

## Employment & Immigration Law

### Courts Continue To Untangle the Continuing Violation Doctrine

Always consider the applicability of the laches defense

By M. Trevor Lyons

Imagine a 20-year employee suddenly asserts that throughout her career, she has been paid less than similarly-situated male employees because of her sex. While one might assume that this employee cannot recover for acts occurring prior to the statutory filing period or statute of limitations, this might not necessarily be the case.

Despite the Law Against Discrimination's two-year statute of limitations, and Title VII of the Civil Rights Act of 1964's requirement that an employee file a charge with the Equal Employment Opportunity Commission within either 180 or 300 days of the last act of discrimination, employers still face liability for long-standing discrimination claims.

Specifically, the "continuing violation" doctrine can expose employers to

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liability for acts that occurred long before the relevant limitations period expired. The doctrine, an equitable remedy, generally provides that when an individual is subject to a continuous pattern of unlawful conduct, the statute of limitations does not begin to run until the wrongful actions cease. In application, this equitable exception to the statute of limitations permits plaintiffs to recover for acts that would otherwise be time-barred, so long as they can show a continuous course of conduct and at least one unlawful act within the relevant limitations period.

Seemingly simple, 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). This article will briefly review New Jersey courts' recent application of the doctrine to discrimination claims, and discuss the continuing availability of a laches defense to such claims.

#### The Discrete Act/Continuing Violation Distinction

The first meaningful case to draw upon

the discrete act, continuing violation distinction was *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). In *Morgan*, an African-American employee claimed racial discrimination and retaliation under Title VII. Morgan alleged both discrete acts of discrimination, such as discriminatory discipline, and exposure to a racially hostile work environment throughout his employment. Writing for a majority, Justice Clarence Thomas distinguished discrete-act discrimination from claims composed of a series of separate acts that only collectively or cumulatively constitute one "unlawful employment practice." As to discrete-act discrimination claims, such as discriminatory discipline, Justice Thomas clarified that each such act constitutes a separate actionable "unlawful employment practice." Therefore, a plaintiff is required to file a separate charge with the EEOC within the relevant filing period for each such act, and the failure to do so can render subsequent claims untimely.

In contrast, Justice Thomas explained that where a series of repeated acts each collectively contribute to form one "unlawful employment practice," such as hostile work environment claims, a plaintiff may file a charge at any point when there is enough unlawful activity to result in an actionable claim. Provided that at least one act contributing to the claim occurred within the relevant statutory filing period, all of the alleged acts supporting the claim, even those beyond the charge filing period, are deemed timely.

Because the LAD's statute of limitation employs decidedly different language than Title VII's administrative filing requirement, it was not clear whether New Jersey would follow *Morgan's* reasoning. Any uncertainty, however, was resolved later that same year in *Shepherd v. Hunterdon Developmental Center*, 174 N.J. 1 (2002).

In *Shepherd*, two plaintiffs alleged that they had been subjected to a continuous pattern of ill-treatment after they supported a co-worker's discrimination lawsuit, and they asserted, among other things, hostile work environment claims. Defendants sought dismissal, arguing that plaintiffs' claims were time barred because they had known that they were discriminated against when they sent a detailed letter about their claims to their superintendent two years and 26 days before they filed their complaint.

Despite noting that federal precedent is only a guide for LAD claims, Justice Peter Verniero, writing for the majority, explained there was a benefit in having New Jersey law "mirror the approach taken in *Morgan* to avoid further confusion in an already complicated area of law." As result, New Jersey's Supreme Court expressly adopted *Morgan's* distinction between discrete act and continuing course of conduct discrimination for LAD claims. Applying that analytical framework, Justice Verniero found that because the plaintiffs had identified one timely act, and had asserted a continuing course of conduct which included that timely act, their claims were timely.

More recently, in *Roa v. LAFE*, 200 N.J. 555 (2010), New Jersey's Supreme Court again spoke to discrete act and continuing violation claims. In *Roa*, a couple alleged that the husband's firing and the termination of his insurance coverage was unlawful retaliation for his reporting of sexual harassment. These events had occurred more than two years before plaintiffs filed their complaint, but Roa alleged that he had only received notice of the coverage termination within the relevant limitations period, and that his discovery less than two years before initiating his lawsuit, rendering his claim as to this act timely. He also argued that his retaliatory discharge claim was part of the same pattern of conduct, and was therefore also timely under the continuing violation doctrine.

The Supreme Court disagreed, holding that the doctrine does not permit the aggregation of discrete discriminatory acts to revive

an untimely act that the victim knew or should have known was actionable. Specifically, the Supreme Court explained that when Roa was fired, he clearly knew, or should have known, he had been the subject of retaliation. Therefore, the Court held that Roa should have filed his unlawful termination claim within two years of that date. When he did not do so, that claim was lost.

### Discriminatory Pay Claims and the LAD

In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), the United States Supreme Court held that employers cannot be sued under Title VII for unequal and discriminatory pay, if such claims are based on decisions made beyond the relevant charge filing period. Specifically, Lilly Ledbetter worked for Goodyear from 1979 until 1998. Although initially paid the same as her male colleagues, she asserted that over the years she was progressively paid less than similarly situated males, and that by 1997, her male colleagues received 15 percent to 40 percent more than her. She brought suit alleging sex discrimination. The Supreme Court held that "she could have, and should have, sued" when the relevant pay decisions were made, instead of waiting well beyond the statutory charging period. The effect of this decision, however, was reversed by the 2009 passage of the Lilly Ledbetter Fair Pay Act, amending Title VII so that the charge-filing period for a discriminatory pay claim resets with receipt of each new paycheck.

Following the passage of the Ledbetter Act, the question arose regarding how New Jersey's courts would treat discriminatory pay claims. In *Alexander v. Seton Hall University*, 410 N.J. Super. 574 (App. Div. 2009), the Appellate Division held that a plaintiff cannot assert a continuing violation claim based on wages received during the limitations period, if the difference in pay is the result of a discrete pay decision occurring before the limitations period. Essentially, without action by the legislature, the Appellate Division chose to follow the decision in *Ledbetter*, despite the latter passage of the Ledbetter Act. The New Jersey Supreme Court, however, granted certification in this case this year.

### Don't Forget About Laches

The state Supreme Court, however, granted certification in this case this year,

and on Nov. 23, rejected the Appellate Division's adoption of the U.S. Supreme Court's *Ledbetter* decision. Instead, Justice LaVecchia, writing for the majority, explained that each payment of unequal wages by an employer constitutes an actionable wrong that is remediable under the LAD, but that the LAD's two-year statute of limitations applies to such violations by cutting off the untimely portion of such claims. Therefore, the Supreme Court held that the plaintiffs' claims were not time-barred, but that they could only recover for wages paid for the two years prior to the filing of their complaint.

Clearly, courts are struggling with the inequity of permitting a less than diligent employee to assert a continuing-violation claim potentially exposing an employer to a disproportionate back pay award, and the difficulty of having to defend against a stale claim.

As recognized by Justice Verniero in *Shepherd*, the risk for potential injustice attendant to the prosecution of such stale claims is much greater in the employment discrimination context than in almost all other types of claims. This is because credibility typically plays such a crucial element in these cases, and evidence of discrimination is uniquely vulnerable to the passage of time. As a result, New Jersey courts have readily supported a laches defense when an employee unreasonably delays bringing a claim, and that delay prejudices the employer's ability to defend itself.

For example, in *Mancini v. Township of Teaneck*, 179 N.J. 425 (2004), a police officer alleged that she had been subjected to a hostile work environment and retaliation since 1981. Despite holding that a laches defense had been waived in that case, the Supreme Court confirmed the availability of laches as a defense to the stale prosecution of discrimination claims. Generally, Justice Verniero identified the following factors as especially relevant to the defense: (1) whether an alleged act is unreasonably distant in time; (2) whether a plaintiff knew or should have known of a valid claim based on that act; and (3) whether the plaintiff's delay in filing a claim has caused undue prejudice to a defendant.

Therefore, an employer facing a continuing-violation claim based upon an event in the distant past should always consider the applicability of a laches defense. ■