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## Too Early or Too Late: U.S. Supreme Court Should Rule Constructive Discharge Claims Accrue Upon Resignation

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# TOO EARLY OR TOO LATE: U.S. SUPREME COURT SHOULD RULE CONSTRUCTIVE DISCHARGE CLAIMS ACCRUE UPON RESIGNATION

**Abstract:** The U.S. Courts of Appeals are divided regarding when an employee’s Title VII constructive discharge claim begins to accrue. The First, Second, Fourth, Eighth, and Ninth Circuits have held that the claim begins to accrue when the employee resigns. The Seventh, Tenth, and District of Columbia Circuits have held that constructive discharge claims begin to accrue at the time of the employer’s last discriminatory act. In April 2015, the U.S. Supreme Court granted certiorari in *Green v. Donahoe*, a 2014 Tenth Circuit decision that deepened the circuit split. This Note argues that the U.S. Supreme Court should resolve this circuit split by overturning the Tenth Circuit’s 2014 decision in *Green v. Donahoe* because accrual upon resignation is more administratively efficient, intuitive for employees, and consistent with Title VII’s purpose.

## INTRODUCTION

Marvin Green worked for the U.S. Postal Service for thirty-five years, starting as a letter carrier and working his way up to postmaster for Englewood, Colorado.<sup>1</sup> In 2008, Green applied for an open postmaster position in Boulder, Colorado, but was denied the promotion.<sup>2</sup> Green believed the Postal Service discriminated against him for being black because the person hired for the position had less experience and did not even submit an application.<sup>3</sup> Green filed a formal charge with the Equal Employment Opportunity (“EEO”) Office regarding his denied promotion.<sup>4</sup> Subsequently, Green believed the Postal Service retaliated against him for making the discrimination complaint and filed two informal charges alleging retaliation.<sup>5</sup>

On December 11, 2009, the Postal Service held an investigative interview in which Green was accused of several transgressions, the most serious of

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<sup>1</sup> *Green v. Donahoe (Green II)*, 760 F.3d 1135, 1137 (10th Cir. 2014), *cert. granted sub nom. Green v. Brennan*, 135 S. Ct. 1892 (Apr. 27, 2015); Petition for Writ of Certiorari at 6, *Green II*, 760 F.3d 1135 (No. 14-613), 2014 WL 6706152, at \*6.

<sup>2</sup> *Green II*, 760 F.3d at 1137; Petition for Writ of Certiorari, *supra* note 1, at 6 (noting Green was passed over for promotion despite his unblemished record).

<sup>3</sup> Petition for Writ of Certiorari, *supra* note 1, at 6.

<sup>4</sup> See *Green II*, 760 F.3d at 1137.

<sup>5</sup> See *id.* (stating Green twice contacted EEO counselors about retaliation while his original denial of promotion complaint went through applicable administrative channels).

which was “intentionally delaying the mail,” a criminal offense.<sup>6</sup> Green was put on “emergency-placement,” a type of probationary administrative leave, and his pay was suspended.<sup>7</sup> Unbeknownst to Green, immediately after the interview on December 11, the investigative agents concluded that Green did not intentionally delay the mail.<sup>8</sup> The Postal Service’s human resources manager warned Green’s union representative that the criminal charge could be a “life changer” and the two worked on negotiating an agreement.<sup>9</sup>

The parties eventually reached an agreement, which was signed on December 16, 2009.<sup>10</sup> The agreement ended Green’s emergency placement and allowed him to use his accumulated paid leave to cover his salary through March 2010.<sup>11</sup> The agreement also removed Green from his current position, demoted him to a position in Wyoming that was almost three hundred miles away, and cut his salary by about \$40,000 per year.<sup>12</sup> Per the agreement, Green could either report to his new position in Wyoming on April 1 or retire by March 31, 2010.<sup>13</sup>

Green submitted his resignation on February 9, effective on March 31, 2010.<sup>14</sup> On March 22, forty-one days after submitting his resignation, Green contacted an EEO counselor and alleged that he was constructively discharged in retaliation for a protected Title VII activity.<sup>15</sup> In 2013, in *Green v. Donahoe*, the U.S. District Court for the District of Colorado dismissed Green’s constructive discharge claim for being untimely.<sup>16</sup> The court held that Green’s constructive discharge claim began to accrue when he signed the agreement and he did not properly act within the forty-five day limitations period set for federal em-

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<sup>6</sup> See *id.* at 1137–38; see also 18 U.S.C. § 1701 (2012) (describing the obstruction of mails generally).

<sup>7</sup> See *Green II*, 760 F.3d at 1138; Petition for Writ of Certiorari, *supra* note 1, at 7 (noting that Green’s supervisors put him on emergency-placement for alleged “disruption of day-to-day postal operations”).

<sup>8</sup> See *Green II*, 760 F.3d at 1138; Petition for Writ of Certiorari, *supra* note 1, at 7–8 (stating that Green went on administrative leave under the impression he might be subject to criminal prosecution).

<sup>9</sup> See *Green II*, 760 F.3d at 1138; Petition for Writ of Certiorari, *supra* note 1, at 8 (noting that the Postal Service’s warning about criminal prosecution occurred one day after investigative agents concluded Green did not intentionally delay the mail).

<sup>10</sup> *Green II*, 760 F.3d at 1138 (stating deal occurred after negotiations between Green’s union representative and Postal Service human resources manager).

<sup>11</sup> *Id.*; Petition for Writ of Certiorari, *supra* note 1, at 8.

<sup>12</sup> See *Green II*, 760 F.3d at 1138; Petition for Writ of Certiorari, *supra* note 1, at 8.

<sup>13</sup> See *Green II*, 760 F.3d at 1138; Petition for Writ of Certiorari, *supra* note 1, at 8.

<sup>14</sup> *Green II*, 760 F.3d at 1138. Prior to giving his resignation notice, Green met with an EEO counselor on January 7, 2010, and filed an informal retaliation charge based on the December 11, 2009, investigative interview. See *id.* Green filed a formal charge on February 17, 2010, but the EEO Office dismissed the claim because Green had signed the settlement agreement on December 16, 2009. See *id.*

<sup>15</sup> See *Green II*, 760 F.3d at 1138; Petition for Writ of Certiorari, *supra* note 1, at 9.

<sup>16</sup> See *Green v. Donahoe (Green I)*, No. 10-CV-02201-LTB-KMT, 2013 WL 424777, at \*5–6 (D. Colo. Feb. 4, 2013).

ployees.<sup>17</sup> In 2014, the U.S. Court of Appeals for Tenth Circuit affirmed the district court's decision.<sup>18</sup>

The U.S. Courts of Appeals are divided regarding when an employee's Title VII constructive discharge claim begins to accrue.<sup>19</sup> Federal regulations set out various restrictions regarding the timing of notice and filing requirements for alleged Title VII violations.<sup>20</sup> The circuits disagree, however, on when the clock starts running in constructive discharge claims.<sup>21</sup> The Seventh, Tenth, and District of Columbia Circuits have held that a claim begins to accrue against the filing window when the adverse employment action occurs.<sup>22</sup> In contrast, the First, Second, Fourth, Eighth, and Ninth Circuits have held that Title VII constructive discharge claims begin to accrue when the employee resigns.<sup>23</sup>

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<sup>17</sup> See *id.*; see also 29 C.F.R. § 1614.103(b)(3) (2014) (applying Part 1614 of C.F.R. to U.S. Postal Service employees complaining of employment discrimination); *id.* § 1614.105 (requiring postal service employees who believe they have been illegally discriminated against to initiate contact with EEO counselor within forty-five days of the date of the alleged discriminatory matter).

<sup>18</sup> See *Green II*, 760 F.3d at 1147.

<sup>19</sup> Compare *id.* at 1143–45 (holding claim began to accrue at time of employer's last discriminatory act), *Mayers v. Laborers' Health & Safety Fund of N. Am.*, 478 F.3d 364, 370 (D.C. Cir. 2007) (ruling employee failed to identify a single act of discrimination within statutory period because constructive discharge itself was not sufficient), and *Davidson v. Ind.-Am. Water Works*, 953 F.2d 1058, 1059–60 (7th Cir. 1992) (holding claim time-barred because last alleged discriminatory act did not include employee's resignation), with *Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000) (ruling constructive discharge claim began to accrue when employee gave definite notice of intention to retire), *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1111 (9th Cir. 1998) (holding limitations period begins to run in constructive discharge cases on date of employee's resignation), *Am. Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 123 (1st Cir. 1998) (holding constructive discharge was alleged discriminatory act that triggered limitations period), *Hukkanen v. Int'l Union of Operating Eng'rs, Hoisting & Portable Local No. 101*, 3 F.3d 281, 285 (8th Cir. 1993) (ruling constructive discharge claim was timely based on employee's date of resignation), and *Young v. Nat'l Ctr. for Health Servs. Research*, 828 F.2d 235, 239 (4th Cir. 1987) (holding employee's claim was timely because constructive discharge is distinct adverse employment action). Constructive discharge occurs when working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign. See *Pa. State Police v. Suders*, 542 U.S. 129, 147 (2004).

<sup>20</sup> See 29 C.F.R. § 1601.13 (non-federal sector employees have 180 days to file a charge with the Commission); *id.* § 1614.103 (applying Title VII to federal employees, including the U.S. Postal Service); *id.* § 1614.105 (declaring that federal sector employees "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"); Petition for Writ of Certiorari, *supra* note 1, at 5 & n.2.

<sup>21</sup> Compare *Green II*, 760 F.3d at 1143–45 (evaluating timeliness based on employer's last act), *Mayers*, 478 F.3d at 370 (same), and *Davidson*, 953 F.2d at 1059–60 (same), with *Flaherty*, 235 F.3d at 138 (evaluating timeliness based on date of employee's resignation), *Draper*, 147 F.3d at 1110–11 (same), *Cardoza-Rodriguez*, 133 F.3d at 123 (same), *Hukkanen*, 3 F.3d at 285 (same), and *Young*, 828 F.2d at 239 (same). See generally Aaron Vehling, *Justices to Eye Time Bar for Constructive Discharge Claims*, LAW360 (Apr. 27, 2015, 3:59 PM), <http://www.law360.com/articles/648079/justices-to-eye-time-bar-for-constructive-discharge-claims> [<http://perma.cc/YG8T-5HEZ>] (discussing U.S. Supreme Court's decision to grant *Green*'s certiorari petition).

<sup>22</sup> See *Green II*, 760 F.3d at 1143–45; *Mayers*, 478 F.3d at 370; *Davidson*, 953 F.2d at 1059–60.

<sup>23</sup> See *Flaherty*, 235 F.3d at 138; *Draper*, 147 F.3d at 1110–11; *Hukkanen*, 3 F.3d at 285; *Young*, 828 F.2d at 239.

This Note argues that the U.S. Supreme Court should overturn the Tenth Circuit's 2014 decision in *Green v. Donahoe*, which held that an employee's constructive discharge claim began to accrue prior to his resignation.<sup>24</sup> Part I of this Note outlines the legal context for Title VII constructive discharge claims and the current circuit split over when those claims begin to accrue.<sup>25</sup> Part II of this Note discusses the implications of the circuit split, including its creation of uncertain outcomes and unequal results for similarly situated claimants.<sup>26</sup> Part III of this Note recommends the U.S. Supreme Court resolve the circuit split by adopting the rule that a constructive discharge claim begins to accrue when the employee resigns.<sup>27</sup>

### I. DIFFERENT ZIP CODE, DIFFERENT TIMELINE: THE CIRCUIT SPLIT OVER WHEN A TITLE VII CONSTRUCTIVE DISCHARGE CLAIM BEGINS TO ACCRUE

Federal statutes and regulations set deadlines for how long an employee has to undertake the actions required before suing for constructive discharge after the "alleged unlawful employment practice occurred."<sup>28</sup> The U.S. Courts of Appeals are divided regarding whether the constructive discharge itself constitutes an alleged unlawful employment practice for the purpose of measuring time-sensitive claims.<sup>29</sup> Although the U.S. Supreme Court has considered when a wrongful termination action occurs for the purpose of a limitations period, it has yet to address the issue in the context of a constructive discharge claim.<sup>30</sup>

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<sup>24</sup> See *infra* notes 201–249 and accompanying text.

<sup>25</sup> See *infra* notes 28–143 and accompanying text.

<sup>26</sup> See *infra* notes 144–200 and accompanying text.

<sup>27</sup> See *infra* notes 201–249 and accompanying text.

<sup>28</sup> See 42 U.S.C. § 2000e-5(e)(1) (2012) (containing quoted language); 29 C.F.R. § 1601.13 (detailing general timeline); 29 C.F.R. § 1614.105 (detailing timeline for federal employees); see also Daniel M. Isaacs, *Rebalancing Current Limitations Periods to Reflect a Society That Values Its Members as Much as Their Money*, 44 STETSON L. REV. 43, 63–64 (2014) (discussing negative effects of strict Title VII limitations periods).

<sup>29</sup> Compare *Green II*, 760 F.3d at 1142–45 (holding constructive discharge claim time-barred because resignation is not unlawful employment practice and no other alleged discriminatory acts occurred during actionable limitations period), *Mayers*, 478 F.3d at 368, 370 (claim held to be time-barred because constructive discharge required "one offending act within statutory period" despite employee's resignation occurring within 180-day window), and *Davidson*, 953 F.2d at 1059–60 (claim determined to be time-barred), with *Flaherty*, 235 F.3d at 138 (holding constructive discharge claim timely based on date employee gave definite notice of intention to retire), *Draper*, 147 F.3d at 1110–11 (claim timely based on date of resignation), *Cardoza-Rodriguez*, 133 F.3d at 123 (claims time-barred based on date of resignation notice), *Hukkanen*, 3 F.3d at 285 (claim timely based on date of resignation), and *Young*, 828 F.2d at 239 (claim timely based on date of resignation).

<sup>30</sup> See *Del. State Coll. v. Ricks*, 449 U.S. 250, 258–59 (1980) (holding limitations period commenced to run when employee was given explicit notice that employment would end in one year); *Draper*, 147 F.3d at 1110–11 (citing *Ricks*, 449 U.S. at 258–59) (distinguishing constructively discharged employee from discharged employee who was given definite notice of termination); Daniel Elms, *Constructive Discharge Claim Accrues When Employer Retaliates*, AM. BAR ASS'N, LITIG.

Section A of this Part outlines the relevant legal context of a Title VII constructive discharge claim.<sup>31</sup> Section B of this Part outlines the circuit court decisions that have held an employee's claim accrues when the employee resigns.<sup>32</sup> Section C of this Part outlines the circuit court decisions that have held an employee's claim accrues when the last adverse employment action occurs.<sup>33</sup> Section D of this Part discusses the U.S. Supreme Court's grant of certiorari to resolve the circuit split.<sup>34</sup>

### A. Constructive Discharge Claims Under Title VII

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of an employee's race, color, religion, sex and national origin.<sup>35</sup> Title VII led to the development of an incredibly complex area of law, which includes various analytical frameworks and divergent approach by lower courts to its statutory interpretation.<sup>36</sup> Examples of unlawful employment practices under Title VII include discrete discriminatory acts (such as wrongful discharge or retaliation), hostile work environment, and constructive discharge.<sup>37</sup> A hostile work environment occurs when discriminatory harassment is so severe or pervasive that it alters the plaintiff's employment conditions.<sup>38</sup>

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NEWS (Dec. 9, 2014), [http://apps.americanbar.org/litigation/litigationnews/top\\_stories/120914-constructive-discharge-claim.html](http://apps.americanbar.org/litigation/litigationnews/top_stories/120914-constructive-discharge-claim.html) [<http://perma.cc/BR9G-H7YH>] (noting that Equal Opportunity Employment Commission ("EEOC") charge filing deadlines for constructive discharge claims may depend on adjudicating court's location until U.S. Supreme Court resolves circuit split).

<sup>31</sup> See *infra* notes 35–87 and accompanying text.

<sup>32</sup> See *infra* notes 88–115 and accompanying text.

<sup>33</sup> See *infra* notes 116–135 and accompanying text.

<sup>34</sup> See *infra* notes 136–143 and accompanying text.

<sup>35</sup> 42 U.S.C. § 2000e-2 (2012) ("It shall be an unlawful employment practice . . . (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ."); see also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986) (recognizing claim for hostile work environment under Title VII); *Griggs v. Duke Power Co.*, 401, 429–30 (1971) (holding discriminatory intent not required for employment practice to be unlawful under Title VII).

<sup>36</sup> See 42 U.S.C. § 2000e-5(e)(1); 29 C.F.R. § 1601.13; 29 C.F.R. § 1614.103; C.F.R. § 1614.105; Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 309–10 (2004) (discussing the difficulty lower courts have in classifying and uniformly handling constructive discharge cases arising under Title VII).

<sup>37</sup> See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2536 (2013) (retaliation and constructive discharge claims); *Harris v. Forklift Sys.*, 510 U.S. 17, 21–23 (1993) (hostile work environment claim); *Prohibited Employment Policies/Practices*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/laws/practices/> [<http://perma.cc/A7TF-B3MU>].

<sup>38</sup> See *Harris*, 510 U.S. at 21–22 (citing *Meritor*, 477 U.S. at 67) (finding company president's suggestive comments, unwanted sexual innuendo, and gender-related insults were sufficient for hostile work environment claim); see also Laura E. Diss, Note, *Whether You "Like" It or Not: The Inclusion of Social Media Evidence in Sexual Harassment Cases and How Courts Can Effectively Control It*, 54 B.C. L. REV. 1841, 1847–49 (2013) (discussing the development of hostile work environment claim first recognized by the U.S. Supreme Court in *Meritor Savings Bank, FSB v. Vinson*).

A wrongful discharge involves an employer firing an employee for an unlawful reason.<sup>39</sup> A constructive discharge occurs when an employee resigns as a result of the employer's actions.<sup>40</sup>

Title VII constructive discharge claimants must exhaust their administrative remedies, have actionable claims within the limitations period, and meet the requirements of a constructive discharge claim for substantive and remedial purposes.<sup>41</sup> Subsection 1 below discusses the filing deadlines imposed on employees who allege discriminatory conduct in violation of Title VII.<sup>42</sup> Subsection 2 explores the continuing violation doctrine and its abrogation for discrete act claims.<sup>43</sup> Subsection 3 discusses the U.S. Supreme Court's 1980 decision in *Delaware State College v. Ricks* regarding when Title VII claims accrue in a non-constructive discharge case.<sup>44</sup> Subsection 4 provides an overview of constructive discharge claims.<sup>45</sup>

## 1. Filing Deadlines to Exhaust Administrative Remedies

Before filing a lawsuit alleging discrimination in violation of Title VII, aggrieved employees must exhaust their administrative remedies.<sup>46</sup> Title VII requires that employees file their charge with the Equal Employment Opportunity Commission ("EEOC") a certain number of days "after the alleged un-

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<sup>39</sup> See *Draper*, 147 F.3d at 1110–11 (noting constructive discharge is one form of wrongful discharge); *Discharge*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "wrongful discharge" as "[a] discharge for reasons that are illegal or that violate public policy").

<sup>40</sup> See *Draper*, 147 F.3d at 1110–11.

<sup>41</sup> See Chamallas, *supra* note 36, at 319–21 (discussing the evolution of substantive and remedial provisions in Title VII constructive discharge law, including the development of the intolerable conditions standard and introduction of tort-like remedies in the 1991 Civil Rights Act); Katherine A. Macfarlane, *The Improper Dismissal of Title VII Claims on "Jurisdictional" Exhaustion Grounds: How Federal Courts Require That Allegations Be Presented to an Agency Without the Resources to Consider Them*, 21 GEO. MASON U. CIV. RTS. L.J. 213, 218–20 (2011) (outlining an employee's administrative exhaustion requirements prior to filing a Title VII suit); Susan Strebel Sperber & Craig R. Welling, *The Continuing Violations Doctrine Post-Morgan*, 32 COLO. LAW. 57, 58 (2003) (discussing the elimination of discrete discriminatory acts from the continuing violations doctrine and each discrete act needing to occur within limitations period to be actionable); see also *Story v. Napolitano*, 771 F. Supp. 2d 1234, 1252–53 (E.D. Wash. 2011) (finding plaintiff adequately exhausted administrative remedies and presented viable constructive discharge claim, but could not recover for conduct outside limitations period).

<sup>42</sup> See *infra* notes 46–57 and accompanying text.

<sup>43</sup> See *infra* notes 58–72 and accompanying text.

<sup>44</sup> See *infra* notes 73–80 and accompanying text.

<sup>45</sup> See *infra* notes 81–87 and accompanying text.

<sup>46</sup> See *Mayers*, 478 F.3d at 367–68, 370 (rejecting a finding of liability against employer because employee failed to exhaust her administrative remedies due to untimely EEOC complaint); 29 C.F.R. § 1601.28 (2015) (outlining procedures for issuance of notice of right to sue from EEOC); 29 C.F.R. § 1614.105 (2015) (requiring aggrieved employees to initiate contact with EEOC counselor within specified time period).

lawful employment practice occurred.”<sup>47</sup> The circuit courts have adopted different statutory interpretations of this provision, which has led to disparate results for employees’ constructive discharge claims.<sup>48</sup>

In general, federal employees have a shorter window than private employees to act on their Title VII claims of discrimination.<sup>49</sup> Pursuant to the Code of Federal Regulations, federal employees must initiate contact with an EEOC counselor within “45 days of the date of the matter alleged to be discriminatory.”<sup>50</sup> If the matter is not resolved, the counselor must inform the aggrieved employee in writing within thirty days of the initial contact with the counselor that the employee has the right to file a discrimination complaint.<sup>51</sup> The federal employee then has fifteen days after the receipt of the written notice to file a complaint with the EEOC.<sup>52</sup> Under Title VII, aggrieved employees may file in an appropriate U.S. District Court within ninety days of final action on the complaint or, if no final action has been taken by the EEOC, within 180 days from the filing of a complaint.<sup>53</sup>

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<sup>47</sup> See 42 U.S.C. § 2000e-5(e)(1).

<sup>48</sup> Compare *Green II*, 760 F.3d at 1142–45 (holding constructive discharge claim time-barred because resignation is not unlawful employment practice and no other alleged discriminatory acts occurred during actionable limitations period), *Mayers*, 478 F.3d at 368, 370 (holding claim time-barred because constructive discharge required “one offending act within statutory period” despite employee’s resignation occurring within 180-day window), and *Davidson*, 953 F.2d at 1059–60 (finding claim time-barred), with *Flaherty*, 235 F.3d at 138 (holding constructive discharge claim timely based on date employee gave definite notice of intention to retire), *Draper*, 147 F.3d at 1110–11 (holding claim timely based on date of resignation), *Cardoza-Rodriguez*, 133 F.3d at 123 (holding claims time-barred based on date of resignation notice), *Hukkanen*, 3 F.3d at 285 (finding claim timely based on date of resignation), and *Young*, 828 F.2d at 239 (holding claim timely based on date of resignation).

<sup>49</sup> See 29 C.F.R. § 1614.105; Kevin Bennardo, *Claimants Beware: Strict Deadlines Limit Federal Employment Discrimination Suits*, 97 ILL. B.J. 304, 305–06 (2009) (noting that non-federal employees must file a charge of discrimination with the EEOC within three hundred days of the act of discrimination, while federal employees “must act with even greater diligence” and consult with an EEO counselor within forty-five days of the discrimination); see also *Bartlett v. Dep’t of the Treasury*, 749 F.3d 1, 2–3 (2014) (discussing how federal employee failed to contact EEO counselor within forty-five-day time limit).

<sup>50</sup> See 29 C.F.R. § 1614.105.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See *id.* § 1614.407. If the aggrieved employee appeals the EEOC’s decision, he or she similarly has ninety days to file a complaint in U.S. District Court from the date of the final decision on the appeal or 180 days from the filing of the appeal, if there has not been a final decision on the appeal by the EEOC. See *id.* The EEOC goes on to explain:

Prior to filing a civil action under Title VII of the Civil Rights Act of 1964 or the Rehabilitation Act of 1973, a federal sector complainant must first exhaust the administrative process set out at 29 C.F.R. Part 1614. “Exhaustion” for the purposes of filing a civil action may occur at different stages of the process. The regulations provide that civil actions may be filed in an appropriate federal court: (1) within 90 days of receipt of the final action where no administrative appeal has been filed; (2) after 180 days from the date of filing a complaint if an administrative appeal has not been filed and final action

The time limits for the administrative exhaustion requirement of non-federal employees' Title VII claims are less demanding than for federal employees.<sup>54</sup> Non-federal employees must make a charge to the EEOC within 180 days "after the alleged unlawful employment practice occurred."<sup>55</sup> This filing period can be extended to three hundred days if the aggrieved employee first files a charge with an appropriate state or local Fair Employment Practice Agency.<sup>56</sup> These Title VII limitations periods operate as a statute of limitations, and therefore, claims based on discrimination that did not occur within these filing windows are almost always time-barred, unless they can be salvaged by the continuing violation doctrine.<sup>57</sup>

## 2. The Continuing Violation Doctrine and Its Abrogation for Discrete Discriminatory Act Claims

The continuing violation doctrine allows events that occur outside the limitations period to serve as a basis for a claim as long as they are considered part of a single unlawful employment practice.<sup>58</sup> Title VII plaintiffs often re-

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has not been taken; (3) within 90 days of receipt of EEOC's final decision on an appeal; or (4) after 180 days from the filing of an appeal with EEOC if there has been no final decision by the EEOC.

See *Federal EEO Complaint Processing Procedures*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/publications/fedprocess.cfm> [<http://perma.cc/3PPQ-V3X6>] (citing 29 C.F.R. § 1614.408).

<sup>54</sup> See 42 U.S.C. § 2000e-5(e)(1); 29 C.F.R. § 1601.13 (2015); Eboneé N. Hamilton et al., *Title VII of the Civil Rights Act of 1964*, 2 GEO. J. GENDER & L. 521, 533–39 (2001) (outlining Title VII's filing procedures, including time limitations for filing EEOC charge and trial court complaint).

<sup>55</sup> See 42 U.S.C. § 2000e-5(e)(1); 29 C.F.R. § 1601.13; Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 866–67 (2008) (describing "unusually short" statute of limitations as "root of the problem for rights-claiming under Title VII").

<sup>56</sup> See 42 U.S.C. § 2000e-5(e)(1); 29 C.F.R. § 1601.13; Hamilton et al., *supra* note 54, at 534 (noting existence of state or local anti-discrimination agency in certain jurisdictions extends EEOC charge filing deadlines).

<sup>57</sup> See, e.g., *Draper*, 147 F.3d at 1107–09 (salvaging otherwise time-barred claim through use of continuing violation doctrine); see also *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393–94 ("We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.").

<sup>58</sup> See *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) ("The continuing violation theory allows for consideration of incidents that occurred outside the time bar when those incidents are part of a single, ongoing pattern of discrimination . . ."); Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271, 302–03 (2008) (discussing the U.S. Supreme Court's 2002 holding in *National Railroad Passenger Corp. v. Morgan* that the "entire hostile work environment encompasses a single unlawful employment practice" because the "very nature" of a hostile work environment "involves repeated conduct" (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109–17 (2002))). For example, an employee can rely on the continuing violation doctrine to include past acts of sexual harassment by her supervisor as a basis for a hostile work environment claim. See Graham, *supra* at 302–03. In order to prevail on this theory, the employee must demonstrate that this pattern of sexual harassment by her supervisor continued into the relevant period of

lied on the continuing violation doctrine to include discriminatory acts in their claim that would otherwise be time-barred.<sup>59</sup> The continuing violation doctrine is somewhat notorious for causing confusion and being applied inconsistently by courts.<sup>60</sup>

There are two important types of continuing violations analyzed by courts in Title VII cases: serial and systemic.<sup>61</sup> Systemic violations involve company-wide policies or practices that continued into the limitations period.<sup>62</sup> Serial violations comprise a series of distinct discriminatory acts against an individual employee.<sup>63</sup> Under a serial violations theory, the most recent discriminatory act by the employer could serve as the date of accrual for the limitations period and pull otherwise time-barred discriminatory acts into the claim.<sup>64</sup>

Serial violations encompassed claims for both a series of discrete discriminatory acts and hostile work environment.<sup>65</sup> Courts created the claim of hostile work environment to combat harassment that did not fit within the tradi-

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limitations. *See id.* If the employee alleges that her supervisor harassed her daily, but only the last day of her employment is within the limitations period, the employee can rely on the continuing violation doctrine to include all the acts of discrimination as a basis for her hostile work environment claim. *See id.*

<sup>59</sup> *See Graham, supra* note 58 at 272–73 & n.6; *see also Huckabay v. Moore*, 142 F.3d 233, 239–40 (5th Cir. 1998) (holding that continuing violation doctrine made hostile work environment claim timely, but doctrine could not be applied to specific instances of demotion and failure to promote); *Williams v. Silver Spring Volunteer Fire Dep’t*, No. GJH-13-2514, 2015 WL 237146, at \*16 (D. Md. Jan. 16, 2015) (applying continuing violation doctrine to allow incidents outside of charge filing period to be included in hostile work environment claim).

<sup>60</sup> *See Davidson v. Am. Online*, 337 F.3d 1179, 1185 (10th Cir. 2003) (noting the “inconsistent and confusing application” of the continuing violation doctrine by the circuit courts before the U.S. Supreme Court’s decision in *Morgan*); Lisa S. Tsai, Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 TEX. L. REV. 531, 531 (2000) (discussing how the continuing violation doctrine is considered “one of the most confusing and inconsistent areas of employment discrimination law”).

<sup>61</sup> *See Graham, supra* note 58 at 303–04 (citing *O’Rourke v. City of Providence*, 235 F.3d 713, 731 (1st Cir. 2001)).

<sup>62</sup> *See id.* at 304 (“Systemic violations alleged that a discriminatory policy or practice that originated outside of the limitations period prior to the filing of a charge remained in effect within that period.”). The cases involved in the current circuit split discussed in this Note do not involve systemic violations. *See Green II*, 760 F.3d at 1143–45 (no discussion of systemic violations); *Mayers*, 478 F.3d at 370 (same); *Draper*, 147 F.3d at 1110–11 (same); *Flaherty*, 235 F.3d at 138 (same); *Cardoza-Rodriguez*, 133 F.3d at 123 (same); *Hukkanen*, 3 F.3d at 285 (same); *Davidson*, 953 F.2d at 1059–60 (same); *Young*, 828 F.2d at 239 (same).

<sup>63</sup> *See Graham, supra* note 58, at 303–04; Tsai, *supra* note 60, at 540.

<sup>64</sup> *See Graham, supra* note 58, at 304 (explaining that a serial violation occurs “when the defendant commit[s] a series of discriminatory acts directed against a single plaintiff” as long as an anchoring discriminatory act occurred within the charge filing window).

<sup>65</sup> *See id.* (discussing the Court’s treatment of hostile work environment and discrete discriminatory act claims under continuing violation doctrine in *Morgan*); *see also Draper*, 147 F.3d at 1108 (stating that because employee’s “hostile work environment claim is not based upon a series of discrete and unrelated discriminatory actions, but is instead premised upon a series of closely related similar occurrences her allegations set forth a claim of a continuing violation”).

tional “economic” or “tangible” forms of employment discrimination under Title VII.<sup>66</sup> Courts often describe a hostile work environment as a workplace “polluted” or “permeated” with discrimination.<sup>67</sup> In a constructive discharge case, a hostile work environment that involves repeated or continuous conduct that compels the employee to resign would presumably be treated as one unlawful employment practice, and thus, the hostile work environment exists until the employee resigns.<sup>68</sup>

The development of hostile work environment jurisprudence has eroded the already muddled continuing violation doctrine.<sup>69</sup> In 2002, in *National Railroad Passenger Corp. v. Morgan*, the U.S. Supreme Court held that the continuing violation doctrine did not apply to a series of discrete discriminatory acts, but that it could still be applied to an employee’s hostile work environment claims.<sup>70</sup> The Court ruled that each discrete act, such as termination or denial of transfer, should constitute a “separate actionable unlawful employment practice” and must actually occur within the limitations period to be actionable.<sup>71</sup> The abrogation of the continuing violation doctrine imputes greater sig-

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<sup>66</sup> See *Faragher v. City of Boca Raton*, 524 U.S. 775, 780, 786 (1998) (discussing U.S. Supreme Court’s recognition of hostile work environment claims); *Meritor*, 477 U.S. at 64 (rejecting employer’s argument that Title VII limited to “economic” and “tangible” discrimination because Title VII intended “to strike at the entire spectrum of disparate treatment of men and women’ in employment” (quoting *L.A. Dep’t. of Water & Power v. Manhart*, 435 U.S. 707, 707 n.13 (1978))).

<sup>67</sup> See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998) (“When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment, Title VII is violated.” (quoting *Harris*, 510 U.S. at 21–23)); *Meritor*, 477 U.S. at 66 (“One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . .” (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971))).

<sup>68</sup> See *Morgan*, 536 U.S. at 122 (“A charge alleging a hostile work environment claim, however, will not be time-barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period.”); *Draper*, 147 F.3d at 1108 (detailing claims of an employee that hostile work environment continued until her final day on the job).

<sup>69</sup> See *Morgan*, 536 U.S. at 114–15 (creating distinction between hostile work environment and discrete discriminatory act claims under constructive discharge doctrine); Graham, *supra* note 58, at 304 (“The Morgan court abrogated serial violations (except insofar as hostile work environment claims are concerned) and cast the fate of systemic violations into doubt.”); Sperber & Welling, *supra* note 41, at 59 (noting the *Morgan* decision made it easier for employers to defend against discrete act discrimination claims because employees can no longer rely on continuing violations doctrine to extend filing period for discrete act claims).

<sup>70</sup> See *Morgan*, 536 U.S. at 114–17; Lawrence D. Rosenthal, *To File (Again) or Not to File (Again): The Post-Morgan Circuit Split Over the Duty to File an Amended or Second EEOC Charge for Claims of Post-Charge Employer Retaliation*, 66 BAYLOR L. REV. 531, 550–51 (2014) (discussing the Court’s holding in *Morgan* that discrete discriminatory act claims begin to accrue on the date they actually occurred for purposes of the limitations period).

<sup>71</sup> See *Morgan*, 536 U.S. at 114–17; *Jones v. Calvert Grp.*, 551 F.3d 297, 303 (4th Cir. 2009) (distinguishing holding in *Morgan* regarding charge filing period for discrete discriminatory act from filing requirements for post-charge discriminatory incidents).

nificance on determining when a discrete discriminatory act occurs for the purposes of claim accrual.<sup>72</sup>

### 3. Title VII Claim Accrual in *Delaware State College v. Ricks*

The U.S. Supreme Court has not directly addressed when constructive discharge claims accrue, but the Court has considered when an unlawful employment practice claim accrues.<sup>73</sup> In 1980, in *Delaware State College v. Ricks*, the U.S. Supreme Court held that a claim begins to accrue at the time of the alleged discriminatory act, rather than at time of the unlawful termination.<sup>74</sup> Although decided before *Morgan*, the Court in *Ricks* declined to apply the continuing violation doctrine to link the employee's last day of employment with the employer's last discriminatory act for purposes of extending the limitations period.<sup>75</sup>

The plaintiff in *Ricks* alleged he was denied tenure because he was discriminated against on the basis of his national origin.<sup>76</sup> After being denied tenure, the college offered the plaintiff a one-year "terminal" contract, at the end of which his employment would expire.<sup>77</sup> The Court determined that this terminal contract was customary procedure for a professor who was denied tenure, and thus the termination of his employment could not be construed as an

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<sup>72</sup> See Sperber & Welling, *supra* note 41, at 59 (noting that after the *Morgan* decision "discrete act claims are considered 'different in kind' from hostile work environment claims in that the filing period for such claims can be extended only through equitable doctrines such as tolling").

<sup>73</sup> See Elms, *supra* note 30. *But see Ricks*, 449 U.S. at 258–59 (holding that unlawful employment practice occurred at notice of tenure denial and not end of employee's employment). The issue of when a constructive discharge claim accrues has arisen several times at the circuit court level. See *Green II*, 760 F.3d at 1143–45; *Mayers*, 478 F.3d at 370; *Flaherty*, 235 F.3d at 138; *Draper*, 147 F.3d at 1110–11; *Davidson*, 953 F.2d at 1059–60; *Young*, 828 F.2d at 239. A wrongful discharge is a discharge based on an illegal reason, which requires action only by the employer. See *Flaherty*, 235 F.3d at 138. A constructive discharge occurs when an employee resigns due to intolerable working conditions, and therefore, requires action by both the employer and employee. See *id.* at 138–39.

<sup>74</sup> See *Ricks*, 449 U.S. at 258–59. In *Ricks*, the plaintiff failed to include a claim for discriminatory discharge in his complaint and only alleged discrimination regarding his denial of tenure. See *id.* at 257. The plaintiff later argued he was discriminatorily discharged, which the Court rejected both because the complaint alleged no facts supporting this argument and based on its analysis of when his discrimination claim accrued. See *id.* at 257–58. Justice Stevens argued in his dissent that he would treat the case where an employee is denied tenure and offered a one-year terminal contract as a discharge case, and therefore, the limitations period would begin to run on the termination date of the one-year terminal contract. See *id.* at 266 (Stevens, J., dissenting).

<sup>75</sup> See *id.* at 257 (majority opinion).

<sup>76</sup> See *id.* at 252. The employee was a black Liberian who began working at the college in 1970. See *id.* He was first passed over for tenure in February 1973, although the college's trustees did not formally vote to deny tenure until March 1974. See *id.*

<sup>77</sup> See *id.* at 252–54 (noting employee immediately began internal grievance procedures after receiving tenure denial, but did not file his Title VII lawsuit until three years later).

alleged discriminatory act.<sup>78</sup> The Court created a temporal distinction between discriminatory acts and their consequences in determining when a claim begins to accrue.<sup>79</sup> Therefore, the Court concluded that it was the denial of tenure—not the employment termination that resulted from the denied tenure—that was the alleged discriminatory act.<sup>80</sup>

#### 4. The Doctrine of Constructive Discharge

Courts have interpreted Title VII to permit constructive discharge claims since its enactment as part of the Civil Rights Act of 1964.<sup>81</sup> A court must find a constructive discharge when an employer discriminates against an employee and intentionally makes working conditions so intolerable that a reasonable person in the employee's position would feel compelled to resign.<sup>82</sup> Courts developed the concept of constructive discharge to expand remedies for illegal employment practices to employees who felt forced to resign due to discriminatory employment conditions.<sup>83</sup>

The doctrine of constructive discharge allows plaintiffs to recover from employers who would otherwise escape liability solely because the employee

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<sup>78</sup> See *id.* at 258; Megan E. Mowrey, *Discriminatory Pay and Title VII: Filing a Timely Claim*, 41 J. MARSHALL L. REV. 325, 342–43 (2008) (discussing Court's balancing in *Ricks* between Title VII's protections and limitations periods).

<sup>79</sup> See *Ricks*, 449 U.S. at 258 (“[T]he proper focus is upon the time of the *discriminatory* acts, not upon the time at which the *consequences* of the acts became most painful.” (quoting *Abramson v. Univ. of Haw.*, 594 F.2d 202, 209 (9th Cir. 1979))).

<sup>80</sup> See *id.* In his dissent, Justice Stevens argued that the date of discharge should trigger the claim accrual because it is the most sensible and easily-administered approach. See *id.* at 267 (Stevens, J., dissenting). Justice Stevens noted that the alleged discriminatory action is subject to change until the employee is actually discharged. See *id.* Furthermore, Justice Stevens noted that the date of discharge is generally easier to identify than the date the employer decided to terminate or the date notice of termination is given to the employee. See *id.*

<sup>81</sup> See *Suders*, 542 U.S. at 141–42 (discussing development of constructive discharge in employment discrimination jurisprudence). The National Labor Relations Board (“NLRB”) developed the constructive discharge doctrine in the 1930s as a response to employers who would either force employees to resign or make working conditions so intolerable that employees would feel compelled to resign as retaliation for employee's union-related activities. See *id.* When Title VII was enacted in 1964, the constructive discharge doctrine was well established in federal employment law and the federal courts recognized constructive discharge claims in Title VII cases. See *NLRB v. Saxe-Glassman Shoe Corp.*, 201 F.2d 238, 243 (1st Cir. 1953) (upholding NLRB's finding that employee was constructively discharged due to sufficient evidence that employer's actions were intended to make employee's job unbearable); *NLRB v. E. Tex. Motor Freight Lines*, 140 F.2d 404, 405–06 (5th Cir. 1944) (upholding NLRB's finding in favor of employees pressured to resign due to their union activities, although not using term “constructive discharge”).

<sup>82</sup> See *Flaherty*, 235 F.3d at 138 (finding constructive discharge claim was not time-barred); *Young*, 828 F.2d at 237–38 (finding plaintiff sufficiently pled constructive discharge).

<sup>83</sup> *Green II*, 760 F.3d at 1142–43 (discussing rationale of recognizing constructive discharge as a distinct claim).

resigned.<sup>84</sup> In determining damages, courts treat constructive discharge the same as actual termination, meaning the plaintiff may recover compensatory and punitive damages.<sup>85</sup> An important difference between constructive discharge and an actual discharge, however, is that constructive discharge requires action by both the employer and employee.<sup>86</sup> Only the employee knows when working conditions have become so intolerable that he or she must resign, and therefore the specific timing of the constructive discharge is under the employee's control.<sup>87</sup>

### *B. Circuit Courts That Hold a Constructive Discharge Claim Accrues When the Employee Resigns*

Five U.S. Courts of Appeals have held that an employee's constructive discharge claim begins to accrue on the date that the employee gives definitive notice of resignation.<sup>88</sup> In 1987, the U.S. Court of Appeals for the Fourth Circuit held in *Young v. National Center for Health Services Research* that a constructive discharge could be considered a distinct discriminatory act.<sup>89</sup> The plaintiff in *Young* was a federal employee and required by EEO regulations to bring her grievance to an EEO counselor within thirty days.<sup>90</sup> The plaintiff contacted an EEO counselor twenty-nine days after her resignation.<sup>91</sup> The Fourth Circuit determined that the constructive discharge was a distinct adverse employment action.<sup>92</sup> The court concluded that the plaintiff had properly exhausted her administrative remedies because the alleged unlawful employ-

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<sup>84</sup> See *id.* (noting remedies that would be unavailable to plaintiffs if constructive discharge claim did not exist).

<sup>85</sup> See 42 U.S.C. § 1981a(a)(1) (2012) (allowing compensatory and punitive damages in cases of intentional discrimination in employment); *Suders*, 542 U.S. at 147–48 & n.8 (discussing compensatory and punitive damages allowed under 42 U.S.C. § 1981a(a)(1)).

<sup>86</sup> See *Green II*, 760 F.3d at 1142–43 (noting constructive discharge involves both employer's discriminatory conduct and employee's decision to leave); *Flaherty*, 235 F.3d at 138 (stating “[i]n the case of constructive discharge, it is only the employee who can know when the atmosphere has been made so intolerable by the discrimination-motivated employer that the employee must leave”).

<sup>87</sup> *Flaherty*, 235 F.3d at 138 (noting employee made decision regarding when to give definite notice of intent to retire due to allegedly intolerable working conditions).

<sup>88</sup> See *Flaherty*, 235 F.3d at 138; *Draper*, 147 F.3d at 1110–11; *Cardoza-Rodriguez*, 133 F.3d at 123; *Hukkanen*, 3 F.3d at 285; *Young*, 828 F.2d at 239.

<sup>89</sup> See *Young*, 828 F.2d at 238. The plaintiff alleged her employer discriminated against her on the basis of her national origin. *Id.* at 236. Additionally, the plaintiff claimed her supervisor made abusive comments, denied her sick and annual leave, and blocked her access to training facilities. *Id.* at 237. Further, the plaintiff alleged her agency's director would not address her grievances until she resigned, and therefore, she was improperly suspended and forced to resign. *Id.*

<sup>90</sup> See *id.*; 29 C.F.R. § 1613.214(a)(1)(i) (1986). The current federal regulation requires federal employees to initiate contact with an EEOC counselor within forty-five days of the alleged discriminatory matter. 29 C.F.R. § 1614.105(a)(1).

<sup>91</sup> *Young*, 828 F.2d at 238 (finding plaintiff sufficiently pled “constructive discharge” in her EEO complaint even though she did not use those precise words).

<sup>92</sup> *Id.* at 237–38.

ment practice—the constructive discharge—was within the reporting window.<sup>93</sup>

In *Young*, the court reasoned that a resignation itself is not a distinct act if it is solely the result of past discrimination and does not rise to the level of constructive discharge.<sup>94</sup> The Fourth Circuit defined constructive discharge as when an employer discriminates against an employee and makes his or her job conditions so intolerable that a reasonable person in the employee's position would feel forced to resign.<sup>95</sup> Because the court concluded that the constructive discharge itself was a distinct discriminatory act, the court held that the limitations period began to accrue once the employee resigned.<sup>96</sup>

Similarly, the U.S. Court of Appeals for the Eighth Circuit held in 1993, in *Hukkanen v. International Union of Operating Engineers, Hoisting & Portable Local No. 101*, that the employee's Title VII constructive discharge claim was timely based on the date of her resignation.<sup>97</sup> The Eighth Circuit found that the employee filed her EEOC claim within the required 180 days of the union's last act of discrimination against her, which the court determined was the effective date of the constructive discharge.<sup>98</sup> Under the continuing violation doctrine, the union's prior acts of discrimination could be included in plaintiff's claim because she alleged and proved a pattern of discrimination that culminated in her constructive discharge, which was within the limitations period.<sup>99</sup>

Although the U.S. Court of Appeals for the First Circuit's 1998 decision in *American Airlines v. Cardoza-Rodriguez* held that employees' claims were time-barred, the court nevertheless used the employees' resignation notice dates to calculate when their claims began to accrue.<sup>100</sup> In *Cardoza-Rodriguez*,

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<sup>93</sup> *Id.* (noting defendant has burden of proving affirmative defense that plaintiff did not exhaust administrative remedies).

<sup>94</sup> *See id.* (distinguishing constructive discharge from "inevitable consequence" of prior discrimination (quoting *Ricks*, 449 U.S. at 257–58)).

<sup>95</sup> *See id.* The Fourth Circuit reasoned that a resignation that is a constructive discharge is "a distinct discriminatory 'act' for which there is a distinct cause of action." *See id.* at 238 (citing *Bristow 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)).

<sup>96</sup> *See id.* at 237–38.

<sup>97</sup> *See Hukkanen*, 3 F.3d at 285 (rejecting union's argument that employee's claim was time-barred).

<sup>98</sup> *See id.* (court did not identify any specific discriminatory act by employer within limitations period).

<sup>99</sup> *See id.* (stating limitations periods do not begin to run until "last occurrence of discrimination" when Title VII violations are "continuing in nature").

<sup>100</sup> *See Cardoza-Rodriguez*, 133 F.3d at 123 (finding constructive discharge claims were time-barred based on date of resignation notice). In contrast to the Second, Fourth, Eighth, and Ninth Circuit decisions that also follow the date-of-resignation rule, the employees' constructive discharge claims in *Cardoza-Rodriguez* were time-barred under either a date-of-resignation or date-of-last-discriminatory-act approach. *Compare Flaherty*, 235 F.3d at 138 (claim timely), *Draper*, 147 F.3d at

the employer made allegedly discriminatory early retirement offers to older employees, which they had approximately two months to accept or risk involuntary termination.<sup>101</sup> The court calculated the limitations period based on the date of each employee's individual notice of resignation, not the date on which the employer made the alleged discriminatory offer.<sup>102</sup> The Fourth Circuit's decision in *Young* influenced the First Circuit to conclude that the constructive discharge itself was the alleged discriminatory act that triggered the limitations period.<sup>103</sup>

The U.S. Court of Appeals for the Ninth Circuit's 1998 decision in *Draper v. Coeur Rochester, Inc.* also comported with the Fourth Circuit's *Young* formula by holding that periods of limitation begin to run in constructive discharge cases on the date of the resignation.<sup>104</sup> In *Draper*, the employee alleged a hostile work environment due to sexual harassment by her supervisor, which resulted in her constructive discharge.<sup>105</sup> The majority of the supervisor's discriminatory behavior that constituted plaintiff's claim occurred before the actionable limitations period.<sup>106</sup>

In determining whether the constructive discharge claim was timely filed, the Ninth Circuit ruled in *Draper* that the date of resignation triggers the limitations period in a constructive discharge case.<sup>107</sup> The Ninth Circuit considered constructive discharge a form of a wrongful discharge claim, but distinguished constructive discharge from a wrongful discharge that was an inexorable result of a prior action, such as denial of tenure resulting in termination.<sup>108</sup> The court reasoned that the constructive discharge was not an inevitable consequence of unlawful employment action, but a distinct action that requires autonomous

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1110–11 (claim timely), *Hukkanen*, 3 F.3d at 285 (claim timely), and *Young*, 828 F.2d at 239 (claim timely), with *Cardoza-Rodriguez*, 133 F.3d at 123 (claim time-barred).

<sup>101</sup> See *Cardoza-Rodriguez*, 133 F.3d at 114, 122 & n.12 (including chart with dates employees accepted allegedly discriminatory retirement offer and filed administrative charges).

<sup>102</sup> See *id.* at 123 (finding employee's acceptance of allegedly discriminatory retirement offer was latest possible date the limitations period could begin to run).

<sup>103</sup> See *id.* (rejecting plaintiffs' arguments that the limitations period began to run on each individual employee's last day or the date they were actually replaced by younger workers (citing *Young*, 828 F.2d at 238)).

<sup>104</sup> See *Draper*, 147 F.3d at 1110–11 (overturning lower court's finding that constructive discharge itself is not an act of discrimination under Title VII).

<sup>105</sup> See *id.* at 1105, 1108 n.1 (noting hostile work environment may not require showing of discrete discriminatory act within limitations period, but concluding that employee's constructive discharge nevertheless constituted such an act).

<sup>106</sup> See *id.* at 1107. The court identified one incident, in which the employee confronted her supervisor about his sexual harassment, as a distinct discriminatory act that occurred within the limitations period. See *id.* at 1109. The court found this violation sufficient to raise a genuine issue of fact as to whether the hostile work environment continued into the relevant limitations period under the continuing violation doctrine. See *id.*

<sup>107</sup> See *id.* at 1110.

<sup>108</sup> See *id.* (noting employer's reliance on *Ricks* was "misplaced" because plaintiff in that case failed to properly plead wrongful termination (citing *Ricks*, 449 U.S. at 257–58)).

decision making by the employee.<sup>109</sup> Therefore, the court concluded, the plaintiff's constructive discharge was an act of discrimination under Title VII and the claim was properly within the limitations period.<sup>110</sup>

Finally, in 2000, in *Flaherty v. Metromail Corp.*, the U.S. Court of Appeals for the Second Circuit held that the plaintiff's constructive discharge claim accrued on the date she gave definite notice of her intention to retire.<sup>111</sup> The plaintiff in *Flaherty* alleged unlawful discrimination on the basis of sex and age.<sup>112</sup> The lower court found that the latest discriminatory act against the plaintiff, her employer's issuance of a warning letter about her "looming termination," occurred outside of the limitations period and the complaint was time-barred.<sup>113</sup> The Second Circuit reversed and ruled that constructive discharge claims accrue on the date of the employee's definite notice of resignation, and thus her complaint was filed within the limitations period.<sup>114</sup> The court noted that only the employee knows when the employer's discriminatory practices have made working conditions so unbearable that the employee must resign, and thus it is the employee's decision to resign that should trigger the limitations period.<sup>115</sup>

### *C. Circuit Courts That Hold a Constructive Discharge Claim Accrues When the Last Adverse Employment Action Occurs*

The Seventh, Tenth, and District of Columbia Courts of Appeals adopted a contrasting approach for determining whether the last act of discrimination was within the limitations period by rejecting constructive discharge as a distinct discriminatory act by the employer.<sup>116</sup> In 1992, in *Davidson v. Indiana-American Water Works*, the U.S. Court of Appeals for the Seventh Circuit held that the plaintiff's claim was time-barred because the last alleged discriminato-

<sup>109</sup> See *id.* (distinguishing case from *Ricks* because constructive discharge is not "inevitable consequence of the employer's actions," as it also requires action by employee).

<sup>110</sup> See *id.* at 1110–11 (reversing lower court's grant of summary judgment to employer on constructive discharge claim).

<sup>111</sup> See *Flaherty*, 235 F.3d at 138–39 (vacating lower court's grant of summary judgment).

<sup>112</sup> See *id.* at 134–36 (discussing ageist and sexist remarks allegedly made to employee by supervisors).

<sup>113</sup> See *id.* at 135–38 (employee received warning letter on August 21, 1996, gave normal notice of retirement on June 12, 1997, and filed an EEOC charge on February 9, 1998); *Flaherty v. Metromail Corp.*, No. 98 CIV 8611 NRB, 2000 WL 288356, at \*4 (S.D.N.Y. Mar. 16, 2000) (rejecting employee's argument that claim accrued on date of resignation), *vacated*, 235 F.3d 133.

<sup>114</sup> See *Flaherty*, 235 F.3d at 136–38 (calculating date three hundred days prior to EEOC charge-filing date and finding employee's claim timely because date of resignation was within this actionable time period).

<sup>115</sup> See *id.* at 138 (relying on substantive constructive discharge law).

<sup>116</sup> See *Green II*, 760 F.3d at 1143–45 (employer's allegedly discriminatory last act was settlement agreement); *Mayers*, 478 F.3d at 367–70 (employer's last allegedly discriminatory act was failure to provide electric tools); *Davidson*, 953 F.2d at 1059–60 (employer's last allegedly discriminatory act was prior to employee's department transfer).

ry act against the plaintiff was when she was transferred out of her department, not when she later resigned and claimed constructive discharge.<sup>117</sup> In her complaint, the plaintiff alleged that a hostile work environment based on age discrimination and a pattern of retaliation led to her constructive discharge.<sup>118</sup> The Seventh Circuit did not categorize the constructive discharge as a distinct violation for the purposes of the limitations period, but as a consequence of a prior, time-barred discriminatory act.<sup>119</sup>

In addition, the U.S. Court of Appeals for the District of Columbia Circuit's 2007 decision in *Mayers v. Laborers' Health & Safety Fund of North America* held that the plaintiff failed to identify a single act of discrimination within the limitations period even though the alleged constructive discharge happened during the actionable time frame.<sup>120</sup> In *Mayers*, the plaintiff alleged unlawful discrimination on the basis of disability, her rheumatoid arthritis, which resulted in her constructive discharge.<sup>121</sup> The District of Columbia Circuit concluded that the plaintiff failed to predicate the constructive discharge on an act of intentional discrimination or retaliation.<sup>122</sup> According to the District of Columbia Circuit, constructive discharge is not an act of discrimination or retaliation by the employer for the purposes of claim accrual.<sup>123</sup>

Finally, the U.S. Court of Appeals for the Tenth Circuit held in its 2014 decision in *Green v. Donahoe* that a discriminatory act, other than the employ-

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<sup>117</sup> See *Davidson*, 953 F.2d at 1059–60 (employee's EEOC charge filed in July 1986 was time-barred based on her October 1985 department transfer and not her January 1986 resignation). The Seventh Circuit affirmed the lower court finding that the plaintiff's EEOC charge was untimely based on the date of her supervisor's last discriminatory act. See *id.* The plaintiff alleged age discrimination by her supervisor, but she was transferred out of that supervisor's department in October 1985. See *id.* The court concluded that her claim began to accrue on the date of her transfer, not when she actually resigned in January 1986. See *id.*

<sup>118</sup> See *id.* at 1058–59 (employee was transferred to another department after complaining that her supervisor harassed and discriminated against her on the basis of her age).

<sup>119</sup> See *id.* (rejecting employee's argument that constructive discharge claim began to run on last day of work).

<sup>120</sup> See *Mayers*, 478 F.3d at 370 (implicitly rejecting date of resignation as moment when constructive discharge claim began to accrue).

<sup>121</sup> See *id.* at 366–68 (noting that the Americans with Disabilities Act incorporates procedural provisions of Title VII, including EEOC charge filing requirement).

<sup>122</sup> See *id.* at 370 (finding constructive discharge "must be predicated on a showing of either intentional discrimination, or retaliation" to be actionable (quoting *Carter v. George Wash. Univ.*, 387 F.3d 872, 883 (D.C. Cir. 2004))).

<sup>123</sup> See *id.* at 367–70. Furthermore, the District of Columbia Circuit noted in *Mayers* that the lower court's decision improperly weighed evidence in summary judgment proceedings when evaluating plaintiff's constructive discharge claim. See *id.* at 370. The District of Columbia Circuit determined this dismissal was inconsequential, however, because the district court correctly concluded that the constructive discharge claim should be disposed of on summary judgment due to the limitations period. See *id.*; *Mayers v. Laborers' Health & Safety Fund of N. Am.*, 404 F. Supp. 2d 59, 61 (D.D.C. 2005) (district court decision granting summary judgment for employer because employee failed to establish constructive discharge), *aff'd*, 478 F.3d 364.

ee's notice of resignation, must happen within the limitations period.<sup>124</sup> The plaintiff in *Green* alleged illegal retaliation in violation of Title VII after he had previously filed a formal charge with the EEOC alleging that he had been denied a promotion because of his race.<sup>125</sup> The plaintiff claimed that his constructive discharge, along with four other alleged retaliatory acts, was an illegal discriminatory action.<sup>126</sup> The court determined that plaintiff's constructive discharge was time-barred because the claim began to accrue when his employer last unlawfully threatened him, in December 2009, and not when he actually resigned, in March 2010.<sup>127</sup> The court warned that allowing the claim to accrue on the date of resignation would allow the employee to have unilateral control over when to bring the claim.<sup>128</sup>

Unlike the Seventh and District of Columbia Circuits' decisions, in *Green*, the Tenth Circuit explicitly acknowledged the differing approaches taken by the Second, Ninth, and Fourth Circuits.<sup>129</sup> The Tenth Circuit criticized *Flaherty*, *Draper*, and *Young* for going beyond the language of EEO federal regulation 29 C.F.R. § 1614.105(a)(1).<sup>130</sup> The federal regulation requires that aggrieved federal employees initiate contact with an EEOC counselor "within 45 days of the date of the matter alleged to be discriminatory."<sup>131</sup> The Tenth Circuit rejected the act of constructive discharge as a sufficient alleged discriminatory action for the purposes of the limitations period because it is the unilateral decision of the employee when to resign.<sup>132</sup>

In *Green*, the Tenth Circuit weighed the merits of the two different approaches the circuits have taken to determining when constructive discharge claims accrue.<sup>133</sup> The court noted the paradox that might be created if an employee cannot complain of a constructive discharge until he or she quits, but nevertheless, the court held the constructive discharge itself cannot be the sole

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<sup>124</sup> See *Green II*, 760 F.3d at 1145.

<sup>125</sup> See *id.* at 1137.

<sup>126</sup> See *id.* at 1138–39 (affirming lower court's disposition of four claims, including constructive discharge, but vacating summary judgment for emergency placement claim).

<sup>127</sup> See *id.* at 1143–45.

<sup>128</sup> See *id.* at 1144–45 (worrying date-of-resignation approach would place "supposed statute of repose in the sole hands of the party seeking relief").

<sup>129</sup> See *id.* at 1144 ("[I]n several decisions under Title VII, courts have said that a claim accrued on the date the employee resigned." (citing *Flaherty*, 235 F.3d at 138; *Draper*, 147 F.3d at 1111; *Young*, 828 F.2d at 237–38)).

<sup>130</sup> See *id.* ("[W]e cannot endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer. Such a fiction stretches the language of 29 C.F.R. § 1614.105(a)(1) too far.")

<sup>131</sup> See *id.*; 29 C.F.R. § 1614.105(a)(1).

<sup>132</sup> See *Green II*, 760 F.3d at 1144–45.

<sup>133</sup> See *id.* (contrasting *Flaherty*, *Draper*, and *Young* date-of-resignation decisions with *Mayers* and *Davidson v. Indiana-American Water Works* last-discriminatory-act decisions).

discriminatory act within the limitation periods.<sup>134</sup> The court proposed that employees should initiate contact with the EEOC when the discriminatory acts occur and if the employee subsequently feels forced to resign, he or she can amend the charge to include a constructive discharge claim.<sup>135</sup>

#### *D. The U.S. Supreme Court Grants Certiorari to Resolve the Circuit Split*

After the Tenth Circuit's decision, Green filed a petition for a writ of certiorari, which was granted by the U.S. Supreme Court in April 2014.<sup>136</sup> Oral argument in *Green v. Brennan* is scheduled for the Court's 2015 October Term.<sup>137</sup> The U.S. Solicitor General, Donald B. Verrilli, Jr., wrote in a letter to the Clerk of the Supreme Court that the government will not defend the rationale of the Court of Appeals decision, but it will continue to defend the judgment itself because the government believes that outcome is the same even using *Green's* proposed rule for determining when the constructive discharge claims accrue.<sup>138</sup> Verrilli suggested that the U.S. Supreme Court may wish to invite amicus curiae to file a brief to defend the rationale of the Court of Appeals' decision.<sup>139</sup> On July 28, 2015, the Court invited Catherine M.A. Carroll, Esq., to brief and argue the case in support of the Court of Appeals judgment.<sup>140</sup>

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<sup>134</sup> See *id.* at 1145 ("We recognize that an employee cannot file suit before presenting a charge in administrative proceedings, and a constructive-discharge charge cannot be submitted before the employee quits his job.").

<sup>135</sup> See *id.* The court posited that an employee could "likely" amend his or her EEOC charge after resigning to add a constructive discharge claim. See *id.* (noting that 29 C.F.R. § 1601.12(b) permits amendments).

<sup>136</sup> See *id.* (certiorari granted Apr. 27, 2015); Petition for Writ of Certiorari, *supra* note 1, at 1–2; Kimberley Bennett, *Supreme Court to Rule in Standing, Labor Law Cases*, JURIST PAPER CHASE BLOG (Apr. 27, 2015, 12:45 PM), <http://jurist.org/paperchase/2015/04/supreme-court-to-rule-in-standing-labor-law-cases.php> [<http://perma.cc/L35C-NHAS>] (discussing the U.S. Supreme Court's grant of certiorari in *Green II*).

<sup>137</sup> See *October Term 2016*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/terms/ot2015/> [<http://perma.cc/5WLU-627N>] (noting that *Green II* is scheduled for the Court's October term). In February 2014, Megan Brennan succeeded Patrick Donahoe as U.S. Postmaster General. Lisa Rein, *New Postmaster General Pledges 'Faster Pace of Change' During Swearing in*, WASH. POST FED. EYE BLOG (Mar. 6, 2015), <http://www.washingtonpost.com/blogs/federal-eye/wp/2015/03/06/new-postmaster-general-pledges-faster-pace-of-change-during-swearing-in/> [<http://perma.cc/5QJ7-WYSM>]. As a result, the case before the U.S. Supreme Court is now called *Green v. Brennan*. See J. Appendix, *Green v. Brennan*, 135 S. Ct. 1892 (July 6, 2015) (No. 14-613), 2015 WL 4148731.

<sup>138</sup> Letter from Donald B. Verrilli, Jr., Solicitor Gen., to the Honorable Scott S. Harris, Clerk, Supreme Court of the U.S. (June 30, 2015), <http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SG-letter-re-the-Marvin-Green-case.pdf> [<http://perma.cc/C4M7-H82B>] (noting government did not express opinion about correctness of rationale of Court of Appeals decision when it opposed certiorari).

<sup>139</sup> See *id.*

<sup>140</sup> *Green v. Brennan*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/green-v-donahoe/> [<http://perma.cc/25CS-PSRM>].

Additionally, two amici curiae have filed briefs in support of Green.<sup>141</sup> The NAACP Legal Defense & Educational Fund, Inc., and National Women’s Law Center filed a joint amicus brief advocating for the date-of-resignation rule for constructive discharge claim accrual because they believe it is more equitable and easier to administer.<sup>142</sup> Similarly, the amicus brief submitted by the National Employment Lawyers Association argues that it is much more intuitive for employees to have a constructive discharge claim only once they have actually resigned.<sup>143</sup>

## II. BAD TIMING: UNCERTAINTY AND INEQUITY CREATED BY THE CIRCUIT SPLIT

The current circuit split regarding when Title VII constructive discharge claims begin to accrue creates uncertain and unequal results for both employers and employees.<sup>144</sup> Section A of this Part analyzes the implications of treating constructive discharge itself as a distinct adverse employment action.<sup>145</sup> Section B of this Part analyzes how geographical differences create unequal results that may be dispositive.<sup>146</sup> Section C of this Part analyzes how this circuit split affects administrative efficiency.<sup>147</sup>

### A. Treating Constructive Discharge as a Distinct Adverse Employment Action

The abrogation of the continuing violation doctrine for a series of distinct acts—essentially all non-hostile work environment claims—places a greater burden on employees to prove each distinct act is within the limitations period.<sup>148</sup> In 2002, in *National Railroad Passenger Corp. v. Morgan*, the U.S. Supreme Court held that distinct discriminatory acts must actually be within the

<sup>141</sup> See *id.*

<sup>142</sup> Brief of Amici Curiae NAACP Legal Defense & Educational Fund, Inc. & the National Women’s Law Center in Support of Petitioner at 26, *Green*, 135 S. Ct. 1892 (July 13, 2015) (calling date-of-resignation approach “simple, fair, and administrable”).

<sup>143</sup> Brief Amicus Curiae for the National Employment Lawyers Ass’n in Support of Petitioner at 4, *Green*, 135 S. Ct. 1892 (July 13, 2015) (arguing reasonable employee would not anticipate having to complain of discrimination underlying constructive discharge claim prior to resignation, while more sophisticated employer could take advantage of counterintuitive deadlines).

<sup>144</sup> See Petition for Writ of Certiorari, *supra* note 1, at 16–19; Elms, *supra* note 30.

<sup>145</sup> See *infra* notes 148–174 and accompanying text.

<sup>146</sup> See *infra* notes 175–192 and accompanying text.

<sup>147</sup> See *infra* notes 193–200 and accompanying text.

<sup>148</sup> See Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 105, 114–15 (2002) (holding continuing violation doctrine could not be used to extend timeliness of discrete discriminatory act claims, but only one act contributing to hostile work environment had to be within limitations period for hostile work environment claim to be timely); Graham, *supra* note 58, at 302–04; Sperber & Welling, *supra* note 41, at 59 (asserting *National Railroad Passenger Corp. v. Morgan* allows employers to more forcefully oppose discrete act Title VII claims).

limitations period to be actionable.<sup>149</sup> After *Morgan*, an employee can no longer rely on the continuing violation doctrine to extend the life of non-hostile work environment claims, which includes wrongful discharge or denial of transfer claims.<sup>150</sup>

The Court's reasoning in *Morgan* may explain why courts are more likely to find that a constructive discharge claim accrues at the date of resignation in a hostile work environment case than in a discrete act case.<sup>151</sup> The pervasive nature of a hostile work environment claim allows earlier, otherwise time-barred, actions to get pulled into the actionable period through the continuing violation doctrine.<sup>152</sup> If the court determines that a hostile work environment exists, it presumably exists until the employee resigns and claims constructive discharge.<sup>153</sup> In contrast, if an employee's resignation is due to an employer's discrete act, but the constructive discharge is the only actionable claim within the limitations period, constructive discharge itself must be a distinct adverse employment action in order for the claim to survive.<sup>154</sup>

The U.S. Court of Appeals for the Fourth Circuit's 1987 decision in *Young v. National Center for Health Services Research* held that constructive discharge is "a distinct discriminatory 'act' for which there is a distinct cause of action."<sup>155</sup> Similarly, the U.S. Court of Appeals for the Second Circuit's 2000 decision in *Flaherty v. Metromail Corp.* held that a constructive discharge date accrues on the date the employee gives definite notice of her intention to resign or retire.<sup>156</sup> The courts in *Flaherty* and *Young* analyzed constructive discharge in the context of the U.S. Supreme Court's 1980 decision in *Delaware State College v. Ricks*, which held that the employer's last discrimi-

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<sup>149</sup> See *Morgan*, 536 U.S. at 114–15 (distinguishing discrete acts of discrimination from hostile work environment).

<sup>150</sup> See *id.* (identifying termination, failure to promote, denial of transfer, or refusal to hire as discrete acts that must actually occur within limitations period to be actionable).

<sup>151</sup> See *id.* at 115–17; *Graham*, *supra* note 58, at 302 ("The *Morgan* majority observed that the 'entire hostile work environment encompasses a single unlawful employment practice' because the 'very nature' of a hostile work environment 'involves repeated conduct.'" (footnote omitted) (quoting *Morgan*, 536 U.S. at 115, 117)).

<sup>152</sup> See *Morgan*, 536 U.S. at 115 (noting that hostile work environment arises from the accumulation of discriminatory acts and does not occur on a specific date).

<sup>153</sup> *Graham*, *supra* note 58, at 302 (discussing the holding in *Morgan* that only one incident of the hostile work environment must occur within the limitations period for the claim to be timely because hostile work environment embodies one unlawful practice).

<sup>154</sup> See *id.* at 304 ("[A]ll nine justices agreed that the plain language of Title VII forbade the aggregation of discrete discriminatory practices directed at a single plaintiff." (citing *Morgan*, 536 U.S. at 113)); Brief for Respondent in Opposition at 11, *Green v. Donahoe*, 760 F.3d 1135 (10th Cir. 2014) (No. 14-613), 2015 WL 1250866, at \*11 (contending plaintiff's argument applying *Morgan* to constructive discharge would require courts to treat employee's resignation as a "discriminatory act").

<sup>155</sup> See *Young v. Nat'l Ctr. for Health Servs. Research*, 828 F.2d 235, 237–38 (4th Cir. 1987).

<sup>156</sup> See *Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000).

natory act was its definite notice of termination, not one year later when the termination was realized.<sup>157</sup>

The *Flaherty* and *Young* decisions emphasized that a constructive discharge is distinguishable from a wrongful termination that was an inevitable consequence of a prior discriminatory act, such as the denial of tenure in *Ricks*.<sup>158</sup> The court in *Flaherty* compared the employee's definite notice of resignation to an employer's definite notice of discharge, which was treated as the date of accrual for the limitations period in *Ricks*.<sup>159</sup> Unlike in *Ricks* where the employer gave notice of discharge, in constructive discharge cases the employee gives notice to the employer that the employment relationship is terminated.<sup>160</sup> The court in *Flaherty* reasoned that only the employee knows when working conditions become "so intolerable" due to the employer's discriminatory actions that he or she must resign.<sup>161</sup> The court concluded that the rule for all constructive discharge cases should be that the claims accrue on the date that employees give definite notice of their intention to resign.<sup>162</sup> Additionally, the court rejected the notion that the employer's discriminatory act prior to the employee's notice to retire triggered the limitations period in a constructive discharge case.<sup>163</sup>

Furthermore, resignation is an essential element of a constructive discharge claim.<sup>164</sup> Therefore, employees cannot successfully allege constructive discharge unless they actually resign or retire.<sup>165</sup> By measuring timeliness from the employer's last discriminatory act, instead of the actual date of resignation, it is possible for the constructive discharge claim's limitations period to run

<sup>157</sup> See *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258–59 (1980); *Flaherty*, 235 F.3d at 137 (citing *Ricks*, 449 U.S. at 258); *Young*, 828 F.2d at 237–38 (citing *Ricks*, 449 U.S. at 258).

<sup>158</sup> See *Ricks*, 449 U.S. at 258–59; *Flaherty*, 235 F.3d at 137; *Young*, 828 F.2d at 237–38.

<sup>159</sup> See *Flaherty*, 235 F.3d at 137–38 (holding constructive discharge claims accrue on date employee gives definite notice of intention to retire or resign).

<sup>160</sup> See *id.* (noting employee must take independent action for constructive discharge to occur).

<sup>161</sup> See *id.* (discussing substantive constructive discharge law requirement that an "employer discriminates against an employee and purposely makes the employee's job conditions so intolerable that a reasonable person would feel forced to resign").

<sup>162</sup> See *id.* (comparing employee's definite notice of resignation to employer's definite notice of termination).

<sup>163</sup> See *id.*

<sup>164</sup> See *Ekstrand v. School Dist. of Somerset*, 583 F.3d 972, 978 (7th Cir. 2009) (holding employee was not constructively discharged because employment relationship continued while she was on leave); Cathy Shuck, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKELEY J. EMP. & LAB. L. 401, 402–03 & n.6 (2002) (discussing legal standard for determining constructive discharge); THOMPSON REUTERS, EMP'T DISCRIMINATION COORDINATOR, § 50:49 (2015) (outlining elements of plaintiff's prima facie constructive discharge claim, which includes resignation).

<sup>165</sup> See *Conrad v. Chaco Credit Union, Inc.*, 946 F.2d 894, 1991 WL 216463, at \*9 (6th Cir. 1991) (unpublished decision) (noting constructive discharge case law implicitly requires employee to resign or retire).

before there is even a constructive discharge claim.<sup>166</sup> This result is contrary to the basic legal rule that a “limitations period commences when the plaintiff has a complete and present cause of action.”<sup>167</sup>

The U.S. Court of Appeals for the Tenth Circuit’s 2014 decision in *Green v. Donahoe* rejected this approach and held that constructive discharge is a “legal fiction” and therefore cannot be treated as an adverse employment action by the employer.<sup>168</sup> The Tenth Circuit evaluated the last alleged act of discrimination committed by the employer and concluded the constructive discharge claim was time-barred.<sup>169</sup> Although the Tenth Circuit’s statement that the concept of constructive discharge is a “legal fiction” is accurate, it potentially disregards the fact that courts developed this fiction to serve both remedial and substantive purposes.<sup>170</sup> Courts developed the constructive discharge doctrine to allow employees to assert legal rights and defenses that would otherwise be unavailable in a situation where the employee simply resigned.<sup>171</sup>

For instance, the Tenth Circuit’s decision in *Green* concluded that the limitations period for the plaintiff’s constructive discharge claim ran forty-five days after the employer’s last discriminatory action, which was the December 16, 2009 settlement agreement, even though the plaintiff did not retire until February 9, 2010.<sup>172</sup> The court in *Green* recommended that plaintiffs navigate this apparent incongruity by filing a charge based on the employer’s most recent discriminatory act and then later amending the charge to include an allegation of constructive discharge.<sup>173</sup> In his petition for a writ of certiorari, *Green* contends that the Tenth Circuit approach runs counter to basic principles of

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<sup>166</sup> See Petition for Writ of Certiorari, *supra* note 1, at 21–22.

<sup>167</sup> See *id.* at 21 (quoting *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418 (2005)).

<sup>168</sup> See *Green v. Donahoe (Green II)*, 760 F.3d 1135, 1137 (10th Cir. 2014), *cert. granted sub nom. Green v. Brennan*, 135 S. Ct. 1892 (Apr. 27, 2015) (rejecting “legal fiction” that an employee’s resignation is a discriminatory act by the employer to satisfy requirement under 29 C.F.R. § 1614.105(a)(1) that federal employees “initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory”).

<sup>169</sup> See *id.* at 1145.

<sup>170</sup> See *id.* at 1144; Chamallas, *supra* note 36, at 317 (noting that without constructive discharge, employees who resigned due to hostile work environment would not be able to recover for their economic losses).

<sup>171</sup> See *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004) (noting how courts treat resignation by employee as a discharge by employer for constructive discharge claims); Chamallas, *supra* note 36, at 317 (“[T]he current law of constructive discharge has both a substantive and a remedial dimension.”); Shuck, *supra* note 164, at 403 (discussing importance of constructive discharge doctrine for federal employees who complain of discrimination because it permits remedies, including back pay, that would otherwise be unavailable to employees who quit).

<sup>172</sup> See *Green II*, 760 F.3d at 1138, 1145.

<sup>173</sup> See *id.* at 1145.

fairness because an employee loses his chance to bring a claim for constructive discharge before the claim could be successfully pleaded.<sup>174</sup>

### *B. Administrative Efficiency Hindered by Differing Approaches*

Federal anti-discrimination statutes require an enormous administrative apparatus to investigate charges of discrimination and enforce the law.<sup>175</sup> In 2014, the Equal Employment Opportunity Commission (“EEOC”) received over 63,000 charges filed under Title VII.<sup>176</sup> Federal regulations require employees who complain of discrimination to first file their charges with an EEOC counselor.<sup>177</sup> An incredibly small percentage of these charges are fully investigated by the EEOC and litigated by the Office of General Counsel.<sup>178</sup> In 2014, the EEOC brought 167 enforcement suits under federal anti-discrimination laws, seventy-six of which included Title VII claims.<sup>179</sup>

The EEOC will frequently develop its own enforcement guidelines for federal anti-discrimination laws that may conflict with some federal courts’ interpretation of the same laws.<sup>180</sup> Although the EEOC has not produced enforcement guidance on how to measure the limitations period for constructive discharge claims, there are indications that the EEOC would support the accrual from date-of-resignation rule.<sup>181</sup> The EEOC filed an amicus brief in support of the employee in the U.S. Court of Appeals for the Third Circuit’s 2002 decision in *Bailey v. United Airlines*, which held that the employee’s wrongful discharge claim began to run when he had unconditional notice of his termina-

<sup>174</sup> See Petition for Writ of Certiorari, *supra* note 1, at 21–22.

<sup>175</sup> See *Enforcement*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/enforcement/index.cfm> [<http://perma.cc/JY9R-VWEU>].

<sup>176</sup> See *Title VII of the Civil Rights Act of 1964 Charges (Includes Concurrent Charges with ADEA, ADA and EPA) FY 1997–FY 2014*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm> [<http://perma.cc/4S3F-DCPL>] [hereinafter *Title VII of the Civil Rights Act of 1964 Charges*].

<sup>177</sup> See 29 C.F.R. § 1601.13 (2014) (outlining filing procedures for non-federal sector employees); *id.* § 1614.105 (providing pre-complaint processing procedures for federal sector employees).

<sup>178</sup> See *EEOC Litigation Statistics, FY 1997 Through FY 2014*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> [<http://perma.cc/4HAT-HVRF>] [hereinafter *EEOC Litigation Statistics*]; *Litigation*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/litigation/index.cfm> [<http://perma.cc/J6KU-XZPU>].

<sup>179</sup> See *EEOC Litigation Statistics*, *supra* note 178.

<sup>180</sup> Nancy M. Modesitt, *The Hundred-Years War: The Ongoing Battle Between Courts and Agencies Over the Right to Interpret Federal Law*, 74 MO. L. REV. 949, 979–81 (2009) (discussing the EEOC’s nonacquiescence policy with regard to federal court decisions); Theodore W. Wern, Note, *Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1578–80 (1999) (analyzing why the EEOC receives less judicial deference than other administrative agencies).

<sup>181</sup> See *Bailey v. United Airlines*, 279 F.3d 194, 202 (3d Cir. 2002); Brief of the EEOC as Amicus Curiae in Support of the Appellant at 1, *Bailey*, 279 F.3d 194 (No. 00-2537), 2001 WL 34105245, at \*1.

tion.<sup>182</sup> The Third Circuit concluded there was a genuine issue of material fact regarding when the employee was notified of the adverse employment action—the offer to resign or be terminated.<sup>183</sup> The Third Circuit did not evaluate the EEOC’s amicus brief argument because the plaintiff did not raise this argument to the lower court and therefore it was waived on appeal.<sup>184</sup>

In its amicus brief in *Bailey*, the EEOC argued that the limitations period for the employee’s wrongful discharge claim should not begin to run until the employee responded to his employer’s offer to resign or be terminated.<sup>185</sup> The EEOC argued that the wrongful discharge claim’s limitations period should begin to run only after the employee told his employer he would not resign.<sup>186</sup> The EEOC’s amicus brief favorably cited *Draper v. Coeur Rochester, Inc.*—a 1998 Ninth Circuit case—and *Young* to argue that the wrongful discharge’s limitations period should be the same as a constructive discharge’s limitations period, which the courts in *Draper* and *Young* held begins to run when the employee communicates their intention to resign.<sup>187</sup>

The EEOC’s amicus brief in *Bailey* was filed before the D.C. Circuit’s 2007 decision in *Mayers v. Laborers’ Health & Safety Fund of North America* and the Tenth Circuit’s 2014 decision in *Green* deepened the circuit split regarding the accrual of constructive discharge claims.<sup>188</sup> It is possible the current circuit split would alter the EEOC’s analysis.<sup>189</sup> Nevertheless, the EEOC has relied on date-of-resignation claim accrual in its adjudication capacity.<sup>190</sup> In

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<sup>182</sup> See Brief of the EEOC as Amicus Curiae in Support of the Appellant, *supra* note 181, at 8–10 (arguing that charge-filing period for employee’s claim of unlawful termination did not begin to run until employee made decision rejecting offer to resign as alternative to termination).

<sup>183</sup> See *Bailey*, 279 F.3d at 202.

<sup>184</sup> See *id.*

<sup>185</sup> See Brief of the EEOC as Amicus Curiae in Support of the Appellant, *supra* note 181, at 8–10 (noting that constructive discharge has difference legal consequences than an actual discharge because the employee has to decide when to resign (citing *Flaherty*, 235 F.3d at 139)).

<sup>186</sup> See *id.* (rejecting contention that claim begins to run when discriminatory offer is made).

<sup>187</sup> See *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1110–11 (9th Cir. 1998); *Young*, 828 F.2d at 239; Brief of the EEOC as Amicus Curiae in Support of the Appellant, *supra* note 181, at 8–10.

<sup>188</sup> See *Green II*, 760 F.3d at 1135, 1143–45; *Mayers v. Laborers’ Health & Safety Fund of N. Am.*, 478 F.3d 364, 370 (D.C. Cir. 2007); Brief of the EEOC as Amicus Curiae in Support of the Appellant, *supra* note 181, at 1–2 (arguing claim accrual begins when employee decides to accept or reject discriminatory retirement offer, which results in either constructive discharge or wrongful termination, respectively).

<sup>189</sup> See *Green II*, 760 F.3d at 1143–45; *Mayers*, 478 F.3d at 370; *Flaherty*, 235 F.3d at 138; *Draper*, 147 F.3d at 1110–11; *Davidson v. Ind.-Am. Water Works*, 953 F.2d 1058, 1059–60 (7th Cir. 1992); *Young*, 828 F.2d at 239; Brief of the EEOC as Amicus Curiae in Support of the Appellant, *supra* note 181, at 8–10 (no discussion of uncertainty in law regarding constructive discharge claim accrual).

<sup>190</sup> See *Shinseki*, EEOC 0120141607, 2014 WL 3697473, at \*2 (July 18, 2014); *Gard*, EEOC 05890730, 1989 WL 1007278, at \*1 (Sept. 8, 1989) (“the appropriate date on which the time period began to run was the effective date of the alleged discriminatory personnel action (retirement)”). In *Gard*, the plaintiff alleged that the Postal Service made a discriminatory offer, on the basis of his age,

a 2014 administrative appeal, *Shinseki's Case*, the EEOC reversed the dismissal of a public-sector employee's constructive discharge/hostile work environment claim by holding that the employee's date of resignation was within the forty-five-day limitations period.<sup>191</sup> It is worth noting, however, that this administrative appeal concerned a constructive discharge resulting from a hostile work environment claim, and is thus distinguishable from *Green*, which concerns a constructive discharge due to a discrete discriminatory act.<sup>192</sup>

### C. Geographical Differences Creating Potentially Dispositive Unequal Results

Although most circuit splits generally involve litigants from different parts of the country facing different interpretations of the law, this particular split has unequal results that are potentially claim dispositive.<sup>193</sup> In his petition for a writ of certiorari in *Green v. Donahue*, Green decried the existing circuit split for allowing “geographical happenstance” to dictate whether a plaintiff's Title VII constructive discharge claim survives in court long enough to be adjudicated on its merits.<sup>194</sup> As a result of the circuit split, two constructive discharge cases with identical facts could have completely unequal results—one case would survive summary judgment to be evaluated on its merits and the other case would be dismissed.<sup>195</sup>

For example, Green worked as a postmaster in Colorado, and therefore his case was appealed to the Tenth Circuit.<sup>196</sup> Green's constructive discharge claim was dismissed before it could be adjudicated on its merits because the Tenth Circuit held that his claim was time-barred.<sup>197</sup> If Green had worked as a postmaster

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that he either resign or be removed from his position. See *Gard*, 1989 WL 1007278, at \*1. On administrative appeal, the EEOC reversed the decision that the plaintiff's claim was untimely because his retirement date was within the actionable period. See *id.*

<sup>191</sup> See *Shinseki*, 2014 WL 3697473, at \*1–2 (finding only one incident must occur within limitations period to be actionable because hostile work environment claim constitutes one unlawful employment practice).

<sup>192</sup> See *Green II*, 760 F.3d at 1136–39; *Shinseki*, 2014 WL 3697473, at \*1–2.

<sup>193</sup> See Brief Amicus Curiae for the National Employment Lawyers Ass'n in Support of Petitioner, *supra* note 143, at 1–2 (distinguishing circuit split at issue in *Green II* from other current circuit splits involving substantive elements of constructive discharge, including conflict over whether employer must intend for employee to resign); Macfarlane, *supra* note 41, at 252 (criticizing courts' inordinate emphasis on determining whether plaintiffs exhausted their administrative remedies instead of evaluating the merits of Title VII claims).

<sup>194</sup> See Petition for Writ of Certiorari, *supra* note 1, at 18.

<sup>195</sup> See *id.*; *Ilori v. Carnegie Mellon Univ.*, 742 F. Supp. 2d 734, 751–53 (W.D. Pa. 2010) (finding constructive discharge claim timely based on Second Circuit's reasoning in *Flaherty* as Third Circuit has not yet addressed when constructive discharge claims accrue); Macfarlane, *supra* note 41, at 242, 252 (discussing a different circuit split regarding whether presentment is jurisdictional that leads to some cases not being heard on the merits).

<sup>196</sup> See *Green II*, 760 F.3d at 1136.

<sup>197</sup> See *id.* at 1135–36 (finding claim time-barred and not addressing whether plaintiff actually suffered constructively discharged).

in neighboring Arizona, his constructive discharge claim would have been timely based on the Ninth Circuit's 1998 decision in *Draper*.<sup>198</sup> The circuit courts' differing approaches to how limitation periods accrue creates a stark contrast.<sup>199</sup> Based on geographical happenstance, some Title VII litigants are able to have the merits of their constructive discharge claims heard in court while others have claims that are time-barred.<sup>200</sup>

### III. CONSTRUCTIVE DISCHARGE IS A DISCRIMINATORY ACT: RESOLVING THE CIRCUIT SPLIT BY OVERTURNING *GREEN V. DONAHOE*

The U.S. Supreme Court granted certiorari to *Green v. Donahoe*, a 2014 decision by the U.S. Court of Appeals for the Tenth Circuit, which held that an employee's claim for constructive discharge began to accrue at the date of the employer's last discriminatory act, not the date of the employee's resignation.<sup>201</sup> The Court should resolve the circuit split by overturning *Green* and ruling that an employee's constructive discharge claim begins to accrue when the employee gives definite notice of resignation.<sup>202</sup>

Section A of this Part asserts that allowing a constructive discharge to be treated as a distinct discriminatory act is more consistent with the remedial and substantive purposes of Title VII.<sup>203</sup> Section B of this Part argues that date-of-resignation accrual is more efficient to administer.<sup>204</sup> Section C of this Part argues that constructive discharge claim accrual based on date of resignation is more equitable for employees and better serves the objective of Title VII.<sup>205</sup>

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<sup>198</sup> See *id.* at 1144; *Draper*, 147 F.3d at 1110–11 (holding that employee's constructive discharge claim was timely based on date of resignation).

<sup>199</sup> See *Green II*, 760 F.3d at 1144; *Draper*, 147 F.3d at 1110–11.

<sup>200</sup> Compare *Green*, 760 F.3d at 1136–37, 1144 (claim time-barred based on employer's last discriminatory act), *Mayers*, 478 F.3d at 370 (same), and *Davidson*, 953 F.2d at 1059–60 (same), with *Flaherty*, 235 F.3d at 138 (claim timely based on date of resignation), *Draper*, 147 F.3d at 1110–11 (same), *Hukkanen*, 3 F.3d at 285 (same), and *Young*, 828 F.2d at 239 (same).

<sup>201</sup> See *Green v. Donahoe (Green II)*, 760 F.3d 1135, 1137 (10th Cir. 2014), *cert. granted sub nom.* *Green v. Brennan*, 135 S. Ct. 1892 (Apr. 27, 2015).

<sup>202</sup> Compare *Green II*, 760 F.3d at 1143–45 (holding claim began to accrue before date of resignation), *Mayers v. Laborers' Health & Safety Fund of N. Am.*, 478 F.3d 364, 370 (D.C. Cir. 2007) (same), and *Davidson v. Ind.-Am. Water Works*, 953 F.2d 1058, 1059–60 (7th Cir. 1992) (same), with *Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000) (holding constructive discharge claim began to accrue on date of resignation notice), *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1111 (9th Cir. 1998) (same), *Am. Airlines v. Cardoza-Rodriguez*, 133 F.3d 111, 123 (1st Cir. 1998) (same), *Hukkanen v. Int'l Union of Operating Eng'rs, Hoisting & Portable Local No. 101*, 3 F.3d 281, 285 (8th Cir. 1993) (same), and *Young v. Nat'l Ctr. for Health Servs. Research*, 828 F.2d 235, 239 (4th Cir. 1987) (same).

<sup>203</sup> See *infra* notes 205–219 and accompanying text.

<sup>204</sup> See *infra* notes 220–237 and accompanying text.

<sup>205</sup> See *infra* notes 238–248 and accompanying text.

*A. Treating Constructive Discharge as a Distinct Discriminatory Act Is More Consistent with the Remedial and Substantive Purposes of Constructive Discharge*

As actual resignation is an essential element of constructive discharge, the claim should not begin to accrue until the employee resigns.<sup>206</sup> This date-of-resignation approach to constructive discharge embodies the general legal rule that a litigant's claim begins to accrue only once they have an enforceable legal right.<sup>207</sup> Treating constructive discharge as a distinct employment act acknowledges the reality that the claim exists only after the employee decides to resign due to intolerable working conditions.<sup>208</sup>

Furthermore, the abrogation of the continuing violation doctrine for discrete discriminatory acts means many constructive discharge claims are likely to be time-barred if the actual resignation is not treated as a distinct act.<sup>209</sup> Constructive discharge developed as a concept to allow employees to assert remedial and substantive rights that would otherwise be barred to them due to their resignation.<sup>210</sup> As the abrogation of the continuing violation doctrine limited the timeliness of many discrete act claims, a date-of-resignation rule for constructive discharge would maintain at least some remedial and substantive Title VII protections for employees.<sup>211</sup>

Additionally, the existing requirement of "intolerable working conditions" for constructive discharge claims should alleviate the concerns raised in the Tenth Circuit's decision in *Green*, which held that the employee's constructive

<sup>206</sup> See *Ekstrand v. School Dist. of Somerset*, 583 F.3d 972, 978 (7th Cir. 2009) (holding employee on leave was not constructively discharged because she had not resigned); *Conrad v. Chaco Credit Union, Inc.*, 946 F.2d 894, 1991 WL 216463, at \*9 (6th Cir. 1991) (unpublished decision) (discussing constructive discharge's implicit requirement that employee be separated from employment through resignation or retirement); Shuck, *supra* note 164, at 403; THOMPSON REUTERS, *supra* note 164, at § 50:49 (explaining requirements for plaintiff's prima facie case to prove constructive discharge).

<sup>207</sup> See *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 418 ("We have repeatedly recognized that Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997))).

<sup>208</sup> See *Flaherty*, 235 F.3d at 138 (noting that only the employee knows when conditions have become so intolerable that they must resign).

<sup>209</sup> See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114–15 (2002) (abrogating the continuing violation doctrine for discrete acts of discrimination); Sperber & Welling, *supra* note 41, at 59 (discussing how *National Railroad Passenger Corp. v. Morgan* made it easier for employers to defend against discrete discriminatory act claims).

<sup>210</sup> Chamallas, *supra* note 36, at 317 (outlining both the substantive dimension of constructive discharge, described as working conditions being so intolerable that the employee's quitting was justified, and the remedial dimension of constructive discharge, which provides that plaintiffs can recover damages for losing their jobs even though they quit).

<sup>211</sup> See *Morgan*, 536 U.S. at 114–15 (abrogating the continuing violation doctrine for discrete acts of discrimination); Chamallas, *supra* note 36, at 317 (discussing substantive and remedial elements of constructive discharge).

discharge claim begins to accrue at the time of the employer's last alleged discriminatory act.<sup>212</sup> The court in *Green* expressed concern that following the approach adopted by the Second, Fourth, and Ninth Circuits would deny defendants the protections of a statute of repose by allowing plaintiffs to independently extend the life of their claims.<sup>213</sup> The Tenth Circuit feared that measuring the limitations period from when the employee resigns gives the employee unilateral control over when the claim's limitations period runs.<sup>214</sup> The Tenth Circuit felt this unilateral control by one party was contrary to the general principles of limitations periods.<sup>215</sup>

The "intolerable working conditions" requirement imposed on constructive discharge claims, however, is sufficient to prevent employees from delaying the resignation for an unreasonable amount of time.<sup>216</sup> In order to have a viable claim for constructive discharge, a reasonable person in that employee's position must feel the conditions were so intolerable that they were forced to resign.<sup>217</sup> For instance, if an employee alleges she was denied a promotion based on her race, but waits a year to resign, she will have destroyed her constructive discharge argument that a reasonable person would feel forced to resign due to intolerable working conditions.<sup>218</sup> Thus, an employee's resignation must be within a reasonable time period of the employer's last discriminatory action to constitute a constructive discharge, and the constructive discharge must be within the limitations period to be actionable.<sup>219</sup> Therefore, the Tenth

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<sup>212</sup> See *Green II*, 760 F.3d at 1144–45.

<sup>213</sup> See *id.* (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)); Brief for Petitioner at 18–19, *Green v. Brennan*, 135 S. Ct. 1892 (July 6, 2015) (No. 14-613) (criticizing Tenth Circuit opinion for conflating statute of limitations, which partially exist to encourage plaintiffs to seek timely relief, with statutes of repose, which exist solely to protect defendants and cannot be equitably tolled).

<sup>214</sup> See *Green II*, 760 F.3d at 1144–45 (expressing concern employees could indefinitely delay filing constructive discharge claims under date-of-resignation rule by not resigning).

<sup>215</sup> See *id.* (arguing date-of-resignation approach would offend an "essential feature of limitations periods" by allowing party seeking relief to indefinitely extend date of claim accrual).

<sup>216</sup> See *Draper*, 147 F.3d at 1110–11 & n.2 (reasoning plaintiffs would undermine substantive constructive discharge claim by unreasonably delaying their resignation).

<sup>217</sup> See *id.*

<sup>218</sup> See *id.* (noting that the "frequency and freshness" of the harassment may enter into factfinder's determination of whether resignation was a constructive discharge).

<sup>219</sup> See *id.* The court in *Draper* noted:

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

Circuit's concern that an employee would keep working under such intolerable circumstances simply to extend his charge-filing period seems unfounded, as it would undermine the merits of the employee's constructive discharge claim.<sup>220</sup>

### *B. Accrual from Date of Resignation Is Simpler to Administer*

The importance of administrative efficiency should motivate the Court to adopt date-of-resignation approach when resolving the circuit split.<sup>221</sup> The Equal Employment Opportunity Commission ("EEOC") processes tens of thousands of charges of illegal discrimination in violation of Title VII each year.<sup>222</sup> This massive caseload makes administrative efficiency especially important in order for Title VII to be successfully enforced.<sup>223</sup> The circuit split exacerbates the already heavy workload faced by the EEOC and hampers the efficient processing of employee's charges.<sup>224</sup> The date-of-resignation rule provides the EEOC with a clear approach to determine whether a constructive discharge claim is timely.<sup>225</sup> Under this rule, less agency resources will be wasted on determining what constituted the employer's last discriminatory act and whether the plaintiff's claim is subse-

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*See id.* at 1110 n.2. Under this approach, an employee's resignation would trigger the limitations period during which the employee must file a charge with the Equal Employment Opportunity Commission ("EEOC"). *See id.* Therefore, a federal employee would still only have forty-five days from his or her date of resignation to initiate contact with an EEO counselor. *See* 29 C.F.R. § 1614.105 (2014) (noting that federal sector employees "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").

<sup>220</sup> *See Green II*, 760 F.3d at 1144–45; *Draper*, 147 F.3d at 1110 & n.2; Macfarlane, *supra* note 41, at 218, 252 (criticizing courts for "aggressively eliminating" Title VII cases based on administrative exhaustion jurisdictional grounds instead of developing Title VII substantive law by allowing more cases to be discussed on their merits).

<sup>221</sup> *See EEOC v. Commercial Office Prods.*, 486 U.S. 107, 124 (1988) (holding three-hundred-day federal filing window still applies even if claim untimely under state law to avoid EEOC having to undertake burdensome case-by-case analysis of state law.)

<sup>222</sup> *See EEOC Litigation Statistics*, *supra* note 178 (seventy-six EEOC enforcement lawsuits with Title VII claims filed in 2014); *Litigation*, *supra* note 178 (noting the Office of General Counsel conducts litigation on behalf of the EEOC).

<sup>223</sup> *See* Petition for Writ of Certiorari, *supra* note 1, at 22–24 (discussing the importance of administrative efficiency in a layperson-initiated process where thousands of cases are filed annually).

<sup>224</sup> *See id.*; *see also Commercial Office Prods.*, 486 U.S. at 118 n.4, 124 (emphasizing importance of efficiency in legislature's decision to adopt state deferral compromise); Macfarlane, *supra* note 41, at 216, 229 (criticizing the ineffective EEOC for essentially being an "administrative waiting room" for Title VII claimants).

<sup>225</sup> *See Flaherty*, 235 F.3d at 138 (claim timely based on employee's retirement); *Draper*, 147 F.3d at 1110–11 (claim timely based on employee's resignation); *Cardoza-Rodriguez*, 133 F.3d at 123 (claim time-barred based on employee's election to retire); *Hukkanen*, 3 F.3d at 285 (claim timely based on employee's resignation); *Young*, 828 F.2d at 239 (claim timely based on employee's resignation).

quently time-barred.<sup>226</sup> The EEOC would be able to make more accurate and efficient decisions about whether a constructive discharge claim is time-barred, and thus, more quickly decide whether to file an enforcement suit or issue a right-to-sue letter to the employee.<sup>227</sup>

In comparing the two approaches on either side of the circuit split, it is apparent that the employee's date of resignation is much easier to determine than the employer's last act of discrimination giving rise to the alleged constructive discharge.<sup>228</sup> The date of an employee's resignation is generally easy to identify, while an employer's last discriminatory act may require the court's analysis of substantive law and fact-specific inquiry.<sup>229</sup> To determine whether a constructive discharge claim is timely, for instance, the court would have to use substantive constructive discharge law to examine which of the employer's most recent discriminatory actions would make a reasonable employee feel forced to quit.<sup>230</sup> In contrast, the date-of-resignation rule simplifies the initial timeliness inquiry and leaves more complicated analysis of substantive law to the merits stage of litigation.<sup>231</sup>

Furthermore, the EEOC lacks the resources to enforce Title VII due to the massive amount of charges they receive each year, so it is often up to private litigants to enforce their rights.<sup>232</sup> As private litigants often have to pursue their own claims in place of the EEOC, the simpler date-of-resignation rule would also benefit Title VII enforcement.<sup>233</sup> By ruling that constructive discharge is an alleged unlawful employment practice for the purposes of the limitations

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<sup>226</sup> See *Delaware State Coll. v. Ricks*, 449 U.S. 250, 265–66 (1980) (Stevens, J., dissenting) (arguing cause of action for discriminatory discharge should accrue on date of discharge because that date can “normally be identified with the least difficulty or dispute”).

<sup>227</sup> See Macfarlane, *supra* note 41, at 238, 252 (noting that the EEOC's lack of resources largely leaves Title VII enforcement to private litigants).

<sup>228</sup> See *Petition for Writ of Certiorari*, *supra* note 1, at 23–24.

<sup>229</sup> See *Ricks*, 449 U.S. at 265–66 (Stevens, J., dissenting) (arguing date of discharge is most sensible rule partly because it is easier to identify than date of employer's decision to terminate or notice of termination); *Brief for Petitioner*, *supra* note 213, at 12–13 (discussing substantive law standards for constructive discharge, hostile work environment, and retaliation that may bear on determining employer's last discriminatory act).

<sup>230</sup> *Brief for Petitioner*, *supra* note 213, at 12–13 (arguing “last-discriminatory-act rule would force courts to determine which ‘acts’ are sufficiently ‘discriminatory’ to trigger the limitations period”).

<sup>231</sup> See *id.* at 30–32 (arguing date-of-resignation rule would avoid complex fact-specific analysis of what constitutes a sufficient discriminatory act when determining timeliness of claim).

<sup>232</sup> See Macfarlane, *supra* note 41, at 238, 252 (arguing that because the EEOC lacks the resources to enforce Title VII, litigants should have more flexibility in amending and investigating their claims in federal court); *EEOC Litigation Statistics*, *supra* note 178 (seventy-six EEOC enforcement suits filed with Title VII claims in 2014); *Title VII of the Civil Rights Act of 1964 Charges*, *supra* note 176 (noting that 63,589 Title VII charges were received in 2014).

<sup>233</sup> See *Petition for Writ of Certiorari*, *supra* note 1, at 22–24 (noting that accommodating laypeople is a core goal of Title VII instructions); Macfarlane, *supra* note 41, at 238 (discussing how private litigants must “stand in the shoes of the EEOC” due to lack of EEOC resources).

period, the U.S. Supreme Court would instead adopt the approach that is easier for the EEOC to administer, both through its own enforcement actions and vicariously through employee's private lawsuits.<sup>234</sup>

The current circuit split also hampers efficiency by creating potentially outcome determinative results based on geographical differences.<sup>235</sup> As there are several circuits that have yet to address when a constructive discharge claim accrues, many employers and employees cannot anticipate whether courts would find a constructive discharge claim timely.<sup>236</sup> The U.S. Supreme Court has previously stated that uncertainty regarding statute of limitations negatively impacts both sides because plaintiffs risk unwittingly forfeiting claims and defendants cannot accurately calculate their potential liabilities.<sup>237</sup> Similarly, employers might arguably be better off with the date-of-resignation rule, even though it would extend some employees' claims, because it is much more clear-cut and allows each side to evaluate the viability of the claim without costly litigation over timeliness.<sup>238</sup>

### *C. The Majority Approach Is More Equitable for Employees and Better Serves the Objective of Title VII*

By ruling that constructive discharge claims accrue on the date of resignation, the U.S. Supreme Court would adopt a clear and intuitive rule that would be easier for employees to follow.<sup>239</sup> Over several decades of litigation, Title VII law has become increasingly complex.<sup>240</sup> The administrative exhaustion requirement of Title VII, however, still necessitates that the law be clear enough so that employees can invoke their rights by filing charges with the EEOC within the proper timeframe.<sup>241</sup> It is counterintuitive that an employee's

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<sup>234</sup> See Petition for Writ of Certiorari, *supra* note 1, at 23–24.

<sup>235</sup> See *id.* at 18 (noting identical action by employer leads to different outcomes based simply on geographic location).

<sup>236</sup> See *Ilori v. Carnegie Mellon Univ.*, 742 F. Supp. 2d 734, 751–53 (W.D. Pa. 2010) (noting Third Circuit has yet to address when constructive discharge claims accrue); Petition for Writ of Certiorari, *supra* note 1, at 18 (arguing uncertainty places burden on national corporations that have to predict which rule will apply in circuits that have yet to address this issue).

<sup>237</sup> See *Wilson v. Garcia*, 471 U.S. 261, 275 & n.34 (1985) (holding more simple approach to statute of limitations is “consistent with the assumption that Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty, and unproductive and ever-increasing litigation”).

<sup>238</sup> See *id.* (arguing defendants also benefit from clear limitations periods in order to calculate liabilities).

<sup>239</sup> See *Ricks*, 449 U.S. at 265–66 (Stevens, J., dissenting) (arguing that discriminatory discharge claim should accrue on date of discharge because it is the date that can “normally be identified with the least difficulty or dispute”).

<sup>240</sup> Chamallas, *supra* note 36, at 309 (arguing Title VII law has never been more complex and is “transform[ing] into a highly technical field where nonspecialists fear to tread”).

<sup>241</sup> See Chamallas, *supra* note 36, at 309 (noting how many commentators have called for simplification of Title VII law because employees should be able to understand the law that protects their

constructive discharge claim could be time-barred before the employee has even resigned.<sup>242</sup> Although it seems reasonable that a layperson employee would realize she has a constructive discharge claim only after she actually resigns, under the Tenth Circuit's approach, her constructive discharge claim could already be time-barred.<sup>243</sup> To avoid this anomaly, the Court should follow the First, Second, Fourth, Eighth, and Ninth Circuits' decisions and adopt the date-of-resignation rule as it is the most intuitive for layperson employees.<sup>244</sup>

This more straightforward approach to measuring constructive discharge claim accrual also prevents more sophisticated employers from abusing a less-intuitive limitations period rule.<sup>245</sup> The approach advocated by the Tenth, Seventh, and District of Columbia Circuits could lead to employers intentionally structuring settlement offers with a long enough consideration period in order to foreclose their employee's potential constructive discharge claims.<sup>246</sup> If an employee, such as Green, takes the entire consideration period the employer provides to decide between an offer of resignation or termination, by the time the employee makes his decision to resign, his constructive discharge claim could already be time-barred.<sup>247</sup> Employees would presumably be unaware that their claim for constructive discharge began to run when the discriminatory settlement offer was made, not after they took time to think about the offer and

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rights); Macfarlane, *supra* note 41, at 255–56 (arguing strict technical requirements should be relaxed to better allow private litigants to enforce their rights under Title VII).

<sup>242</sup> See Petition for Writ of Certiorari, *supra* note 1, at 21–24 (arguing employees would not expect their constructive discharge claims to expire before they resign).

<sup>243</sup> See *Green II*, 760 F.3d at 1145 (suggesting employees could likely file EEOC charge before resigning and then amend claim to add constructive discharge); Brief for Petitioner, *supra* note 231, at 33–34 (criticizing Tenth Circuit's suggestion that employees amend charge to add constructive discharge because amending may not extend the filing deadline, is more confusing for laypeople employees, and does not apply to stand-alone constructive discharge claims).

<sup>244</sup> See *Flaherty*, 235 F.3d at 138; *Draper*, 147 F.3d at 1110–11; *Hukkanen*, 3 F.3d at 285; *Young*, 828 F.2d at 239.

<sup>245</sup> See Petition for Writ of Certiorari, *supra* note 1, at 26 (arguing last-discriminatory-act rule incentivizes employers to structure discriminatory offers with long consideration periods to foreclose employees' potential constructive discharge claims).

<sup>246</sup> See *id.*

<sup>247</sup> See *Green II*, 760 F.3d at 1143–45; *Mayers*, 478 F.3d at 370; *Davidson*, 953 F.2d at 1059–60; Petition for a Writ of Certiorari, *supra* note 1, at 26. For instance, in *Green*, after the plaintiff reported the alleged discrimination to an EEOC counselor, the employer told Green that he could either retire or take a position at another branch three hundred miles away. See *Green II*, 760 F.3d at 1138. Green signed the settlement agreement on December 16, 2009, which stated that he had until the end of March to make his decision between retiring and transferring. See *id.* When Green submitted his resignation on February 9, 2010, the limitations period on his constructive discharge claim had already run, according to the Tenth Circuit, because his resignation was more than forty-five days after the settlement agreement. See *id.* at 1138–39. There is nothing in the record to suggest that the Postal Service structured the offer this way to foreclose Green's potential constructive discharge case. See *id.* Furthermore, the current circuit split over when constructive discharge claims accrue made it especially unlikely that the Postal Service predicted this settlement would foreclose Green's potential future constructive discharge claim. See *id.* at 1143–45.

decided to resign.<sup>248</sup> Therefore, the U.S. Supreme Court should overturn the decision in *Green* so that employers cannot trick employees to forgo their potential constructive discharge claim by offering them a long enough time period for to mull a discriminatory settlement offer.<sup>249</sup>

#### CONCLUSION

The U.S. Supreme Court should resolve the circuit split regarding when an employee's Title VII constructive discharge claims begins to accrue by overturning the Tenth Circuit's decision in *Green v. Donahoe*. A majority of circuit courts that have addressed this issue have held that the employee's claim accrues on the date when the employee gives definite notice of his intention to resign or retire. The U.S. Supreme Court should adopt this majority approach because it is more administratively efficient and intuitive for employees. Title VII is intended to empower laypeople employees to report and contest discrimination in the workplace. The U.S. Supreme Court should adopt the rule that best serves the objectives of Title VII by allowing employees to enforce their rights and combat workplace discrimination.

MAGGIE STRAUSS

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<sup>248</sup> See Petition for Writ of Certiorari, *supra* note 1, at 26 (arguing date-of-last-discriminatory-act rule creates potential for abuse by employers).

<sup>249</sup> See *Green II*, 760 F.3d at 1145–47; Petition for Writ of Certiorari, *supra* note 1, at 26 (comparing employers' potential use of tactfully-structured discriminatory offers to employers' objectionable strategies that originally led to the development of the constructive discharge doctrine).