Continuing Violations After *Morgan*

Debra S. Friedman, Esquire
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
(215) 665-3719

I. Introduction

In *National Railroad Passenger Corp. (Amtrak) v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), the United States Supreme Court held that the continuing violation doctrine is available for hostile work environment claims as long as one act of the harassment occurred within the statutory period. The Court further held that the doctrine is *not* available for discrete discriminatory acts.

Attorneys and human resource practitioners need to understand how *Morgan* may affect:

- how they investigate discrimination complaints;
- how they respond to discrimination complaints;
- how plaintiff's lawyers draft their complaints, pursue discovery and frame their claims; and
- how defense lawyers approach and evaluate cases and the costs and benefits of settlement.

II. The Continuing Violation Doctrine Prior to *Morgan*

A. Title VII's Charge Filing Provision

1. Statutory time period

A charge of discrimination or retaliation made pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended, must be filed with the Equal Employment Opportunity Commission ("EEOC") within 300 days or, if a state does not have an agency whose charter is similar to the EEOC's, the charge must be filed with the EEOC within 180 days of the alleged unlawful employment practice. *See* 42 U.S.C. § 2000e-5(e)(1).

2. Filing period is not jurisdictional

Filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982). Rather, the requirement is like a statute of limitations and is subject to waiver, estoppel and equitable tolling. *Id*.

B. The Continuing Violation Doctrine

1. What is the continuing violation doctrine?

The continuing violation doctrine permits a plaintiff to pursue alleged discriminatory acts that occurred outside the statutory period under

Title VII. Over time, courts have applied the continuing violation doctrine in four types of situations:

(a) serial violations, which involve a number of similar discriminatory acts, both before and during the statutory period;

(b) systemic violations, which involve the continuing policy or practice of discrimination on a company-wide basis, which policy or practice continues into the statutory period;

(c) actions involving sub-acts, each of which may be a reasonable starting point for the limitations period (such as a discharge and the exhaustion of a grievance process disputing it); and

(d) actions involving the effects of a discriminatory act that occurred outside the statutory period (*i.e*., present effects of past discrimination).

As discussed below, the United States Supreme Court does not recognize the application of the continuing violation doctrine in the third and fourth situations. *Morgan* also rejects the first situation, at least with respect to discrete acts of discrimination. It still permits application of the doctrine with respect to serial hostile environment claims. *Morgan* left unresolved the issue of whether the continuing violation doctrine applies to systemic violations.

2. Why has the continuing violation doctrine been accepted, to varying degrees, in employment litigation?

The statutory period for filing discrimination charges is arbitrary and very short. Courts may have viewed this short period for filing a discrimination charge as inequitable compared to the longer periods for filing personal injury and other types of actions. Therefore, courts may have justified using the continuing violation doctrine to allow claims outside the short statutory period.

3. Differing approaches to the continuing violation doctrine

Some commentators have labeled the continuing violation doctrine "the most muddled area in all of employment discrimination law." *See Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 53 (1st Cir. 1999), *citing* 2 B. Lindemann & P. Grossman, *Employment Discrimination Law* (3d Ed.1996) 1351, *cert*. *denied*, 528 U.S. 1161, 120 S. Ct. 1174, 145 L. Ed. 2d 1082 (2000). Therefore, it is not surprising that the federal courts took varying approaches to the continuing violation doctrine prior to *Morgan*. However, as the Supreme Court noted in *Morgan*, "none [of the approaches] are compelled by the text of the statute."

For instance, the Seventh Circuit refused to allow a plaintiff to recover for acts outside the statutory period "unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct,

as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations." *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996). *Cf. Provencher v. CVS Pharmacy*, 145 F.3d 5, 14 (1st Cir. 1998) (applying notice approach).

The Ninth Circuit, on the other hand, did not use the Seventh Circuit's "notice" approach. The Ninth Circuit permitted a plaintiff to recover for acts outside the limitations period as long as the acts represented an ongoing unlawful employment practice. *See*, *e.g.*, *Anderson v. Reno*, 190 F.3d 930, 936 (9th Cir. 1999).

The Third and Fifth Circuits followed yet another approach. They employed a multi-factor test which took into account whether (1) the alleged acts involved the same type of discrimination; (2) the incidents were recurring or independent and isolated events; and (3) the earlier acts had sufficient permanency to trigger the employee's awareness of, and duty to, challenge the alleged violation. *See*, *e.g.*, *Rush v. Scott Specialty Gases, Inc.,* 113 F.3d 476 (3d Cir. 1997), *rehearing denied* (1997); *Berry v. Board of Supervisors*, 715 F.2d 971, 981 (7th Cir. 1983).

C. Pre-*Morgan* Supreme Court Cases on Timely Title VII Charges

Prior to *Morgan*, the Supreme Court addressed the timeliness of Title VII charges on various occasions. While these cases set the groundwork for the majority's reasoning in *Morgan*, none involved application of the continuing violation doctrine to claims involving acts within and beyond the statutory period.

1. *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 234, 50 L. Ed. 2d 427, 97 S. Ct. 441 (1976)

In this case, the Court was faced with the issue of whether an unlawful employment practice occurred on the date of the employee's discharge or after the conclusion of a grievance arbitration procedure upholding the discharge. The Court held that the unlawful employment practice occurred on the date of the discharge, finding that the discharge was not "tentative" or "non-final" as the plaintiff contended.

2. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 52 L. Ed. 2d 571, 97 S. Ct. 1885 (1977)

In *Evans*, a flight attendant challenged United's policy of requiring married women to resign their employment with the company. At some point after that rule was found to be unlawful, plaintiff reapplied for employment with United and was hired. However, she was not given any credit under the seniority system for her prior employment.

Evans sued United, claiming that United's action in refusing to credit her prior employment with the airline for seniority purposes

constituted illegal discrimination. The Court found that her claim was time-barred. Specifically, the Court stated that

> [a] discriminatory act which has not been made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences. *Evans*, 431 U.S. at 558.

Evans shows that the Supreme Court rejected any application of the continuing violation doctrine to actions involving the effects of a discriminatory act that occurred outside the statutory period.

3. *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980)

In this case, the Supreme Court held that a professor's claim that he was denied tenure because of his national origin was time-barred. The professor failed to file a charge within 300 days after the denial of his tenure, but instead waited until the conclusion of a one-year terminal contract offered to him. The professor claimed that the statutory period did not begin to run until after he was terminated at the conclusion of his terminal contract. The Court disagreed. It found that the "mere" continuity of employment, without more, was not enough to prolong this claim.

In *Ricks*, the Court rejected application of the continuing violation doctrine to actions involving sub-acts (in this case the denial of tenure, which comprised notice to the plaintiff, and the eventual termination that resulted from the denial of tenure).

4. *Bazemore v. Friday*, 478 U.S. 385, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986)

The Court in *Bazemore* held, *per curiam*, that where a company had a discriminatory salary structure, each payroll check was an actionable act under Title VII.

III. The *Morgan* Decision

A. Facts/Prior Disposition

1. Background facts

Amtrak hired Abner Morgan, a black male, as an electrician's helper in August 1990. Morgan claimed that he should have been hired as an electrician. Morgan eventually was given the electrician's position, but only after he filed a union grievance over the issue.

In February 1991, Morgan was terminated for refusing to follow orders. He filed another union grievance. Morgan won his grievance claim and was reinstated. His termination was reduced to a suspension. Morgan still claimed the suspension was harsher discipline than given to white workers in the same situation.

Morgan further claimed that in 1991 he was treated unfairly when he was given written warnings for insubordination. One warning occurred after he complained to Amtrak's Equal Employment Opportunity office about discrimination and another warning was issued to him shortly after a Congresswoman visited Amtrak's facility to discuss employees' concerns about the company.

Morgan also complained that he was wrongfully denied the ability to return to work in January 1994 without producing a doctor's note even though the company did not have a policy requiring such a note. Finally, Morgan claimed that his managers used racial epithets against him throughout his employment.

Morgan filed a charge of discrimination with the EEOC on February 27, 1995 and cross-filed the charge with the California Department of Fair Employment and Housing. Even though all of the above conduct occurred more than 300 days prior to Morgan's filing a charge of discrimination, he claimed other discriminatory acts occurred within the statutory period: being denied training, being wrongfully suspended for insubordination, and being falsely accused of threatening a manager.

Morgan also claimed that, on March 3, 1995, he was wrongfully terminated after his manager reported that Morgan threatened the manager. Morgan was ordered to his supervisor's office for a meeting. At the meeting, Morgan asked for union representation or a co-worker witness. His supervisor denied him both and told Morgan to get his "black ass" into the office. Morgan then refused to attend the meeting and later was fired for violating company rules.

2. District Court disposition

The United States District Court for the Northern District of California granted Amtrak's motion for partial summary judgment. The Court ruled that Amtrak could not be held liable for any events occurring before the 300-day statutory period.

In reaching its determination, the district court relied on the test established by the Seventh Circuit in *Galloway v. General Motors Service Parts Operations*, *supra* (the Title VII statutory period applied to bar all claims outside the applicable 180-day or 300-day period unless a plaintiff could not have reasonably brought suit before the statute had run). Because the district court found that Morgan knew the actions he complained of were discriminatory at the time they occurred, Morgan could not rely on the continuing violation doctrine to pursue claims that took place outside the statutory period.

The parties tried the remaining issues. Amtrak won a defense verdict and Morgan appealed it to the Ninth Circuit.

3. Ninth Circuit disposition

The Ninth Circuit reversed the district court. It held that the continuing violation doctrine "allows courts to consider conduct that would ordinarily be time-barred 'as long' as the untimely incidents represent an ongoing unlawful employment practice.'" *Morgan*, 232 F.3d 108, 1014 (9th Cir. 2000) (quotation omitted). Specifically, the Ninth Circuit held that a plaintiff could pursue claims that ordinarily would be time-barred so long as they are either "sufficiently related" to incidents that fall within the statutory period or are part of a systematic policy or practice of discrimination that took place, at least in part, within the statutory period.

The Ninth Circuit then remanded the case for a new trial. Amtrak appealed the decision to the United States Supreme Court.

B. United States Supreme Court's Ruling

The Supreme Court affirmed the Ninth Circuit in part, reversed in part and remanded the matter. The Supreme Court defined the issue before it as "whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside [the] statutory time period."

In an opinion by Justice Thomas, the Court unanimously ruled that discrete discriminatory and retaliatory acts are *not* actionable if time-barred – even if related to timely filed charges. The Court reasoned that discrete acts such as termination, refusal to hire, and denial of a promotion or transfer are "easy to identify" and constitute a separate, actionable unlawful employment practice. Therefore, each discrete act "starts a new clock" for filing charges under Title VII. However, the plaintiff still may be able to introduce time-barred acts as evidence at trial to support timely filed charges.

The Court, in a 5-4 split, viewed hostile environment claims differently than discrete discriminatory or retaliatory acts, noting that "[t]heir very nature involves repeated conduct." The Court held that a hostile environment claim generally does not occur on any given day, but rather occurs over a number of days or even years and is based on the cumulative effects of several acts. For that reason, the Court ruled that as long as one act contributing to the hostile environment claim occurs within the statutory period, a Title VII plaintiff may recover for the entire period of that hostile environment.

Finally, the Court stated that equitable tolling may be available to plaintiff and equitable defenses, such as laches, waiver and estoppel may be available to employers. The Court declined, however, to set forth any guidelines for when these equitable doctrines could be employed.

C. Analysis of Decision

1. Discrete acts

Justice Thomas looked to Title VII's language and the Court's prior precedents to support the Court's ruling that discrete acts of discrimination and retaliation must be filed within the statutory period or be time-barred.

a) Statute

First Justice Thomas focused on 42 U.S.C. § 2000e-5(e)(1). That provision of Title VII states, in relevant part: "A charge under this section shall be filed within 180 days after the alleged unlawful employment practice occurred."

The Court noted that the use of the word "shall" made the time period mandatory. It further noted that the word "occurred" meant that the practice took place or happened in the past. Based upon this language, the Court then phrased the critical question as "What constitutes an 'unlawful employment practice' and when has that practice 'occurred'?" In answering those questions, the Court reached different answers for discrete acts and hostile environment claims.

b) Prior precedents

Morgan argued that a charge must be filed within 180 or 300 days after "an unlawful employment practice." Morgan reasoned that "practice" suggests an ongoing violation that can recur over a period of time.

The Court disagreed. It noted that "[t]here is simply no indication that the term 'practice' converts related discrete acts into a single unlawful employment practice for the purposes of untimely filing."

The Court supported its conclusion by discussing prior cases where it interpreted the term "practice" to apply to a discrete act or single occurrence. Specifically, the court discussed *Electrical Workers v. Robbins & Myers*, *supra*, *Bazemore v. Friday*, *supra*, *Delaware State College v. Ricks*, *supra*, and *United Air Lines, Inc. v. Evans*, *supra*. Justice Thomas stated that these cases demonstrated that the discrete discriminatory acts are not actionable if time-barred, even if they are related to acts alleged in timely filed charges.

Significantly, Justice Thomas failed to note that in *Ricks* and *Evans* the plaintiffs did not allege any timely filed charges, which clearly distinguishes those cases from *Morgan*. Accordingly, the Court never satisfactorily explained why the continuing violation doctrine does not apply when there is a present violation.

c) Time-barred discrete acts still admissible as evidence

The Court stated that the statute does not bar an employee from using prior acts that may be time-barred as background evidence in support of a timely claim.

2. Hostile environment claims

The Court split 5-4 on this part of the opinion, with Justices O'Connor, Rhenquist, Scalia and Kennedy dissenting. While the majority found that the continuing violation doctrine may apply to hostile work environment claims, the dissent disagreed. The dissenting justices would have applied the strict 180-day or 300-day statutory limit imposed by the statute to hostile work environment claims as well.

a) "Different in kind"

The Court began its analysis with the premise that "[h]ostile environment claims are different in kind from discrete acts." The Court noted that such claims are based on the "cumulative effect of individual acts," and therefore an "unlawful employment practice" cannot be said to occur on any particular day and may occur over a series of days or perhaps years. Moreover, the Court pointed out that a single act of harassment may not be actionable on its own as compared to a discrete act.

b) Acts outside statutory period are part of one unlawful employment practice

Because the Court viewed a hostile work environment as a series of separate acts which constitute one unlawful employment practice, it held that as long as one act of the claim occurs within the filing period, the entire period of the hostile work environment may be considered by a court for purposes of determining liability. This is a key distinction between discrete acts and a hostile work environment. Whereas evidence of prior discrete acts outside the statutory period may be admissible to support timely filed acts, hostile environment acts well outside the statutory period can form the basis for employer liability.

c) Role of equity

1) Laches, waiver, estoppel

The Court tempered its holding somewhat, noting that equity may play a role in assessing hostile work environment claims. Whereas the Court focuses on equity to enlarge the time period for plaintiffs with respect to discrete acts, here the court is offering a bone to employers in terms of using laches, waiver or estoppel to prevent a plaintiff from recovering for his/her claims outside the statutory period. Notably, however, the Court provides no guidance whatsoever on how these equitable doctrines should be applied.

The Court also noted that it is not commenting on whether the laches defense may be asserted against the EEOC, even though traditionally the doctrine has not been applied against a sovereign entity.

2) Intervening action by employer

Finally, the Court also notes that if there is no relation between hostile environment acts over time due to "certain intervening action[s] by the employer," then the employee cannot recover for the previous acts. Again, the Court provides no guidance as to what it means by an intervening action. Does that mean an investigation by the employer pursuant to its anti-discrimination policies? Does it require an employer to show prompt and effective remedial action? Is the Court referring to the affirmative defense set forth in the Supreme Court's *Ellerth* and *Faragher* decisions? *See* Section III (C)(3) below.

3. Implication of decision

The decision is a mixed bag for both employees and employers. On the one hand, employers will not be liable for stale discriminatory or retaliatory claims where those claims are based on discrete acts. On the other hand, employers may face expanded liability for hostile environment claims spanning over multiple years. This may allow employees to sit on their claims without risk so long as they can make one hostile environment allegation within the relevant time period.

Because the continuing violation doctrine is not available for discrete discriminatory acts, employees may file multiple charges of discrimination to preserve all claims. This will require the employee to be very diligent. It also will require the employer to coordinate and to defend more charges from an individual employee. Finally, it hurts employer-employee relations because charge filing is emphasized over resolving issues informally.

Another likely effect of the Court's ruling regarding discriminatory acts is that plaintiffs will try to plead all claims outside the statutory period as being part of a hostile environment. Plaintiff's ability to do this highlights how the Court's rationale for its differing treatment of discrete acts and hostile environment acts is unsound. In other words, discrete acts may be sufficiently related to each other and/or to hostile environment acts such that they all can fall under the hostile environment label to avoid the statutory bar.

The scope of discovery may very well be widened in hostile environment cases in particular because employees potentially may recover for acts going back many years. See Section VI.D. below for a more detailed discussion of this decision's impact on the discovery process.

Notably, for harassment claims, the Court is taking itself away from its earlier decision in *United Air Lines, Inc. v. Evans*, *supra*, 431 U.S. 553, where it held that an act outside the 300-day statutory period is "merely an unfortunate event in history which has no present legal consequences." Indeed, in *Morgan*, the Court now is stating that all acts of harassment do have present legal

consequences, mainly pertaining to liability. Therefore, there is no safe harbor against most harassment claims spanning beyond the statutory period. Employers cannot sweep their past histories under the rug and just move forward; they are being forced to look back in time as well.

Finally, the Court appears to be shifting its focus from the procedural issue of timeliness as a shield against liability, at least with respect to hostile environment claims, to the substantive issue of whether the employer has an affirmative defense to the underlying claims. This shift can be viewed as an extension of the Court's holdings in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Ellerth v. Burlington Industries, Inc.*, 524 U.S. 951 (1998). In those cases, the Court held that employers can avail themselves of an affirmative defense in certain discrimination actions if they can show that (1) they exercise reasonable care to prevent and promptly correct harassing behavior; and (2) the employee unreasonably fails to take advantage of a preventive or corrective opportunity provided by the employer or to avoid harm otherwise.

4. Issues left unresolved

a) Pattern and practice claims

The Court notes, in footnote 9 of its opinion, that "[w]e have no occasion here to consider the timely filing question with respect to 'pattern-or-practice' claims brought by private litigants as none are at issue here."

b) Accrual of claims

The Court notes, in footnote 7 of its opinion, that "[t]here may be circumstances where it will be difficult to determine when the time period [for each act] should begin to run." The Court does not, however, discuss how to deal with this issue of accrual of a discrimination action.

c) Discovery rule

The Court also comments that an issue may arise as to whether the limitations period begins to run when the injury occurs, as opposed to when the injury should have reasonably been discovered. The latter situation is known as the discovery rule. The Court then leaves this question open, noting that it presents no occasion to resolve the issue.

Notably, Justice O'Connor, in her dissent, agrees that there is no need to fully resolve the application of the discovery rule to claims based on discrete discriminatory acts. She does comment, however, that she believes "some version of the discovery rule applies to discrete act claims."

5. Damages

The Court tries to bolster the hostile environment part of its decision by referring to the fact that Title VII permits recovery for two years of back pay. The Court reasons that if Congress had intended to limit liability to conduct occurring within the period in which a party must file a charge, then it is

unlikely they would have allowed recovery for two years of back pay. Along the same lines, the Court noted that because Congress expressly limited the amount of recoverable damages to a particular time period, the timely filing provision was not meant to serve as a specific limitation either on damages or on the conduct that might be considered for purposes of one actionable hostile work environment claim.

IV. Post-*Morgan* Decisions[1]

A. Title VII

The cases discussed below demonstrate how the lower courts have been applying *Morgan*.

1. Discrete acts

a) Transfers

Transfers, as the *Morgan* Court noted, are discrete acts. The continuing violation doctrine does not apply to them, even if the employee can demonstrate that a transfer occurring outside the statutory period was related to conduct alleged within the statutory period. *See Morgan, supra; Miller v. New Hampshire Dept. of Corrections,* 296 F.3d 18 (1st Cir. 2002) (holding that "[u]nder *Morgan*, it is clear that the . . .transfer is a discrete act and is time barred"); *Darmanin v. San Francisco Fire Dept.,* 2002 U.S. App. LEXIS 19676, 2002 WL 31051571 (9th Cir. 2002) (refusing to apply continuing violation doctrine to an alleged discriminatory transfer occurring outside the statutory period, notwithstanding plaintiff's claim that the transfer initiated a course of conduct to remove him from his position and to prevent him from being reinstated).

b) Failure to accommodate

An employer's failure to accommodate an employee's request to participate in Friday prayer sessions is a discrete act. *See Elmenayer v. ABF Freight System, Inc.,* 318 F.3d 130 (2nd Cir. 2003). In *Elmenayer*, the Second Circuit refused to view the rejection of the accommodation as a continuing violation even though the employee continued to feel the effect of the rejection over time.

c) Failure to hire

Failure to hire claims are discrete acts. The continuing violation doctrine does not apply to them. *See Morgan, supra; EEOC v. Joe's Stone Crabs, Inc.,* 296 F.3d 1265 (11th Cir. 2002), *rehearing denied*, __ F.3d ___, 55 Fed. Appx. 904 (2002).

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[1] These materials do not address state law cases discussing *Morgan* and its application to the statute of limitations for state fair employment practice laws.

d) Failure to promote

Failure to promote claims also are discrete acts. *See Morgan, supra; Glaser v. Fulton-Montgomery Community College,* 2002 U.S. App. LEXIS 22550, 2002 WL 31422849 (2nd Cir. 2002); *Jarmon v. Powell,* 208 F.Supp.2d 21 (D.D.C. 2002).

e) Discipline

Discipline is considered a discrete act as well. *See Bauer v. Board of Supervisors,* 2002 U.S. App. LEXIS 16349, 2002 WL 1822328 (9th Cir. 2002) (discipline, including demotions, are discrete acts); *Miller v. New Hampshire Dept. of Corrections,* 296 F.3d 18 (1st Cir. 2002) (letter of warning is a discrete act).

2. Hostile work environment

a) Continuation violation doctrine applicable

Where plaintiff pleads sexual and racial hostile environment claims dating from the early 1980s until she filed her EEOC Charge in August 1997, the Tenth Circuit finds that the continuing violation theory applies. *See Boyler v. Cordant Technologies, Inc.,* 316 F.3d 1137 (10th Cir. 2003). Similarly, where plaintiff complains of harassment both inside and outside the applicable limitations period, all such conduct is actionable under *Morgan*. *See McFarland v. Henderson,* 307 F.3d 402 (6th Cir. 2002); *Marrero v. Goya of Puerto Rico, Inc.,* 304 F.3d 7 (1st Cir. 2002).

b) Continuing violation doctrine not applicable

The continuing violation doctrine does not apply to a hostile environment claim when all acts occurred outside the statutory period. *See Scott v. Lee County Youth Development Center,* 232 F.Supp.2d 1289 (M.D. Ala. 2002) (rejecting plaintiff's argument that her constructive discharge occurred within statutory period and was part of the hostile environment where plaintiff resigned outside the statutory period, but her final day of work was within statutory period); *Singleton v. Chicago School Reform Bd. of Trustees of the City of Chicago,* 2002 WL 2017082 (N.D. Ill. 2002). The continuing violation doctrine also does not apply where the plaintiff does not plead or argue that the complained of conduct constituted a hostile environment; the court will not *sua sponte* examine this issue. *Bauer v. Board of Supervisors, supra,* 2002 U.S. App. LEXIS 16349, 2002 WL 1822328.

The Second Circuit found that transfers to unattractive environments, loss of pay, loss of vacation, changes in an evaluation and termination, coupled with acts unrelated to plaintiff's employment, do not constitute a hostile environment; therefore, the continuing violation doctrine does not apply. *Allah v. City of New York Dept. of Parks & Recreation*, 2002 U.S. App. LEXIS 20475, 2002 WL 31119698 (2nd Cir. 2002). The Second Circuit also held that where untimely alleged discriminatory actions were "discontinuous in time with one another" and with the sole timely act alleged (termination) the

continuing violation doctrine does not apply. *Johnson v. Buffalo Police Dept.*, 2002 U.S. App. LEXIS 18419, 2002 WL 31004726 (2nd Cir. 2002).

3. Pattern and practice claims

In *Branch v. Guilderland Central School Dist.*, 2003 WL 110245 (N.D.N.Y. 2003), the District Court for the Northern District of New York held that *Morgan* did not foreclose application of the continuing violation doctrine to Title VII pattern and practice cases. For that reason, the Court found that the doctrine could be invoked for a Section 1983 policy or custom case, which the Court viewed as analogous to a Title VII pattern and practice case. The Court then stated that the test for application of the continuing violation doctrine was whether the conduct was sufficiently similar or related in both time and substance to the same policy. *See EEOC v. Dial Corp.,* 2002 WL 1974072 (N.D. Ill. 2002) (*Morgan* does not preclude application of continuing violation doctrine to pattern and practice cases).

B. Application to Other Statutes/Constitutional Claims

Morgan's Title VII continuing violation analysis has been applied to other statutes, as well as to First Amendment claims. *See Shea v. City and County of San Francisco,* 2003 U.S. App. LEXIS 1675, 2003 WL 192111 (9th Cir. 2003) (ADA); *McCarron v. British Telecom,* 2002 WL 1832843 (E.D. Pa. 2002) (ADA); *Kaster v. Safeco Ins. Co. of America,* 212 F.Supp. 2d 1264 (D.Kan. 2002) (ADEA); *Sherman v. Chrysler Corp.,* 2002 U.S. App. LEXIS 19186, 2002 WL 31074591 (6th Cir. 2002) (ADEA); *Inglis v. Buena Vista University,* 235 F. Supp. 2d 1009 (N.D. Iowa 2002) (Equal Pay Act); *Branch v. Guilderland Central School District,* 2003 WL 110245 (N.D.N.Y. 2003) (Section 1983); *Darmanin v. San Francisco Fire Dept.,* 2002 U.S. App. LEXIS 19676, 2002 WL 31051571 (9th Cir. 2002) (Section 1983); *Moiles v. Marple Newtown School Dist.,* 2002 WL 1964393 (E.D. Pa. 2002) (Section 1983); *Shields v. Fort James Corp.,* 305 F.3d 1280 (11th Cir. 2002) (Section 1981); *RK Ventures, Inc. v. City of Seattle,* 307 F.3d 1045 (9th Cir. 2002) (Section 1985); *Crosland v. Safir,* 2002 U.S. App. LEXIS 26741, 2002 WL 31867823 (2nd Cir. 2002) (First Amendment).

V. Handling a Post-*Morgan* Internal Investigation of a Discrimination Complaint

Post-*Morgan*, employers need to re-evaluate how they conduct their workplace investigations.

A. Investigation pitfalls: What not to do

Many employers and attorneys severely limit the scope of internal investigations of discrimination complaints. They review only the complaints specifically raised and then assess their potential exposure based solely on those complaints. In essence, they hold their breath, hope more than 300 days pass before the complainant files a charge and then dream of being home free--or facing only limited exposure if litigation is pursued. That is a big mistake.

Anyone conducting an internal investigation of a discrimination complaint or advising others performing an investigation should keep the following in mind:

1. Don't automatically limit the timeframe of the investigation to the last 180 or 300 days.

At the outset of an investigation, it may be perilous to assume that any claim is limited to the last 180 or 300 days. While this may be obvious post-*Morgan* for easily identified harassment complaints, it also follows in many other situations. For example, if an employee complains that he failed to receive a promotion and that the failure was discriminatory, it is tempting to view the claim as being limited to the promotion, which is a discrete act. However, the employee can later claim that he did not receive the promotion as a result of ongoing, unlawful harassment, namely that the loss of the promotion was really an effect of harassment.

2. Don't assume the complaint is not about a hostile work environment just because the complainant never utters the words "harassment" or "hostile."

Don't let a complainant's description of the alleged discrimination limit an assessment as to the applicable statute of limitations and/or consequent exposure to liability. Often a complainant never will utter the words "harassment" or "hostile." While most of the time it may be obvious to the investigator that the substance of the claim is about a hostile working environment, that is not always the case. What may appear to be seemingly discrete events to an investigator at a given time may later be used to portray the work environment as hostile.

3. Don't self-label the complaints either "harassment" or "discrete acts" and then use the labels to assess potential liability.

A similar mistake would be to self-label complaints as either "harassment" or "discrete acts." Again, it is difficult to put such labels on complaints at any one given point. The investigator doesn't have a crystal ball into viewing how a plaintiff's lawyer later will formulate a complaint or how a court will view the allegations. Furthermore, self-labeling during the investigation may be risky, in that the investigator or other evaluator may make an ill-informed assessment of potential liability.

4. Don't assume that unreported harassment allegations cannot crop up later and form the basis for liability.

If a plaintiff does not report harassment allegations to the employer, defense counsel may contend that they cannot form the basis for liability. This is particularly likely in light of the Supreme Court's decisions in *Ellerth* and *Faragher*, which place a burden on the plaintiff to utilize an employer's policy for addressing discrimination complaints.

Once again, such a view may be shortsighted. As long as a plaintiff has reported one timely harassment allegation to management, the plaintiff can claim that all prior acts of harassment are a part of the same alleged unemployment practice. The employee then can argue that she only had a duty to report the harassment allegations once and that the responsibility shifts to the employer to do a full investigation.

5. Don't assume allegations that lack merit today cannot later provide grounds for liability.

Allegations that are insufficient to state a claim for unlawful harassment today may form one component of a viable harassment claim at a later date. Note that this may occur even if the employer takes steps to remediate meritless harassment allegations should additional harassment allegations be made at a later date.

6. Don't assume "old" discrimination allegations never will see the light of day.

Morgan removes most doubt about the admissibility of "old" harassment allegations so long as they are related to at least one timely harassment allegation. Moreover, the *Morgan* Court noted that even old, discrete acts of discrimination may be admissible to support timely allegations of discrimination.

B. Employer tips

1. Train management and staff.

Employers must continually train both management and staff about unlawful discrimination and harassment and how to prevent and respond to such claims. This is particularly important because employers no longer can assume with certainty that any discrimination or harassment allegation is too old, innocuous or remote to result in, or contribute to, employer liability.

2. Thoroughly document the investigation.

Documentation goes hand-in-hand with employee training. A paper trail may be necessary for an employer to demonstrate that it adequately addressed the employee's complaint. This is particularly critical if some or all of the employees involved are no longer employed by the company or memories simply fade.

In sum, *Morgan* is a telling reminder to employers that they have a continual, ongoing legal responsibility for preventing and correcting unlawful harassment.

VI. Litigating the Post-*Morgan* Employment Discrimination Case

Morgan may change the way attorneys prepare and try many of their discrimination cases.

A. Pre-complaint Investigation

Plaintiff's counsel, like employers and defense counsel, should be particularly wary of glossing over or dismissing seemingly stale claims. Plaintiff's counsel also should actively search for ways to plead the plaintiff's complaints as a hostile environment claim to maximize the potential grounds for proving employer liability.

B. Drafting the Complaint

A plaintiff's attorney should seriously consider pleading all discrimination claims involving conduct beyond the 180 or 300-day statutory period as being part of a hostile work environment. If successful, this tactic will:

- enlarge the timeframe, and possibly the substance, of discoverable evidence;
- ensure that the acts outside the statutory period constitute admissible evidence, likely avoiding a F.R.E. 403 challenge (rule permitting exclusion of relevant evidence where it may unduly prejudice, confuse or mislead factfinder); and
- allow the acts outside the statutory period to be considered by the factfinder in assessing liability (as opposed to merely background evidence of motive, etc.).

At this point, the United States Supreme Court has not ruled as to whether a Title VII plaintiff can avail herself of the discovery rule. Therefore, if a plaintiff has delayed in filing a charge, his/her attorney should explore the reason for the delay. If the plaintiff claims that he/she did not realize he/she was a victim of discrimination, the plaintiff's attorney then should assert facts in the complaint to support application of the discovery rule.

C. Responding to the Complaint

1. Throw out the motion to dismiss harassment claims as being time-barred

Post-*Morgan*, it will be extremely difficult for defense counsel to win a motion to dismiss based upon the statute of limitations in Title VII. Indeed, as long as the plaintiff's attorney pleads one act of an alleged hostile environment claim within the statutory period, the other acts are considered timely.

Even when the discrimination or retaliation claim is limited to seemingly discrete acts, a court may be hesitant to dismiss the claims outside the statutory period so long as the plaintiff claims they are part of a hostile work environment and one or more acts are alleged to have occurred within the statutory period. This is particularly true since the United States Supreme Court's decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002), where the Court held that a Title VII complaint need only conform to the federal court's notice pleading system. Greater particularity in pleading facts is not required.

2. Drafting an answer to the complaint

The *Morgan* Court expressly recognized that employers may be able to avail themselves of equitable defenses when a plaintiff alleges a hostile work environment claim outside of the statutory period. Therefore, defense counsel always should consider whether there is a basis for asserting any of the equitable defenses (laches, waiver and estoppel) or the statute of limitations to plaintiff's discrimination and/or retaliation claims. If so, these affirmative defenses must be set forth in the answer. *See* Fed. R. Civ. P. 8(c).

The *Morgan* Court also noted that employers may be able to defend themselves against hostile work environment claims based upon "certain intervening action." While the Court did not explain what it meant, one plausible interpretation is that the Court is referring to the *Faragher/Ellerth* affirmative defense. This defense is available to employers who can demonstrate that (1) they exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Accordingly, defense counsel always should consider whether the *Faragher/Ellerth* affirmative defense may be asserted and, if so, plead the defense in the answer.

To determine whether any of the above affirmative defenses apply, defense counsel must carefully evaluate the complaint. Issues to evaluate include:

- Does plaintiff explicitly allege a hostile work environment?
- Is plaintiff asserting only discrete acts of discrimination?
- Is the plaintiff trying to couch a discrete act of discrimination, such as a failure to hire or a termination, as part of a hostile work environment claim?
- Did the plaintiff report the alleged harassment?
- Did the plaintiff take advantage of opportunities provided by the employer to avoid harm?

D. Discovery Tools and Tactics

Morgan opens the door for wide-ranging discovery by plaintiffs—especially in hostile environment cases. How can both plaintiff and defense counsel take advantage of this new opportunity for more discovery? What can and should defense counsel still do to limit the disclosure of information?

1. Written Discovery

With *Morgan*, plaintiffs are better equipped to win discovery battles over how much information an employer must disclose about discrimination complaints made by employees similarly situated to plaintiff. Consider the following example:

> Susie Smith claims that two of her supervisors at ABC Company in Philadelphia sexually harassed her over the entire course of her employment: from 1991 through December 2002.
>
> Susie believed she was a victim of harassment since 1991. Susie did not, however, file a charge with the EEOC and state fair employment practice agency until January 2000. She first complained to management about alleged harassment in January 1998.
>
> Ms. Smith's counsel serves interrogatories requesting information about all sexual harassment complaints made by employees against ABC Company at its Philadelphia location for the period 1985 through present.

Prior to *Morgan*, much of the requested information might be relevant for discovery purposes, and even admissible at trial as background evidence. Nevertheless, courts often would be sympathetic to employer's claims that such a broad request went beyond the permissible scope of discovery—particularly where the plaintiff knew of the alleged harassment and did not complain to management or file a charge for years. Now, however, courts may bend the other way if the plaintiff is asserting a hostile work environment over a long period of time and the employer cannot claim that many of the allegations are time-barred.

2. Depositions

a) Plaintiff's deposition

Plaintiff's deposition is always a critical component of an employment discrimination case. Accordingly defense counsel will want ample time to question the plaintiff about his/her allegations in detail. This is crucial for defending the case. Indeed, it may be the only way that defense counsel will truly be able to evaluate the scope of plaintiff's claims given that the plaintiff need not plead each discriminatory allegation in his/her complaint. *See Swierkiewicz v. Sorema N.A.*, *supra*.

Employer Tip:

> Request an extension of the seven-hour deposition time limit. Fed. R. Civ. P. 30(d)(2) imposes a seven-hour limit on oral depositions. The time limit may be extended by agreement of the parties or by court order. Notably, the Advisory Committee Notes to the 2000 amendments recognize that "[i]f the examination will cover events occurring over a long period of time, that may justify allowing additional time."

Furthermore, now that hostile work environment allegations dating back years potentially can form the basis for employer liability, defense counsel must be particularly diligent about trying to show that some or all of plaintiff's allegations are unrelated and isolated. Defense counsel also should explore whether the employer can avail itself of any of the equitable defenses (laches, waiver and/or estoppel).

b) Fed. R. Civ. P. 30(b)(6) depositions

Plaintiff's counsel will want to obtain information regarding anti-discrimination policies in place during the time period of the alleged discrimination, as well as the employer's response to all discrimination complaints made during that time period. Plaintiff may only be able to obtain some or all of this information by deposing the employer's human resources managers or other corporate employees. *See* Fed. R. Civ. P. 30(b)(6) (requiring the employer to designate and make available for deposition corporate employees who have knowledge of the subject matter at issue).

Plaintiffs alleging a hostile work environment claim over a lengthy period of time may need to depose multiple corporate designees to learn about the employer's history of handling discrimination complaints. In these depositions, plaintiffs may uncover a treasure trove of helpful information.

Prior to *Morgan*, courts may have been more amenable to defense motions for protective orders limiting the number and scope of 30(b)(6) depositions related to an employer's history of handling discrimination complaints over a lengthy period of time. Courts also may have been more likely to preclude admission of an employer's lengthy history of handling discrimination complaints based on relevance, prejudice or other grounds. In other situations, the employer's history may have come in solely as background evidence.

Now there is a greater chance that the employer's history of handling discrimination complaints over time may be used to prove liability where the timeframe of the "history" coincides with one or more acts of harassment. Therefore, plaintiff's counsel should be proactive in requesting depositions of persons with specific knowledge of the employer's history of handling discrimination complaints.

Plaintiff's Tips:

- Serve interrogatories early on requesting the names of each of the employer's human resource directors for the time period of plaintiff's alleged harassment. Those currently employed by the employer then can be served deposition notices.

- Use subpoenas to depose former human resource directors identified as having relevant knowledge about the company's history of handling discrimination complaints.

- Use a 30(b)(6) deposition notice to learn of any other personnel who may have relevant knowledge should the current human resource personnel lack knowledge for a certain time period.

E. Summary Judgment

1. Hostile work environment claims

The hostile work environment aspect of *Morgan*'s holding will limit opportunities for an employer to obtain summary judgment on harassment claims. Prior to *Morgan*, an employer might have been successful in moving for partial summary judgment to dismiss portions of plaintiff's harassment complaint as time-barred even where there was a timely filed charge with respect to other harassment allegations. Now such opportunities will be limited.

An employer still may be able to assert equitable defenses such as laches and estoppel on summary judgment. It is too early, however, to determine how the courts will respond.

Allowing allegations of harassment from well outside the statutory period to form part of a harassment complaint also increases the likelihood of the court finding a genuine issue of material fact in dispute, thereby precluding summary judgment.

2. Discrete act claims

Employers may fare better in obtaining summary judgment on discrete act claims now that the United States Supreme Court has precluded use of the continuing violation doctrine to save such claims from the 180 or 300-day statutory bar.

F. Trial

Motions in limine will be as important as ever. Defense counsel must be creative in approaching admissibility issues surrounding discriminatory and/or harassment allegations occurring outside the statutory period. For instance, it will be more difficult for defense counsel to preclude introduction of hostile environment allegations spanning back many years on relevancy grounds now that the allegations may be used to prove employer liability. It also will be harder to demonstrate prejudice, jury confusion, and/or the cumulative nature of the evidence as grounds for preclusion of hostile environment allegations that go directly to the basis for employer liability.