

Employment Discrimination Task Force

NEWSLETTER

December 2002
Vol. V, No.3

RECENT DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW

A. UPDATE ON THE CONTINUING VIOLATIONS DOCTRINE AFTER MORGAN

In the six months since the Supreme Court's decision in National Railroad Passenger Corp. v. Morgan, 122 S.Ct. 2061 (2002), a wave of lower court opinions have grappled with how to interpret and apply Morgan. Some of the principles taking shape in these opinions will undoubtedly impact future cases.

* Of primary interest is the way lower courts are analyzing timeliness in the wake of Morgan. By and large, courts have acknowledged that Morgan abrogated the continuing violation doctrine. When challenging discrete discriminatory acts, a federal employee must contact an EEO counselor within 45 days of the action, and stale claims are not saved even if related to a timely personnel action. See Miller v. New Hampshire Dept. of Corrections, 296 F.3d 18, 21-22 (1st Cir. 2002); Jarmon v. Powell, 208 F. Supp. 2d 21, 28-30 (D.D.C. 2002). Further, in the context of hostile work environment claims, the concept of a serial violation is now irrelevant. Instead, the trial court must examine the work environment in its entirety, and determine if the "smallest portion" of the unlawful employment practice falls within the limitations period. Shields v. Fort James Corp., 305 F.3d 1280, 1282 (11th Cir. 2002)(also noting that Morgan "essentially rejected" the continuing

violation doctrine); see also Crowley v. L.L. Bean, Inc., 303 F.3d 387, 406 (1st Cir. 2002)(noting that Morgan "supplants our jurisprudence on the continuing violation doctrine in hostile work environment claims."); Marinelli v. Chao, 222 F. Supp. 2d 402, 415 (S.D.N.Y. 2002)(observing that Morgan "abrogated the continuing violation doctrine in the context of discrimination claims brought pursuant to Title VII").

* Some courts, however, continue to use the "continuing violation" terminology in examining timeliness. For instance, in Tinner v. United Insurance Company of America, 308 F.3d 697 (7th Cir. 2002), the Seventh Circuit acknowledges that Morgan prevents an employee from relying upon a pattern of discrete discriminatory acts to salvage untimely claims. Id. at 708. Nevertheless, the court undertook a continuing violation analysis of the type typical in pre-Morgan cases (albeit in dicta), inquiring whether the untimely acts should have put the employee on notice of his duty to file an EEO claim.

* A few cases have addressed the question left unanswered by footnote 9 in Morgan – how the continuing violation doctrine might apply to discrete discriminatory acts in the context of a pattern or practice case. See 122 S. Ct. at 2073, n.9. After Morgan, some plaintiffs seized on this footnote to breathe life into otherwise time barred employment actions by insisting that the untimely claims are part of an on-going policy of discrimination. So far, this theory has not found any support.

For instance, in Lyons v. England, 307 F.3d 1092 (9th Cir. 2002), the plaintiffs alleged that, over a period of several years, they were denied promotions and not given favorable work assignments due to their race. The Ninth Circuit found that any claims earlier than 45 days prior to their EEO contact were time barred. Id. at 1106-07 ("If a plaintiff chooses to bring separate claims based on each discriminatory act [rather than a class action], his assertion that this series of discrete acts flows from a company-wide, or systematic, discriminatory practice will not succeed in establishing the employer's liability"). See also Kaster v. Safeco Insurance Co., 212 F. Supp. 2d 1264, 1269, n.4 (D. Kan. 2002)("Plaintiff's bald assertions that defendant engaged in a pattern and practice of discrimination against him individually is a wholly distinct theory from 'pattern-or-practice' cases brought by a class of persons alleging general discriminatory treatment.").

* Finally, in Jensen v. Henderson, ___ F.3d ___, 2002 WL 31748850 (Dec. 10, 2002, 8th Cir.), plaintiff's EEO complaint challenged the adequacy of the Post Office's investigation of a report of sexual harassment and not the underlying conduct itself. In reversing the district court's granting of a motion to dismiss plaintiff's EEO complaint as untimely, the Eighth Circuit held that the employer's failure to take action on the complaint continued into the 45 day period, making the complaint timely even without any evidence that the plaintiff, who was on stress leave, was actually harassed during this time period. The court remanded for development of the facts underlying plaintiff's allegation that her complaint was timely. The opinion is

published and may prompt future EEO complaints that challenge an agency's investigation, but not the underlying harassment itself. This theory risks creation of an open-ended 45 day window that is only closed when the agency takes final action on a complaint of hostile work environment. See also Swenson v. Potter, 271 F.3d 1184, 1191 (9th Cir. 2001)(in a pre-Morgan decision, the Ninth Circuit determined that the matter alleged to be discriminatory related to the adequacy of the employer's response to a claim of sexual harassment, not to the co-workers' underlying behavior and, thus, the 45-day period did not begin to run until the agency took final action on plaintiff's EEO complaint).

*** The decisions in Jensen and Swenson are problematic because they extend the filing deadline for a hostile work environment claim. Under these decisions, the act that triggers the filing of a discrimination complaint is not a hostile or otherwise adverse act by a co-worker or employer, but rather the action or inaction by the employer in response to plaintiff's complaint. Arguably, the employer's decision about how to respond to the employee's hostile work environment claim is distinct from the discriminatory acts themselves, going more to the question of the degree to which the employer should be liable and not to the underlying basis for the claim itself.

Please feel free to contact the Employment Discrimination Task Force regarding application of the Morgan decision. We would also appreciate receiving any Morgan briefs that address the

points discussed here or any other aspects of the decision. The Department has not yet articulated any policy positions regarding the ramifications of Morgan.

B. ANALYSIS OF "BECAUSE OF" SEX COMPONENT IN SEXUAL HARASSMENT CASES

Two recent circuit court decisions have examined the question of what it means to be discriminated against "because of" sex under Title VII. In Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002), the Ninth Circuit held that a male employee who alleged he was subjected to severe, pervasive, and unwelcome physical contact of a sexual nature in the workplace due to his sexual orientation asserted a viable Title VII claim. Plaintiff alleged that he was the subject of continuous, daily physical harassment by male supervisors and coworkers. The Court held that it was clear that the plaintiff had alleged physical conduct that constituted an objectively abusive work environment. The Court emphasized that the sexual orientation of the victim was irrelevant, and that the physical attacks, which targeted body parts clearly linked to his sexuality, were "because of sex." The Court concluded that this case is a straightforward sexual harassment claim (citing Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), in which the Court noted that Title VII forbids severe or pervasive same sex offensive sexual touching and that offensive sexual touching is actionable discrimination even in a same sex workforce). The dissent noted that assault or harassment is actionable under Title VII only if it is "because of" one of the protected characteristics covered by the statute, and pointed out that the plaintiff

alleged that he was discriminated against because of his sexual orientation, which is not "because of" sex, and thus not actionable under Title VII.

The decision in Ochletree v. Scollon Productions, Inc., 308 F.3d 351 (4th Cir. 2002) is harder to explain. Plaintiff, a female employee, worked in the production shop of the defendant. During her tenure at the company, "some of the primarily male staff engaged in open conversations about sex, made comments about the sexual habits of others on the staff, used foul, vulgar, and profane language, and told sexually-oriented jokes." 308 F.3d at 353-54. Other specific incidents that occurred during plaintiff's employment included "an incident where she witnessed employees pretending to perform oral sex and other sexual acts on a mannequin, another incident when employees showed [her] a picture of pierced male genitalia and asked her what she thought about it" and "an incident where a co-worker sang her a song" with offensive, explicit lyrics. Id. at 354.

The Fourth Circuit held that the critical question is whether the complaining employee in this case would have suffered the same harassment had she been of a different gender. The court concluded that, except for three incidents, "the vast majority of offensive conduct upon which Ochletree relies the uncontested evidence demonstrates conclusively that Ochletree would have been exposed to the same atmosphere had she been male." Id. at 356. The court concluded that the three incidents directed at the plaintiff over the course of a year and a half because of her gender were not severe or pervasive enough to alter the terms of her

employment. The dissent, however, stated that a reasonable jury could find that the banter plaintiff was subjected to was "because of sex" inasmuch as it was intentionally said in her presence in order to make her uncomfortable and self-conscious about her status as the only woman in the shop and due to the relentless, graphic descriptions of her co-workers' sex lives were sex-based because they portrayed women as sexually subordinate to men. The dissent concludes by stating that its primary objection to the majority opinion is that it has turned the "because of" sex requirement into an obstacle where it had not been an obstacle before, thereby making it more difficult to establish a sexual harassment claim.

C. RECENT DECISIONS INVOLVING "ADVERSE EMPLOYMENT ACTIONS"

The question of what constitutes an adverse employment action in a discrimination or retaliation case is one to which the courts continue to offer a range of answers. Although most circuits have developed a definition of what constitutes an adverse employment action, the determination of whether a particular action by an employer rises to the level of an adverse employment action remains an intensely fact-dependent exercise. Some recent decisions that address this issue and conclude that no adverse action was presented include:

a. In Gu v. Boston Police Department, 312 F.3d 6 (1st Cir. 2002), plaintiffs, two senior analysts in the Office of Research and Evaluation of the Boston

Police Department, filed a discrimination complaint based on gender after they failed to obtain promotions. Following the selection of an outside male candidate, the office was reorganized and plaintiffs alleged their job duties were diminished in retaliation for having filed an EEO claim. The court rejected plaintiffs' claims of retaliation, finding that they had not suffered an adverse employment action. The court noted that, generally, to be adverse, an action must "materially change" the conditions of plaintiffs' employ. Id. at 14. Under First Circuit case law, material changes include demotions, disadvantageous transfers or reassignments, failures to promote, unwarranted negative performance appraisals, and "dramatically decreased supervisory authority" with no voice in major decisions. Id. In this case, plaintiffs lost some of their supervisory authority due to a reorganization of the office, but their essential jobs remained the same. The court concluded that "[w]hen a general reorganization results in some reduction in job responsibilities without an accompanying decrease in salary, or grade, those changes cannot be dubbed adverse employment actions." Id.

b. In another case involving an office reorganization, the D.C. Circuit also declined to find an adverse employment action. The plaintiff in Forkkio v. Powell, 306 F.3d 1127 (D.C. Cir. 2002), alleged, inter alia, that he was discriminated against based on his race when, after the section in which he worked at the FDIC was reorganized, his temporary promotion to a section chief was not automatically made permanent (although plaintiff later received a promotion to a different section chief position). The court

rejected plaintiff's claim that he suffered an adverse employment action based on a loss of prestige. Further, the court noted that, although plaintiff reverted from a temporary GS 15 to a GS 14 as a result of the reorganization, he did not suffer from a loss of pay or benefits. Moreover, plaintiff's substantive responsibilities were not reduced inasmuch as he was given additional duties and he continued to supervise staff. The fact that he no longer attended management meetings or received emails and other management communications did not cause any adverse consequence to his position or future career and, thus, plaintiff did not establish an adverse employment action.

c. The Sixth Circuit issued a recent decision involving the definition of an adverse employment action in a reassignment case. In White v. Burlington Northern & Santa Fe Railway Co., 310 F.3d 443 (6th Cir. 2002), plaintiff had been hired as a railroad track laborer. After she complained to management that the foreman was treating her differently based on her sex, she was reassigned from the position of forklift operator to more physically demanding duties within the same job classification. The court noted that, to establish an adverse employment action, plaintiff must show a materially adverse change in the terms or conditions of her employment, such as a termination, a demotion with concurrent reduction in salary, a less distinguished title, or a material loss of benefits. In this case, the position to which plaintiff was reassigned was within the job classification for which she had been hired and, thus, she did not make a cognizable claim of an adverse employment action.

A BIG THANKS to Kay Baldwin, who during her time at the Federal Programs Branch provided invaluable insights and support to the endeavors of the Employment Discrimination Task Force. Kay has now taken her considerable legal skills and judgment to her new position as the Deputy Special Counsel for the Office of Special Counsel for Immigration-related Unfair Employment Practice in the Civil Rights Division.

PRACTICE TIPS

1. FRONT PAY

When you have good reason to believe that a plaintiff will seek front pay in lieu of reinstatement, consider retaining an expert to testify regarding an appropriate amount of front pay given the particular plaintiff's employment history and future employment prospects. Front pay "is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." Pollard v. E.I. duPont de Nemours & Co., 532 U.S. 843, 846 (2001); Green v. Administrators of the Tulane Educational Fund, 284 F.3d 642 (5th Cir. 2002). Like back pay, front pay is not considered to be an element of compensatory damages and, thus, may be awarded in addition to any compensatory damages. Pollard v. du Pont de Nemours & Co., 532 U.S. 843, 853-54 (2001). In general, courts will not award lengthy front pay awards because they are too

speculative, see, e.g., Peyton v. DiMario, 287 F.3d 1121, 1128-29 (D.C. Cir. 2002)(district court abused discretion by awarding 26 years of front pay based solely on plaintiff's subjective intent to remain in job until retirement); United Paperworkers Int'l Union Local 274 v. Champion Int'l Corp., 81 F.3d 798 (8th Cir. 1996); McKnight v. General Motors Corp., 973 F.2d 1366, 1370 (7th Cir. 1992), cert. denied, 507 U.S. 915 (1993), or where such awards would constitute a windfall to plaintiff, see, e.g., Moysis v. DTG Datanet, 278 F.3d 819, 829 (8th Cir. 2002).

Nevertheless, there have been cases where courts awarded significant amounts of front pay. See, e.g., Mathieu v. Gopher News Co., 273 F.3d 769, 779 (8th Cir. 2001)(front pay award based on time until retirement; plaintiff was 57 at date of judgment and would have retired at 65, so 8 years of front pay upheld); Hukkanen v. International Union of Operating Engineers, 3 F.3d 281, 285 (8th Cir. 1993)(front pay awarded for 10 years, but limited to the difference between pay when discharged and lower pay at new job).

Especially where plaintiff has retained an expert to testify about front pay issues, the government should consider retaining its own expert to review the expert's report and conclusions. Cf. Peyton v. DiMario, 287 F.3d 1121, 1128-29 (D.C. Cir. 2002)(noting that expert testimony concerning plaintiff's earning potential would be appropriate for purposes of calculating front pay). An economic expert may also be used to rebut plaintiff's testimony about future job intentions, even if plaintiff does not proffer expert testimony on this point,

to reduce the amount of front pay in a particular case.

2. COMPENSATORY DAMAGES

A word of caution: Some courts have demonstrated a willingness to award significant compensatory damages in federal sector employment discrimination cases based primarily, if not solely, on lay testimony concerning plaintiff's physical, emotional, and psychological injuries due to discrimination or retaliation. In other words, plaintiffs may not need expert testimony in order to justify significant awards of compensatory damages. As a result, be prepared to produce evidence to rebut plaintiff's testimony regarding the nature and extent of his or her injuries, even if it appears that such evidence is vague and uncorroborated. The cost of inaction can be steep, as the cases discussed below demonstrate.

In Salinas v. O'Neill, 286 F.3d 827 (5th Cir. 2002), plaintiff, a Customs agent, alleged that he was discriminated against on the basis of his race and age, as well as retaliated against, when the Customs Service failed to promote him. At trial, the court ruled in the government's favor with respect to plaintiff's race discrimination claim. The jury determined, however, that the agency had retaliated against plaintiff and awarded \$1 million in compensatory damages. The district court, inter alia, reduced the compensatory damage award to the \$300,000 cap, but denied defendant's motion to remit the award on the basis that there was insufficient evidence to support emotional and mental suffering meriting that amount of damages. The only evidence

plaintiff introduced at trial was his own testimony and that of his wife regarding plaintiff's loss of self esteem, feelings about not being a competent agent, loss of sleep, stress, paranoia, fear of future retaliation, and high blood pressure. The court of appeals noted its wariness when upholding emotional damage awards based solely on the testimony of plaintiff and a spouse. Nevertheless, the court ultimately deferred to the jury's determination that plaintiff had in fact suffered such damages. After comparing the case with other similar cases and applying a multiplier pursuant to the maximum recovery rule, the court remitted the district court's award to \$150,000.

her last few months, had been intimidated, physically assaulted and retaliated against for exercising her rights, and ultimately was fired for engaging in protected activity under the statute. Given these circumstances, the evidence supported the jury's conclusion that plaintiff was depressed and angry, and had suffered a loss of self esteem.

In another recent federal sector case, Peyton v. DiMario, 287 F.3d 1121 (D.C. Cir. 2002), plaintiff was an employee of the Government Printing Office for 11 years. Plaintiff alleged she was subjected to quid pro quo sexual harassment and a hostile work environment, as well as retaliation. A jury found in plaintiff's favor and awarded \$482,000 in compensatory damages. The district court remitted the damages to the statutory cap, or \$300,000. In affirming this award on appeal, the D.C. Circuit rejected the government's argument that the upward cap of \$300,000 should be awarded only in the most egregious cases. The court noted that the language of 42 U.S.C. § 1981a(b) merely provides a cap and, thus, as long as the damages awarded are supported by the evidence and do not shock the conscience or otherwise are unreasonable, then the award should be upheld. The court determined that plaintiff had been the victim of the egregious conduct Title VII is designed to remedy: she had worked her way up the career ladder, had been harassed by a supervisor in

3. TAX ENHANCEMENT

With increasing frequency, plaintiffs are attempting to obtain monetary awards in settlement agreements that would provide them with the amount necessary to cover their tax liability with respect to awards of damages, fees, and costs. In other words, plaintiffs seek not only an amount of damages, costs, and fees that makes them whole, but also the sum they will be out of pocket to pay the taxes due and owing on such awards. Because plaintiffs who receive awards in employment discrimination cases as a result of either judgments or settlement agreements are responsible for paying taxes on the total amount, including attorneys fees, in some instances the amount of an award realized by the plaintiff after taxes and fees are paid is a relatively small portion of the total amount of the award.

To remedy the perceived unfairness of this situation, a growing number of plaintiffs and their representatives have attempted to obtain court approval of enhanced awards so that, in effect, the government pays the plaintiff's taxes. When faced with such an argument, counsel for the government should argue that Title VII (and the other employment discrimination statutes) do not waive sovereign immunity from tax enhancement damages, citing Arneson v. Callahan, 128 F.3d 1243, 1247 (8th Cir. 1997)(treating the tax enhancement remedy like the prejudgment interest remedy, court held that "Congress must expressly and unequivocally waive sovereign immunity before a party can recover a tax enhancement award from the federal government."). In addition, we note that legislation has been introduced in Congress

to amend 42 U.S.C. § 1988 to permit tax enhancement awards in employment discrimination cases. To date, no action has been taken on the bill, but we will keep you advised of developments as they occur.

4. EEO SETTLEMENT AGREEMENTS

Another issue arising more and more often relates to plaintiff's claims that an agency has breached an agreement reached to resolve a prior EEO claim at the administrative level. The EEOC's regulations provide that, if an employee believes an EEO settlement has been breached, he must notify the EEO Director of the noncomplying agency within 30 days of when he knew or should have known of the noncompliance. 29 C.F.R. § 1614.504(a). The agency must resolve the matter of noncompliance and respond to the complainant in writing. 29 C.F.R. § 1614.504(b). If the complainant is not satisfied with the agency's response (or lack thereof), he may appeal to the EEOC for a determination as to whether the agency has complied with the agreement or decision. Id. However, the regulation by its terms does not require a complainant to appeal to the EEOC before filing suit in federal court. Saksenasingh v. Secretary of Educ., 126 F.3d 347, 350-51 (D.C. Cir. 1997); contra Ramirez v. Runyon, 971 F. Supp. 363, 368-69 (C.D. Ill. 1997) (an appeal to the EEOC is required for the exhaustion of administrative remedies).

When a case alleging breach of an EEO settlement agreement is filed in court, the plaintiff often seeks specific enforcement and damages resulting from the breach. The question is whether the district court has

jurisdiction over the breach of contract claim. Several district courts have determined that these cases should be in the Court of Federal Claims. See Kokkonen v. Guardian Life Insurance Co., 511 U.S. 375 (1994)(claim for enforcement of a settlement agreement requires its own jurisdictional basis, and there is no derivative jurisdiction based on the nature of the original dispute that was settled). The Court of Federal Claims, however, has consistently taken the position that Title VII provides the exclusive remedy for all claims relating to discrimination, including claims involving breaches of administrative EEO settlement agreements.

The Department has taken the position that the court probably has jurisdiction to specifically implement the terms of an administrative settlement agreement under Title VII. On the other hand, we have argued that the court does not have jurisdiction to award damages because there has been no waiver of sovereign immunity for such a claim under Title VII. The cases in this area have reached some anomalous results. Please let the Task Force know if you have a breach of contract issue and would like some assistance in briefing it.

FYI

**EEOC PROPOSES CHANGES TO
FEDERAL SECTOR CLAIMS PROCESS**

In November, the EEOC heard testimony and received recommendations from a broad range of interested parties on reforming the discrimination complaint process for federal employees. Witnesses

included EEO complainants, EEO officials in a variety of federal agencies, EEOC officials, and representatives of the plaintiff's bar. Chair Cari M. Dominguez noted that, although there is no formal plan under consideration by the Commission, the EEOC is in the process of collecting data that would support a potential revision of the federal sector claims process, possibly as early as September 2003. Indeed, she claimed that a streamlined federal sector EEO process is a top item on the EEOC's regulatory agenda. We will keep you informed of developments in this area.

***Need to know if the Attorney
General has been served with a
complaint?***

The DOJ Mail Referral Unit keeps track of this information and should have the answer. The number is (301) 436-1020.