that under Title VII, a constructive discharge claim accrues on the date of the discriminatory employment action that forces the worker to quit, not when he or she resigns. Thus far, the majority of the circuits, in decisions dating between 1987 and 2000, have held that constructive discharge claims accrue on the date an employee resigns;¹² however, the D.C. and Seventh Circuits have agreed with the Tenth Circuit. The petitioner in *Green* filed a writ of certiorari on November 25, 2015, to resolve the issue of, “Whether, under federal employment discrimination law, the filing period for a constructive discharge claim begins to run when an employee resigns or at the time of an employer’s last allegedly discriminatory act giving rise to the resignation.”¹³ The Respondent filed a reply on March 18, 2015. The Supreme Court granted the writ of certiorari on April 27, 2015.

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

II. PURPOSE OF TITLE VII AND CONSTRUCTIVE DISCHARGE

A. History

Section 703(a) of Title VII of the Civil Rights Act of 1964 (“Title VII”) makes it unlawful for employers to discriminate against any individual on the basis of race, color, religion, sex, or national origin.¹⁴ A viable Title VII claim requires jurisdictional coverage of the plaintiff and the employer, compliance with the procedural prerequisites to the filing of a suit, and existence of a

¹¹ *Green v. Donahoe*, 760 F.3d 1135, 1142 (10th Cir. 2014). The case name was later changed to *Green v. Brennan* after Meghan J. Brennan assumed the position of Postmaster General of the United States on February 1, 2015.

¹² The majority circuits include: the First Circuit, the Second Circuit, the Fourth Circuit, the Eighth Circuit, and the Ninth Circuit.

¹³ Pending Petition, *Green v. Brennan*, <http://www.scotusblog.com/case-files/cases/green-v-donahoe/> (last visited May 6, 2015).

¹⁴ 42 U.S.C. § 2000e-2(a) (2014).

prima facie case.¹⁵ The theory of constructive discharge has long been recognized in U.S. history. The doctrine of constructive discharge emerged in the 1930s in the context of alleged unfair labor practices under the NLRA “in which employer coerced employees to resign,” rather than simply discharging them.¹⁶ *Pennsylvania State Police v. Suders* brought the discussion of constructive discharge in the Title VII context to light.¹⁷ *Suders* explored a constructive discharge claim stemming from a hostile work environment and held that constructive discharge claims are viable under Title VII.¹⁸ The *Suders* Court also decided whether a constructive discharge, resulting from supervisor harassment, is a tangible employment action, precluding assertion of the *Ellerth/Faragher*¹⁹ defense.²⁰ The Court concluded that the assertion of the *Ellerth/Faragher* defense does not come into play when a supervisor’s official act precipitates the constructive discharge; however, absent a tangible employment action, the defense is available to the employer whose supervisors are charged with harassment.²¹ Note that this paper is concerned with the timeliness of constructive discharge claims, and the conflict between tangible and non-tangible employment actions, and the existence of a hostile work environment is beyond the scope of this paper.²²

¹⁵ BARBARA T. LINDEMAN & DAVID D. KAUDE, *The Evolution of Workplace Harassment Law*, in WORKPLACE HARASSMENT LAW 107, 108 (2 ed. 2012) (noting the prima facie case has four elements: (1) the plaintiff is a member of the protected class; (2) the plaintiff was subjected to an adverse employment action; (3) there was a causal connection between (1) and (2); and (4) employer liability).

¹⁶ *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004).

¹⁷ *Id.* at 142.

¹⁸ *Id.* at 140.

¹⁹ In two companion cases, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) and *Farther v. City of Boca Raton*, 524 U.S. 775, 795 (1998), the Supreme Court held that a tangible employment action taken by the supervisor becomes, for Title VII purposes, the act of the employer. The Supreme Court emphasized that “no affirmative defense is available . . . when the supervisor’s harassment culminates in a tangible employment action, such as a discharge, demotion, or undesirable reassignment.” *Ellerth*, 525 U.S. at 765.

²⁰ *Suders*, 542 U.S. at 148.

²¹ *Id.* at 140-41.

²² *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002) (holding that a Title VII plaintiff may file suit on events that fall outside of the requirements of 42 U.S.C. 2000e-5(1)(1) and may file a charge with the EEOC within 180 or 300 days after the alleged unlawful employment practice occurred); *see also id.* at 101, 105-15 (concluding that the answer depends on whether the alleged discrimination consists of discrete discriminatory acts or a series of related acts creating a hostile work environment and explaining that “hostile work environment claims are different in kind from discrete acts [because] their very nature involves repeated conduct” and they “are based on the cumulative effect of individual acts”); *id.* 117-18 (explaining further that where a series of related acts create an ongoing hostile work environment, a charge is timely filed if any act contributing to the hostile work environment occurred within the charge period. *But see* Del. State. Coll. v. Ricks, 449 U.S. 250, 255 (1980) (holding that Ricks’ complaint was untimely, and his argument that the limitations periods did not commence to run until his 1-year “terminal” contract expired could not be squared with the allegations of the complaint because mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination).

B. Statutory Requirements

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

“Statutes of limitation . . . promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.”²³

The statute of limitations for filing a claim under Title VII is somewhat different for federal employees and other workers.²⁴ For private-sector employees, a charge of discrimination must be filed with the Equal Employment Opportunity Commission (EEOC) within 180 days, although the time can be extended to as much as 300 days if the claim is pursued initially with a state or local agency empowered to prosecute discriminatory employment practices.²⁵ If the EEOC finds no discrimination or is unsuccessful at resolving the claim, the employee can then seek judicial review.²⁶ Federal employees, however, must begin the process by contacting an EEO counselor in the employee’s agency within 45 days.²⁷ If the counselor does not resolve the matter, the employee can file a charge with the employing agency.²⁸ 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.²⁹

²³ *Morgan*, 536 U.S. at 135 (citing *R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)).

²⁴ *See Shekels v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1311 (10th Cir. 2005). *See generally* *Laber v. Harvey*, 438 F.3d 404, 416-17 & n.9 (4th Cir. 2006).

²⁵ *See* 42 U.S.C. § 2000e-5(e)(1).

²⁶ *See id.* § 2000e-5(f)(1).

²⁷ *See* 29 C.F.R. § 1614.105(a)(1)-(2) (“Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter. An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action. The agency or the Commission shall extend the 45-day time limit . . . when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.”).

²⁸ *See id.*

²⁹ *See* 42 U.S.C. § 2000e-16(c); 29 C.F.R. §§ 1614.108-110, 1614.401, 1614.407 (2015).

C. Remedy

In addition to affecting an employee's ability to bring a claim, the timeliness factor affects the remedy available to the employee. The language of section 706(g) specifically provides for back-pay as an appropriate Title VII remedy.³⁰ Several circuits have applied the general rule that employees are entitled to awards such as back-pay past the date of resignation and reinstatement only if they were actually or constructively discharged from their employment. The rationale behind application of the rule has most often been that "society and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships," a rationale first stated by the Fifth Circuit in *Bourque v. Powell Electrical Manufacturing Co.*³¹ The Ninth Circuit expanded on that principle in *Thorne v. City of El Segundo*, emphasizing that an employee "should not quit at the first sign of institutional discrimination."³² The *Thorne* court also stated that restricting back-pay awards "encourages the employee to work with supervisors within the existing job setting and employment relationship in an effort to overcome resistance within that workplace and to eradicate the discrimination."³³

As an incentive for employers to eliminate discriminatory practices, back-pay has a direct connection with Title VII's primary objective of achieving "equality of employment opportunities and [removing] barriers that have operated in the past."³⁴ Reinstatement, or alternatively front-pay, may also be appropriate under Title VII as a remedy for returning a victim of discrimination to the position he or she would have occupied absent the discrimination. Several circuits have approved front-pay as a means of making plaintiffs whole for losses caused by discrimination.³⁵ Additionally, the Supreme Court has instructed that a complete remedy "should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suf-

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

³¹ See generally *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 66 (5th Cir. 1980).

³² See generally *Thorne v. City of El Segundo*, 802 F.2d 1131, 1134 (9th Cir. 1986).

³³ See *id.*

³⁴ *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

³⁵ See *Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982) (citing *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 932 (10th Cir. 1979)).

ferred through past discrimination.”³⁶ Remedy is only relevant if the employee is allowed to bring in a suit against discriminatory treatment in the first place. The analysis of the past and recent cases below attempts to shed light on the conflict involving the viability of constructive discharge claims.

III. RELEVANT CASE LAW AND ANALYSIS

The recent Tenth Circuit case that stirred the discussion of the time limitation in constructive discharge cases involved a former postmaster who claimed that the U.S. Postal Service retaliated against him after he made employment discrimination claims.³⁷ The plaintiff was investigated, threatened, with criminal prosecution, and placed on unpaid leave.³⁸ Shortly after being placed on leave, the plaintiff signed a settlement agreement with the Postal Service that provided him paid leave for three and a half months, after which he could choose either to retire or to work in a position that paid much less and was located about 300 miles away.³⁹ Ultimately, the plaintiff decided to retire.⁴⁰ The plaintiff then filed a complaint against Patrick Donahoe, the Postmaster General, in the United States District Court for the District of Colorado, alleging five retaliatory acts in violation of Title VII: (1) a letter notifying him to attend an investigative interview; (2) the investigative interview; (3) a threat of criminal charges against him; (4) his constructive discharge; and (5) his place on unpaid leave (also known as emergency placement).⁴¹ The district court dismissed the first three claims for failure to exhaust administrative remedies. On the two remaining claims, the court granted summary judgment for Donahoe, ruling that the constructive discharge claim was untimely and that emergency placement was not a materially adverse action.⁴² An appeal followed, and the judgment below, except for the emergency placement claim, was affirmed. The court of appeals reasoned that holding the date of resignation as a “discriminatory act” stretches the language of 29 C.F.R. § 1614.105(a)(1) too far, and “the proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts become most painful.”⁴³ This is the case that is now in front of the Supreme Court and has set up the scenario for the question of timeliness to be answered.

³⁶ *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

³⁷ *Green v. Donahoe*, 760 F.3d 1135, 1136 (10th Cir. 2014).

³⁸ *See id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1144 (quoting *Del. State Coll. v. Ricks*, 449 U.S. 250 (1980)).

As the court in *Green* acknowledged, several circuits have weighed in on this issue in the past. The Fourth Circuit was the first to articulate the majority rule in constructive discharge cases over twenty-five years ago.⁴⁴ In *Young*, the Fourth Circuit held that, in constructive discharge cases, periods of limitations begin to run on the date of the resignation.⁴⁵ Dr. Young sued her former employer, the National Center for Health Services Research (NCHSR) under Title VII alleging discrimination based on national origin.⁴⁶ Dr. Young contacted an EEO counselor twenty-nine days after she resigned, complaining about the abusive treatment at work, as well as the arbitrary denial of leave and stated that the continual harassment led her to feel sick and forced her to resign.⁴⁷ Two days after meeting with the counselor, Dr. Young filed a formal complaint with the EEOC and later filed a *pro se* complaint at the district court. The district court found that Dr. Young failed to bring her grievance to the EEO counselor within the requisite time period and dismissed the suit.⁴⁸ The Fourth Circuit reversed the district court decision and reasoned that:

“It is settled law that a federal employee must seek administrative review of her grievance before filing a suit for unlawful discrimination in employment. It is also settled that the applicable administrative deadlines run from the time of the discriminatory act, not from the time of a later, inevitable consequence of that act. Whether an employer’s action is a “discriminatory act” or merely an ‘inevitable consequence’ of prior discrimination depends on the particular facts of the case. A resignation is not itself a ‘discriminatory act’ if it is merely the consequence of past discrimination, but if the employer discriminates against an employee and purposely makes the employee’s job conditions so intolerable that a reasonable person would feel forced to resign, then the resignation is a constructive discharge - a distinct discriminatory ‘act’ for which there is a distinct cause of action.”⁴⁹

As a result, the court held that there was evidence of continual harassment, which could certainly make working conditions so intolerable that a reasonable person would feel forced to resign.⁵⁰

⁴⁴ See *Young v. Nat’l Ctr. for Health Servs. Research*, 828 F.2d 235, 238 (4th Cir. 1987).

⁴⁵ *Id.* at 238.

⁴⁶ *Id.* at 236.

⁴⁷ *Id.* at 237 (holding an aggrieved party has 30 days to bring a grievance to an EEO counselor under 29 C.F.R. § 1613.214(a)(1)(i) (1986)).

⁴⁸ *Id.*

⁴⁹ *Id.* at 237-38 (citing *Bristol v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985); *EEOC v. Fed. Reserve Bank of Richmond*, 698 F.2d 633, 672 (4th Cir. 1983)).

⁵⁰ *Id.* The court also noted that Dr. Young did not use the word constructive discharge in her EEO complaint; however, as the complaint was *pro se*, the court stated the complaint was to be construed liberally and the omission was not fatal.

The Ninth Circuit echoed the Fourth Circuit decision in *Draper v. Coeur Rochester, Inc.*, holding that in constructive discharge cases, the “periods of limitation begin to run on the date of the resignation.”⁵¹ In *Draper*, Katie Draper appealed the district court’s grant of summary judgment in favor of her formal employer on the claim that the constructive discharge period began to run when the discriminatory acts occurred.⁵² Draper was a Hispanic woman who began to work for Coeur at its mining operation in November 1992.⁵³ For the first three months of her employment, she was a temporary laborer; thereafter, she was permanently assigned to Coeur’s “D” and was the only woman on the crew.⁵⁴ Joe Anelli was an equipment operator on the crew and soon became Draper’s primary supervisor.⁵⁵ Draper worked for Coeur for a period of two years; throughout her employment, Anelli made sexual remarks that caused her to feel uncomfortable.⁵⁶ On several occasions, Anelli made comments to Draper about his sex life, commented about Draper’s “ass,” joked to other members of the crew that “it would be fun to get into Draper’s pants,” made lewd comments about Draper on the loudspeaker, and forced Draper to eat lunch in his office.⁵⁷ In June 1994, Draper complained to management, but to no avail.⁵⁸ In November 1994, Draper again complained, but the harassment continued.⁵⁹ On December 7, 1994, Draper went to Anelli’s office to complain; while she in the office, Anelli called his supervisor on the phone and laughed with him about Draper’s complaints.⁶⁰ Draper concluded there was no chance the harassment would stop and quit on the spot.⁶¹

Draper filed a charge of sexual harassment with the Nevada Equal Rights Commission on July 5, 1995.⁶² On September 15, she filed a charge of discrimination with the EEOC.⁶³ Coeur moved for summary judgment on the grounds that Draper failed to file her Title VII claims with-

⁵¹ *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1105, 1111 (9th Cir. 1998).

⁵² *Id.* at 1105.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 1105-06.

⁵⁸ *Id.* at 1106.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

in the 300-day limitations period and that there was no triable issue of material fact as to any of her discrimination claim.⁶⁴ The district court granted the motion and, with respect to the constructive discharge claim, held that “though the termination of [her] employment may have *resulted* from some act of unlawful discrimination, discharge by itself is not an ‘act of discrimination’ under the statute.”⁶⁵

The Ninth Circuit reversed the district court’s decision on the constructive discharge claim and held that, “the date of discharge triggers the limitations period in a constructive discharge case, just as in all other wrongful discharge.”⁶⁶ Therefore, “the date of Draper’s quitting falls within the relevant period of limitations, as it unquestionably does here, her claim is timely filed.”⁶⁷ The court further noted:

“Of course, Draper retains the burden of proving that her termination was a constructive discharge - that, in the view of a reasonable person, her conditions of employment had become intolerable. The frequency and freshness of the instances of harassment may enter into that determination. If the trier of fact finds, however, that under all of the circumstances the termination was a constructive discharge, then the discharge becomes the actionable event for purpose of the 300-day limitation. Our decision determines only *when* the claim arose, not whether its merits have been established; in reviewing the district court’s summary judgment that the claim was time-barred, we necessarily assume that Draper can prove a constructive discharge.”⁶⁸

Expressly “agree[ing] with the Ninth Circuit,” the Second Circuit in *Flaherty v. Metromail Corp.*, held that “the date of discharge triggers the limitations period in a constructive discharge case, just as in all other cases of wrongful termination.”⁶⁹ In *Flaherty*, Mary Flaherty claimed that she experienced gender and age discrimination from her supervisors at work on a daily basis for over four years.⁷⁰ Throughout the period of discrimination, Flaherty claimed she “continued to experience stress-related symptoms, both physical and emotional, allegedly [as a] result of the

⁶⁴ See 42 U.S.C. § 2000e-5(e)(1) (explaining that although Title VII provides that a plaintiff seeking relief in a discrimination case must file a charge with the EEOC within 180 days of the alleged unlawful employment practice, the period is extended to 300 days if the plaintiff first instituted proceedings with a state or local agency that has the authority to “grant or seek relief”); see also *Draper*, 147 F.3d at 1107 (noting that like a statute of limitation, the limitation period contained in Title VII is “subject to waiver, estoppel, and equitable tolling” (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982))).

⁶⁵ *Draper*, 147 F.3d at 1107 (emphasis in original).

⁶⁶ *Id.* at 1110.

⁶⁷ *Id.*

⁶⁸ *Id.* (emphasis in original).

⁶⁹ *Flaherty v. Metromail Corp.*, 235 F.3d 113, 138 (2d Cir. 2000).

⁷⁰ *Id.* at 135-36.

discrimination.”⁷¹ In August 1996, Flaherty was told she would be terminated if she did not meet certain budgetary requirements even though most of her accounts were being taken away from her.⁷² The discrimination continued and Flaherty ultimately retired in June 1997.⁷³ The district court determined that Flaherty’s cause of action accrued on the day she received notice of her looming termination, August 1996, and therefore held that her case was time-barred.⁷⁴ In reversing its decision, the Second Circuit made clear that the filing period begins when an employee gives “definite notice of her intention to retire” - a rule that, the court emphasized, “should be the same in all cases of constructive discharge.”⁷⁵

In addition to the aforementioned three circuits, the First and Eighth Circuits have adopted the same rule. In *Hukkanen v. International Union of Operating Engineers, Hoisting & Portable Local No. 101*, the Eighth Circuit held that an employee’s EEOC complaint was timely after concluding that her employer’s “last act of discrimination against [her] was her constrictive discharge.”⁷⁶ Hukkanen was subjected to sex discrimination through August 1984.⁷⁷ She resigned in October and filed her EEOC charge in March 1985.⁷⁸ Given the 180-day filing period, her charge was timely when measured from the date of resignation, but would have been untimely if measured from the employer’s alleged last act of discrimination, as the Tenth Circuit’s rule would have required. Similarly, the First Circuit has held that for a constructive discharge claim, “the limitations period commenced when the employees elected to participate” in an early retirement program.⁷⁹ In another case, *American Airlines v. Cardoza-Rodriguez*, as part of a workforce reduction program employees were presented with a Voluntary Early Retirement Program (VERP) which allowed them a choice of retiring early, or risking involuntary termination, to all employees on the same date, but it gave them roughly two months to decide whether to accept.⁸⁰ The court used the various individual dates on which each employee submitted his or her formal resignation as the beginning of those individuals’ filing periods.⁸¹

⁷¹ *Id.* at 136.

⁷² *Id.* at 135-36.

⁷³ *Id.* at 136.

⁷⁴ *Id.* at 137.

⁷⁵ *Id.* at 138.

⁷⁶ *Hukkanen v. Int’l Union of Operating Eng’rs, Hoisting & Portable Local No. 101*, 3 F.3d 281 285 (8th Cir. 1993).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *See Am. Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 123 (1st Cir. 1998).

⁸⁰ *Id.* at 114.

⁸¹ *Id.* at 123.

The Tenth Circuit’s analysis was faulty when it suggested that “perhaps these decisions of our sister circuits could be distinguished on the ground that the last act of discrimination was within the limitations period.”⁸² In *Young*, for example, Dr. Young’s claim was timely only because the Fourth Circuit measured the filing window from the date the employee officially resigned.⁸³ Dr. Young filed her EEO claim thirty-seven days after her suspension; however, she resigned twenty-nine days before she filed, and, on that basis, the claim was timely.⁸⁴ The Ninth Circuit expressly adopted the general rule established by the Fourth Circuit in *Young*.⁸⁵ The Second Circuit, as noted, stated that its date-of-resignation rule “should be the same in all cases of constructive discharge.”⁸⁶ If Green had been employed in any of the circuits that have a date-of-resignation rule, his claim would have been held as timely filed and precedent would require it to be resolved on its merits.

By contrast, in three circuits employees like Green lose their claims before reaching the merits. The Seventh Circuit was the first to hold that the filing period for a claim of constructive discharge is triggered on the date that an employer “takes some adverse personnel action” against its employee.⁸⁷ In *Davidson v. Indiana-American Water Works*, Vivian Davidson brought suit against her former employer, Indiana American Water Company (IAWC) alleging that a hostile work environment and a continuous pattern of retaliation led to her constructive discharge.⁸⁸ The district court dismissed her suit on the basis that her claim was untimely, and the Seventh Circuit affirmed.⁸⁹ Davidson, who worked for IAWC for twelve years, began to experience harassment and discrimination from her supervisor beginning in January 1985.⁹⁰ On October 3, 1985, Davidson filed the first of two charges with the EEOC, in which she alleged that her transfer from accounting to billing was discriminatory.⁹¹ The EEOC dismissed the charge because it was unable to substantiate Davidson’s allegations.⁹² On July 9, 1986, Davidson filed her second EEOC charge based on IAWC’s retaliation against her for filing the first charge and constructive-

⁸² *Green v. Donahoe*, 760 F.3d 1135, 1144 (10th Cir. 2014).

⁸³ *Young v. Nat’l Cntr. for Health Servs. Research*, 828 F.3d 235, 238 (4th Cir. 1987).

⁸⁴ *Id.* at 238. At the time, federal employees like Dr. Young and Green had thirty days to contact an EEO counselor.

⁸⁵ *See Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1111 (9th Cir. 1998).

⁸⁶ *Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000).

⁸⁷ *See Davidson v. Ind.-Am. Water Works*, 953 F.2d 1058, 1059 (7th Cir. 1992).

⁸⁸ *Id.* at 1058-59.

⁸⁹ *Id.* 1059.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

ly discharging her.⁹³ The court stated that, to be timely, the alleged discriminatory conduct of which Davidson complained had to occur on or after January 10, 1986, during the 180-day period preceding the filing of her July 9, 1986 charge.⁹⁴ Davidson argued that the statute of limitations for constructive discharge claims begins to run on the last day that an employee appears at work, and therefore, her July 9, 1986 complaint was timely, having been filed within the 180-day period following her constructive discharge on January 13, 1986.⁹⁵ Nevertheless, the circuit court held that Davidson was required to prove the existence of discriminatory conduct which occurred within the statutory period in order to recover on her claims, and absent such evidence, Davidson's EEOC charge was stale.⁹⁶

Further, in *Mayers v. Laborers' Health & Safety Fund of Norther America*, the D.C. Circuit held that the plaintiff's constructive discharge claim failed as a matter of law because she "failed to identify a single act of discrimination or retaliation within the 180-day period."⁹⁷ Hazel Mayers worked for the defendant from November 1992 until January 2001, initially as a data entry clerk, and then, beginning in February 1996, assembling desktop publishing materials.⁹⁸ During the course of her employment, Mayers developed rheumatoid arthritis, making her new responsibilities - cutting, stapling, and the like - painful and difficult to complete.⁹⁹ Mayers notified defendant of her disease soon after being diagnosed and requested accommodations, such as an electric stapler and cutter.¹⁰⁰ The defendant failed to provide Mayers with the requested tools even a year later when Mayers was promoted and required to complete twice the work.¹⁰¹

In April 1999, Mayers supplied defendant with a letter from her physician stating that Mayers should be put on light duty.¹⁰² Mayers was not put on light duty even after a year.¹⁰³ The breaking point for Mayers was a project she was forced to finish after returning from her vacation.¹⁰⁴ Mayers began a one-week vacation on December 22, 2000, which happened to be in the middle

⁹³ *Id.*

⁹⁴ *Id.* at 1060.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Mayers v. Laborers' Health & Safety Fund of N. Am.*, 478 F.3d 364, 370 (D.C. Cir. 2007).

⁹⁸ *Id.* at 366.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See id.* at 366-67.

¹⁰³ *See id.* at 367.

¹⁰⁴ *Id.*

of a 4,000-brochure project with a December 29 deadline.¹⁰⁵ Mayers believed that the project would be finished by someone else in her absence; however, when she returned on January 2, 2001, the project had not been completed, and she had to finish the project the next day, severely exacerbating her arthritis.¹⁰⁶ Mayers resigned on January 19, 2001, effective January 26, 2001, and had applied for a position with another employer even before the January incident; she began work with the new employer on January 29, 2001.¹⁰⁷ On March 12, 2001, Mayers filed a complaint with the EEOC alleging that defendant failed to reasonably accommodate her arthritis, retaliated against her for requesting a reasonable accommodation, and constructively discharged her.¹⁰⁸ The district court rejected Mayers' constructive discharge claim holding that she had "*voluntarily* left her employment with [defendant]," and the D.C. Circuit affirmed, relying on *Morgan's* second limiting principle which required Mayers to show one offending act within the statutory period.¹⁰⁹

More recently, the Tenth Circuit has created a roadblock for an aggrieved employee to bring a suit on the claim of constructive discharge.¹¹⁰ The Tenth Circuit correctly noted that a constructive discharge claim cannot be submitted before the employee quits her job.¹¹¹ However, the court is incorrect in proposing that an employee who later decides to quit can simply amend a timely charge to include an allegation of constructive discharge.¹¹² Since resignation is a required element of constructive discharge, it makes no sense for the filing period for a constructive discharge claim to begin before the employee has resigned. Further, amending the complaint, as proposed by the Tenth Circuit, only adds additional stress and complications to the aggrieved employee. It is imperative that we answer the question of how time limits apply to claims brought under the constructive discharge theory in a timely manner. Thousands of constructive discharge claims are brought each year. In 2014 alone, the EEOC received 1,487 constructive discharge cases on the basis of race, 2,100 on the basis of sex, 2,284 on the basis of retaliation, and 1,142 on the basis of disability.¹¹³ The resolution to this deep and longstanding conflict among the circuits is on the horizon with the Tenth Circuit case.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Green v. Donahoe*, 760 F.3d 1135, 1145 (10th Cir. 2014).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Statutes of Issue FY 2010 - FY 2014*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/bases_by_issue.cfm (last visited April 1, 2015).

IV. CONCLUSION

When resolving the conflict between the circuits in *Green*, the Supreme Court should favor the facts and the arguments presented by the majority circuits and hold that the statute of limitations in a constructive discharge case should begin from the date of the resignation. *Young* held that a resignation can be a “discriminatory act” for the purpose of a constructive discharge claim as “‘continual harassment’ . . . could certainly make working conditions so ‘intolerable’ that a reasonable person would feel forced to resign.”¹¹⁴ There is definitely merit in *Young*’s conclusion. A resignation is not only a natural consequence of continual harassment, but it is the final straw that forces an aggrieved employee to file suit. An employee cannot predict that the nature of the discrimination against her will force her to resign. In addition, discriminatory acts in most constructive discharge cases are not discrete or identifiable.¹¹⁵ It is only when the conditions become “so intolerable”¹¹⁶ that the employee feels helpless and is ultimately forced to resign. This “final straw” is different for each person, and is utterly difficult to tie it to one event or chain of events. Therefore, requiring an employee to be bound to an unmarked event in the timeline confuses the issue, works against the employee, and undermines the purpose of Title VII. Further, the Supreme Court recognized the continuing violation theory in *Morgan* when it stated that the employee may challenged the “entire hostile work environment” as long as “any act that is part of the hostile work environment” occurs within the statute of limitations period.¹¹⁷ The phrase “any act” includes the final act of discrimination, which is the termination itself.

Furthermore, the Tenth Circuit was incorrect in noting that “setting [the discriminatory act] at the date of resignation would run counter to an essential feature of limitations period by allowing the employee to extend the date of accrual indefinitely, thereby ‘placing the supposed statute of repose in the sole hands of the party seeking relief.’” This analysis is faulty because there is little reason to believe that delayed suits would materialize. In addition, this analysis does not take into account the well-established proposition from *Suders*, that “a constructive discharge involves both an employee’s decision to leave and the precipitating conduct.”¹¹⁸ Both the reaction by the employee and the conduct of the employer are key facts, and one party, by itself, cannot “extend the date of the accrual indefinitely.”

Lastly, the *McDonnell Douglas* burden-shifting framework serves as a check to the employee’s claim on the basis of merit.¹¹⁹ Under this scheme, after the plaintiff has filed a timely complaint, it then has the initial burden of establishing a *prima facie* case of discriminatory

¹¹⁴ *Young v. Nat’l Cntr. for Health Servs. Research*, 828 F.2d 235, 238 (4th Cir. 1987).

¹¹⁵ *See Flaherty v. Metromail Corp.*, 235 F.3d 113, 137 (2d Cir. 2000).

¹¹⁶ *See Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1211, 1133 (10th Cir. 2013).

¹¹⁷ *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117-18 (2002) (emphasis added).

¹¹⁸ *Pa State Police v. Suders*, 542 U.S. 129, 148 (2004).

¹¹⁹ *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

practice.¹²⁰ Doing so shifts the burden to the defendant to produce a legitimate, nondiscriminatory justification for taking the disputed employment action.¹²¹ If the defendant so provides, the burden shifts back to the plaintiff to show that the proffered reason is a pretext for unlawful discrimination.¹²² The plaintiff may demonstrate pretext “by showing the employer’s proffered reason was so inconsistent, implausible, incoherent, or contradictory that it is unworthy of belief.”¹²³ A case should not be stifled before it has a chance to be decided on the merits just because there are conflicting statutory periods in different jurisdictions. As a result, the date of resignation should be adopted as the appropriate measure for constructive discharge claims, and the Tenth Circuit case on appeal should be denied accordingly.¹²⁴

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Stover v. Martinez*, 382 F.3d 1064, 1070 (10th Cir. 2004).

¹²⁴ The Supreme Court rendered a decision in this case on May 23, 2016. The arguments set forth in this paper were upheld in a 7-1 decision. The opinion stated that, in a constructive discharge claim, (1) the statute of limitations begins running only after an employee resigns; and (2) 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 thereof.