

Third Circuit "Clarifies" Continuing Violation Doctrine

February 22, 2013

In *Mandel v. M & Q Packaging Corp.*, No. 11-3913, 2013 WL 141890 (3d Cir. Jan. 14, 2013), the U.S. Court of Appeals for the Third Circuit "clarified" the application of the continuing violation doctrine as defined by the U.S. Supreme Court in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). This alert discusses the holding and significance of this decision for employers.

Facts

Plaintiff Shannon Mandel worked as an Inside Sales Customer Relations Coordinator for Defendant M & Q Packaging Corporation, which manufactures and sells packaging film.

On January 9, 2009, Mandel filed a Complaint against M & Q with the United States District Court for the District of Pennsylvania, alleging, *inter alia*, sexual harassment in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* Specifically, Plaintiff alleged that throughout her employment, spanning from October 25, 1996 to May 23, 2007, she was subject to a hostile work environment based on unwanted solicitations, gender-charged remarks (including references to her appearance), lewd comments, and less pay and vacation time than her male counterparts.

To file suit under Title VII in a deferral state such as Pennsylvania, the claimant must first file a charge with the Equal Employment Opportunity Commission (EEOC) within 300 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1). On September 13, 2007, the EEOC received questionnaires (dated July 17, 2007) from Mandel. On the questionnaires, Mandel checked boxes stating "I want to file a charge." The EEOC processed the forms and issued a Charge of Discrimination (Charge) on December 14, 2007. That same day, Mandel requested that the EEOC dual file the Charge with the Pennsylvania Human Relations Commission.

In assessing the timeliness of Mandel's Title VII claims, the District Court determined that the EEOC questionnaires were sufficiently similar to a charge to toll the statute of limitations and, therefore, her claims would be timely so long as they occurred within 300 days of September 13, 2007, i.e., after November 17, 2006.

Mandel argued, however, that the alleged acts of discrimination prior to November 17, 2006 were, in fact, part of an ongoing pattern of harassment and, therefore, also timely under the continuing violation doctrine. The District Court rejected the application of the doctrine but, for the reasons set forth below, the Third Circuit reversed.

Governing Legal Standards

The Third Circuit restated the seminal distinctions between discrete acts of discrimination (i.e., "termination, failure to promote, denial of transfer, or refusal to hire") and a hostile work environment ("composed of a series of separate acts that collectively constitute one 'unlawful employment practice'" and "cannot be said to occur on any particular day") for purposes of triggering the statute of limitations. *Morgan*, 536 U.S. at 114-117.

On the one hand, "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges," i.e., a discrete act in and of itself constitutes a separate actionable unlawful employment practice. *Id.* at 113.

On the other hand, under the continuing violation doctrine, discriminatory acts that are not individually actionable may be aggregated to make out a hostile work environment claim; such acts "can occur at any time so long as they are linked in a pattern of actions which continues into the applicable limitations period." *O'Connor v. City of Newark*, 440 F.3d 125, 127 (3d Cir. 2006) (citing *Morgan*, 536 U.S. at 105) (explaining courts may consider the "entire scope of a hostile work environment claim . . . so long as any act contributing to that hostile environment takes place within the statutory time period"). Accordingly, to allege a continuing violation, the plaintiff must show that all acts which constitute the claim are part of the same unlawful employment practice and that at least one act falls within the applicable limitations period. *See Morgan*, 536 U.S. at 122; *see also West v. Phila. Elec. Co.*, 45 F.3d 744, 754-55 (3d Cir. 1995) (explaining plaintiff must show that at least one act occurred within the filing period and that the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination").

Holding

Prior to *Morgan*, the Third Circuit had adopted from *Berry v. Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983), a non-exhaustive list of three factors to help distinguish between the occurrence of isolated acts of discrimination and a persistent, ongoing pattern. In particular, *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476 (3d Cir. 1997) and *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 (3d Cir. 1995), contained dicta explaining that the Fifth Circuit Court of Appeals considered the (i) subject matter ("whether the violations constitute the same type of discrimination"), (ii) frequency, and (iii) degree of permanence ("whether the nature of the violations should trigger the employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate") of the underlying acts.

Here, citing *West*, the District Court applied the *Berry* factors and determined that Plaintiff's claims met the subject matter and frequency requirements but failed the permanency requirement. The District Court reached this conclusion on the basis that Plaintiff should have been aware of the need to assert her rights but "did not pursue her claim with reasonable diligence, and thus she is precluded from using the continuing violation theory."

In reversing the District Court, the Third Circuit held that, following *Morgan*, permanency is not required to establish a continuing violation, reiterating:

It is precisely because the entire hostile work environment encompasses a single unlawful employment practice that we do not hold, as have some of the Circuits, that the plaintiff may not base a suit on individual acts that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on such conduct. The statute does not separate individual acts that are part of the hostile environment claim from the whole for the purposes of timely filing and liability. And the statute does not contain a requirement that the employee file a charge prior to 180 or 300 days 'after' the single unlawful practice 'occurred.' Given, therefore, that the incidents constituting a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim. In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment.

Morgan, 536 U.S. at 117-18.

Having clarified the continuing violation doctrine post-*Morgan*, the Third Circuit determined that Mandel could proceed under a continuing violation theory. Indeed, the Court concluded that Mandel had alleged at least one act fell within the statute of limitations period (i.e., she allegedly was called a derogatory gender-charged remark during a meeting), and many of the acts that occurred prior to the applicable limitations period involved similar conduct by the same individuals – thus suggesting a persistent, ongoing pattern. The Third Circuit, therefore, remanded the case to the District Court for further proceedings, including a determination of the scope of the incidents properly considered part of the continuing violation for the hostile work environment claim.

Takeaway

The Third Circuit's *Mandel* decision should brace employers for a more lenient application of the continuing violation doctrine, which could prolong otherwise untimely claims dating back a number of years. Furthermore, employers should beware that, even if an alleged discriminatory act is stale, the underlying facts may still be admissible as background evidence (and, therefore, practically speaking, may have the same effect as if the act was independently viable).

Employers also should note that the Third Circuit addressed the concern that a plaintiff might "unreasonably" delay filing a charge without the permanency requirement. To avoid such a result, the *Mandel* Court cited *Morgan* for the proposition that employers would have recourse, including equitable defenses such as laches. *Morgan*, 536 U.S. at 121-22. Defendant M & Q had raised the doctrine of laches as a defense, but the District Court did not consider it. In light of the clarified doctrine, the Third Circuit held that M & Q should have the opportunity to argue a laches defense, and the District Court should consider whether it applies.

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If you have any questions or concerns regarding the Third Circuit's *Mandel* decision or related jurisprudence, please contact your Proskauer lawyer or any co-chair of the Employment Law Counseling Practice Group.

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