THE NATIONAL LAW JOURNAL
JULY 31, 2015
An ALM Publication

When the High Court Wants Help

A Wilmer lawyer gets the call in a civil rights case.

BY TONY MAURO

The U.S. Supreme Court has appointed Washington appellate expert Catherine Carroll to argue in favor of a position that the Obama administration has disavowed in a civil rights case the justices will hear in the fall.

Carroll, a partner at Wilmer Cutler Pickering Hale and Dorr who clerked for now retired Justice David Souter, was named on July 28 to argue as "amicus curiae in support of the judgment below" in the case *Green v. Brennan*, the order stated.

The court's action, while unusual, puts Carroll in the company of a select group of lawyers, most of them former law clerks, who get a prized opportunity to argue at the high court by appointment rather than through a client. Lawyers including John Roberts Jr., now the chief justice, and Maureen Mahoney, now of counsel to Latham & Watkins, got their start as Supreme Court advocates in this way.

"We are very pleased that the court reached out to the firm for this appointment," Carroll said in a statement.

Carroll got a call from Justice Sonia Sotomayor's chambers asking if she was willing to argue in the case. After checking for conflicts, Carroll said yes. Sotomayor, the "circuit justice" for the Tenth Circuit, handles emergency appeals and other administrative matters in cases from that circuit. *Green v. Brennan* originated in Colorado, which is part of the Tenth Circuit.

> "We plan to approach the briefing and argument in the same way we would prepare for any other case at the court," Carroll said. "The primary difference will be that we are not representing the interests of a client, but instead serving the court, we hope, by providing a fully joined adversary presentation of both sides of the question presented."

Green will be Carroll's second Supreme Court argument. She argued in a 2013 Employee Retirement Income Security Act case, *Heimeshoff v. Hartford Life & Accident Insurance*, winning a unanimous ruling for Hartford Life and Wal-Mart Stores Inc. in a dispute over the filing deadline for an employee's disability claim.

Green v. Brennan also involves a deadline of sorts, this one involving the employment discrimination statute, Title VII of the Civil Rights Act. At issue is whether, in making a "constructive discharge" claim against an employer, the 45-day period for filing such a claim begins when the employee resigns, or when the employer's last discriminatory act that triggered the resignation occurred.

Marvin Green filed a claim after a lengthy dispute with his employer the U.S. Postal Service. Green, who is African-American, claims his race was the reason he was passed over for a job opening as postmaster in Boulder, Colorado. After making a formal complaint with the Equal Employment Opportunity Commission that was ultimately settled, he made other claims he was retaliated against for his actions. Negotiations and other complaints ensued, leading to a settlement in 2009 and his notice of resignation in 2010.

Some of his claims were dismissed at the federal district court level because they were filed well beyond 45 days after the settlement agreement in 2009. The Tenth Circuit affirmed, though it said that "quitting is an element of the claim" and noted that other appeals courts had used the date of resignation or announced resignation as the starting point for the 45-day window. But it concluded that neither resignation nor the announcement of resignation was a "discriminatory act" that would start the clock ticking.

Green appealed to the Supreme Court, claiming that appeals courts are "intractably divided" over when employees must initiate their claims. Early in the case, the petition stated, the government advocated the "last discriminatory act" position, even though the EEOC in other contexts has embraced the resignation-date rule.

"The date-of-resignation rule furthers Title VII's goals by promoting administrable rules for adjudicators, fairness for laypeople, and conciliation between employers and employees," Brian Wolfman of Stanford Law School, Green's counsel of record, wrote in his merits brief filed July 6. By his calculation, Green made contact with the EEOC 41 days after submitting his resignation, thereby complying with the date-of-resignation rule.

In opposing review, the solicitor general's office did not express a view on the Tenth Circuit's rationale, but said that even under Green's preferred timetable, he would not prevail.

On July 28, Solicitor General Donald Verrilli Jr. filed a merits brief urging the high court to affirm the Tenth Circuit's judgment about Green's specific case. But Verrilli asserted, contrary to the Tenth Circuit, that the period for initiating of constructive discharge claims "does not begin until the employee gives notice of his resignation."

Anticipating the government's position, Verrilli on June 30 wrote to the court, urging that it appoint someone else to defend the Tenth Circuit's rationale rejecting the resignation-date rule. "Under the circumstances, the court may wish to invite an amicus curiae to file a brief to defend the rationale of the court of appeals' decision," Verrilli wrote.

Contact Tony Mauro at tmauro@alm.com. On Twitter: @Tonymauro