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EMPLOYMENT LAW DECISIONS FROM THE UNITED STATES SUPREME COURT'S 2001-2002 TERM: PART II

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This Public Personnel Law Bulletin is the second of two discussing the employment law decisions issued by the United States Supreme Court during its 2001 – 2002 term. Part I discussed four Americans with Disabilitites Act cases: *Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, Chevron USA, Inc. v. Echazabal, Barnes v. Gorham and US Airways, Inc. v. Barnett*. This Bulletin discusses six cases covering a range of personnel law issues: *Ragsdale v. Wolverine World Wide, Inc.* (Family and Medical Leave Act), *Adams v. Florida Power Corp.* (Age Discrimination in Employment Act), *Equal Employment Opportunity Commission v. Waffle House, Inc.* (arbitration and the role of the EEOC), and *National Railroad Passenger Corp. v. Morgan*, Edelman v. Lynchburg College, and *Swierkiewicz v. Sorema, N.A.* (all Title VII).

The Family and Medical Leave Act (FMLA)

Ragsdale, et al., v. Wolverine World Wide, Inc., 535 U.S. __, 122 S.Ct. 1155 (March 19, 2002).

Holding: The Department of Labor regulation that requires employers who fail formally to designate leave as "FMLA leave" to give employees an additional twelve weeks of leave is invalid.

Public employers generally give their employees a set number of paid sick and vacation days each year. In addition, the FMLA gives most public employees the right to twelve weeks of *unpaid* leave each year either to take care of their own or an immediate family member's serious heath condition, or following the birth or adoption of a child. If the employer chooses, it may count paid sick or vacation leave against the twelve weeks of FMLA leave. But what happens if the employer doesn't let the employee know that a paid absence is being counted against his or her FMLA entitlement? Can the absence

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still count against the employee's FMLA leave bank? Or does the employee keep the time in the FMLA bank? The United State Supreme Court has now ruled that the absence counts against the employee's FMLA entitlement.

When Congress passed the FMLA, it included a requirement that employers post a summary of employee rights and employer responsibilities under the Act.[1] This is the sole notice provision in the statute itself. Subsequently, regulations issued by the United States Department of Labor (DOL) placed additional notice requirements on employers. For example, an employer must tell employees requesting medical or personal leave that the employer is, in fact, counting the requested leave against the employee's twelve-week FMLA entitlement.[2] The employer must give employees *written* notice of the designation within a reasonable time of their request, preferably within two business days.[3] In addition, the regulation found at 29 C.F.R. § 825.700(a) provided that "if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." In other words, under this official-designation regulation, an employee's FMLA leave would not begin until the employer had given the employee individual notice that it had designated the leave as FMLA leave. If an employer failed to give the employee the required individualized notice, it could not count a leave that otherwise qualified as FMLA leave, and the employee would still have a full twelve weeks of FMLA leave available for that year.

In its 5-4 decision in *Ragsdale*, the United States Supreme Court held that § 825.700(a) — the official-designation regulation — is invalid because it is contrary to the FMLA and beyond the authority of the Secretary of Labor.[4]

The Facts of Ragsdale

Defendant Wolverine World Wide's sick-leave policy allowed employees to take up to seven months of unpaid leave, and Tracy Ragsdale took advantage of the policy when she was diagnosed with cancer. Ragsdale applied and received permission to take the full seven-months of leave. At no time did Wolverine notify Ragsdale that it was designating twelve weeks of this leave as FMLA leave. When Ragsdale was not well enough to return to work at the conclusion of her seven-month sick leave, she asked for another twelve weeks of leave as "FMLA leave." Wolverine denied her request and terminated her when she did not return to work. At the conclusion of what would have been Ragsdale's additional twelve-week "FMLA-leave" period (had Wolverine granted her request), Ragsdale was well enough to work. She filed suit against Wolverine for violating the FMLA, seeking backpay and reinstatement to her previous position. Wolverine argued that by giving Ragsdale more than the required twelve weeks of leave, it had complied with the statute.

The Supreme Court's Decision

The Court concluded that the official-designation regulation effectively functioned as an absolute penalty. If an employer failed to give an employee the required notice, the employer had to grant that employee an additional twelve weeks of leave -- even where the employee had full knowledge of his or her FMLA rights and had expected the leave to count against the twelve-weeks.[5] The statutory language of the FMLA puts the burden on an employee to show that as a result of the employer's violation of the statute, the employee has been unable to exercise FMLA rights, and has suffered harm as a result.[6] The Court found that the official-designation regulation was inconsistent with the statute because it relieved employees of their burden by presuming that in *all* cases, the failure to give the required notice would interfere with an employee's ability to take FMLA leave. As the Court noted, Ragsdale had not been restrained in any way in the exercise of her FMLA rights, but had received the twelve weeks of leave to which she was entitled.[7]

The Court also concluded that the penalty imposed for failure to give notice by the official designation regulation was disproportionate to the penalty imposed by Congress for violations of the FMLA.[8] Congress, the Court noted, had included only one notice provision in the statute itself: the requirement that employers post a summary of rights and responsibilities under the Act.[9]

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[1] *See* 29 U.S.C. § 2619 (2002).

[2] *See* 29 C.F.R. §§ 825.208(a) and 825.301(c).

[3] 29 C.F.R. § 825.301(c).

[4] *Ragsdale*, 122 S.Ct. at 1159.

[5] *Ragsdale*, 122 S.Ct. at 1161.

[6] *Ragsdale*, 122 S.Ct. at 1162**.** *See also* 29 U.S.C. §§ 2615, 2617 (2002)**.**

[7] *Ragsdale*, 122 S.Ct. at 1162.

[8] *Ragsdale*, 122 S.Ct. at 1164.

[9] *See* 29 U.S.C. § 2619(a) (2002).

Willful violations of this statutory posting requirement are punishable only by a civil fine of no more than one hundred dollars for each offense.[10] In contrast, the official-designation regulation imposed a much heavier sanction for both willful and unintentional violations of DOL's additional notice requirement.[11]

The Court expressly declined to decide the validity of two other notice regulations — 29 CFR § 825.208(a), which requires an employer to tell an employee that an absence will be considered FMLA leave, and 29 CFR § 825.301(c), which requires employers to give the employee *written* notice of the designation of an absence as FMLA leave within a reasonable time.[12] The Court also expressly declined to decide whether a penalty less severe than that requiring the employer to given an additional twelve weeks of leave -- a fine, for example -- might be a valid, alternate means of enforcing these notice requirements.[13]

What Must an Employer Now Do to Comply with the FMLA?

What are an employer's obligations now that the Supreme Court has declared the official-designation regulation invalid? Now, an employee's FMLA leave begins to run at the time that the employer begins to provide leave consistent with the statute's requirements. Employers must still, however, comply with the notice provision of the Act itself and post in a conspicuous place a summary of employee rights and employer responsibilitites under the FMLA.[14] Pursuant to 29 C.F.R. §§ 825.208(a) and 825.301(c), which the Court did not invalidate, employers still have a duty formally to designate qualified absences as FMLA leave and to give employees written notification that a leave is being counted against their FMLA entitlement within two business days, wherever possible. For now, the only civil penalty that can be assessed by DOL for failure to comply with these rules is the maximum fine of $100 for each willful violation of the posting requirement set forth in the statute itself.[15]

It will be the rare employee who has suffered damages as a result of an employer's failure to designate qualifying absences as FMLA leave or to give written notice of that designation, but those who can show such an injury may bring suit in federal or state court to recover double damages.[16]

The Age Discrimination in Employment Act of 1967 (ADEA)

Adams, et al. v. Florida Power Corp., 535 U.S. __, 122 S.Ct. 1290 (April 1, 2002).

Holding: None. Dismissed on the grounds that review was improvidently granted.

Can a court hold an employer liable for unintentional age discrimination under the ADEA as it can for race and gender discrimination under Title VII? The question is still open.

The plaintiffs in *Adams* were a group of older employees who had been terminated by Florida Power in a series of reductions-in-force that took place during the mid-1990s. They alleged that over 70 percent of those laid off during this period were over 40 years old. The issue before the Supreme Court was whether age discrimination claims brought under the ADEA may be based on a theory of disparate impact (sometimes known as unintentional discrimination or adverse impact), which the Supreme Court held applicable to Title VII claims of race discrimination in 1971 in *Griggs v. Duke Power Co*.[17]

Two weeks after oral argument, the Court dismissed the appeal as improvidently granted in a one-sentence decision. It gave no fuller explanation of the its decision. The federal courts of appeal are split as to whether plaintiffs alleging age discrimination under the ADEA may use the disparate impact method of proving discrimination. The First, Seventh, Tenth and Eleventh Circuits (*Adams* was on appeal from the Eleventh Circuit) have all held that disparate impact claims are not authorized by the ADEA.[18]

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[10] *See* 29 U.S.C. § 2619(b) (2002).

[11] *Ragsdale*, 122 S.Ct. at 1164.

[12] *See Ragsdale*, 122 S.Ct. at 1165.

[13] *See Ragsdale*, 122 S.Ct. at 1165.

[14] 29 U.S.C. § 2619 (2002).

[15] *See* 29 U.S.C. § 2619(b) (2002).

[16] *See* 29 U.S.C. § 2617(a) (2002).

[17] 401 U.S. 424 (1971). The ADEA is codified at 29 U.S.C. § 621 *et seq*.

[18] *See, e.g.*, Mullin v. Raytheon Co., 164 F.3d 696, 703-704 (1st Cir. 1999); Abbon v. Federal Forge, Inc., 912 F.2d 867, 872 (6th Cir. 1990) EEOC v. Francis W. Parker School, 41 F.3d 1073, 1076-78 (7th Cir. 1994); Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir. 1996). *See also* DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 734 (3d Cir. 1995) (doubting viability of theory).

The Second, Eighth and Ninth Circuits have allowed disparate impact claims to proceed under the ADEA.[19]

Whether or not employees may bring age discrimination lawsuits based on a claim that an employment practice has had an unintentional, but adverse impact on older workers has become an issue of more than academic interest as many North Carolina public employers, grappling with unprecedented budget shortfalls, begin to consider reductions-in-force. The status of such claims in North Carolina is unclear: the Fourth Circuit Court of Appeals has not addressed the viability of disparate impact claims under the ADEA, although at least one lower North Carolina federal court has permitted an ADEA plaintiff to proceed under a disparate impact theory.[20] For the moment, employers should continue to evaluate their personnel practices to avoid negative disparate impact on employees age 40 and older.

Equal Employment Opportunity Commission (EEOC)

Equal Employment Opportunity Commission v. Waffle House, Inc., 532 U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755 (January 15, 2002).

Holding: The existence of an arbitration agreement does not bar the EEOC from seeking relief on behalf of a complaining employee.

Although agreements to arbitrate employment disputes have become increasingly commonplace in the private sector, North Carolina public employers have not generally made use of them. The United States Supreme Court's decision in *Equal Employment Opportunity Commission v. Waffle House, Inc.,* provides public employers with an opportunity to review what an arbitration agreement can and cannot do in the context of a claim of discrimination.

The Facts of Waffle House

Eric Baker suffered a seizure sixteen days after he began his employment as a grill operator at one of Waffle House's South Carolina restaurants. He was discharged shortly thereafter. Like all Waffle House employees, as a condition of employment, Baker had signed an agreement that provided for binding arbitration of any disputes or claims arising out of his employment. Baker did not seek arbitration, nor did he bring a lawsuit contesting his termination. Instead, he filed a charge with the EEOC alleging that Waffle House had discharged him in violation of the Americans with Disabilities Act.[21]

The EEOC investigated his allegations and made an unsuccessful attempt at conciliation. The EEOC itself then brought an enforcement action against Waffle House in federal court, alleging that the restaurant company engaged in employment practices — including the termination of Baker — that violated the ADA. The EEOC asked the court to grant injunctive relief to remedy the effects of both past and present discrimination by Waffle House and to order make-whole relief for Baker – that is, backpay, reinstatement and compensatory damages. The EEOC also asked the court to award Baker punitive damages because Waffle House had acted with malice or reckless indifference in terminating him.[22]

The Federal Arbitration Act, enacted in 1925 to encourage the use of private arbitration agreements, provides that lawsuits in federal courts are to be stayed when an issue in the case can be referred to arbitration under an agreement to arbitrate. The Act authorizes federal trial court judges to compel arbitration when one party to an arbitration agreement does not comply with it. Waffle House accordingly moved to stay the EEOC's action and to compel arbitration, or to dismiss. The district court denied the motion.

On appeal, the Fourth Circuit held that although a valid, enforceable arbitration agreement existed between Baker and Waffle House, the EEOC was not a party to the agreement and the existence of the agreement did not foreclose it from bringing suit. But the Fourth Circuit also held that while the EEOC could ask for an injunction against Waffle House to remedy disability discrimination generally, it could not seek personalized relief such as backpay, reinstatement and damages on behalf of

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[19] *See, e.g.,* Geller v. Markham, 635 F.2d 1027, 1032-34 (2d Cir. 1980*), cert. denied*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981); EEOC v. McDonnell Douglas Corp., 191 F.3d 958, 950 (8th Cir. 1999); EEOC v. Borden's Inc., 724 F.2d 1390, 1393 (9th Cir. 1984).

[20] Fisher v. Asheville-Buncombe Technical Community College, 857 F.Supp. 465, 468 (W.D.N.C. 1993), *aff'd*, 25 F.3d 1039 (4th Cir. 1994).

[21] The facts of the case are set forth in *Waffle House*, 122 S.Ct. at 758.

[22] *See Waffle House*, 122 S.Ct. at 758-59.

Baker. To allow the EEOC to do so would interfere with the federal policy favoring arbitration when Baker had himself agreed to submit any dispute to arbitration.[23]

The EEOC appealed to the United States Supreme Court. Other federal courts of appeals had considered whether the existence of an arbitration agreement barred the EEOC from pursuing so-called victim-specific relief and had reached varying conclusions.[24] The question was ripe for decision by the Supreme Court.

The Supreme Court's Decision

In a 6-3 decision, the Supreme Court reversed the Fourth Circuit. It found that nothing in any of the relevant statutes that suggests that the remedies that the EEOC may seek are in any way limited by the existence of an arbitration agreement to which the EEOC is not a party. The Court emphasized that, by statute, the EEOC is authorized to seek both compensatory and punitive damages for intentional discrimination in violation of either Title VII or the ADA.[25] It noted that the statutory scheme puts the EEOC, and not the complaining employee, in charge of the litigation: during the 180-day period during which it maintains exclusive jurisdiction, the employee may not file suit in his or her name; if the EEOC files an action based on the employee's charge, it is the EEOC that decides what relief it will seek.[26]

The Court itself expressly recognized the limit of its decision. It is clear, the Court said, that were Eric Baker to have failed to mitigate his damages, or had Waffle House offered and Baker accepted a monetary settlement of his claim, the EEOC would be accordingly limited in any recovery it obtained on his behalf through its enforcement action, since the courts generally seek to preclude double recovery by a plaintiff.[27] But precisely to what extent the EEOC's right to proceed or to seek relief would have been affected in such a situation remains unclear. As Justice Stevens put it, "It is an open question whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek. The only issue before this Court is whether the fact that Baker has signed a mandatory arbitration agreement limits the *remedies* available to the EEOC" (emphasis added).[28]

When Public Employers Settle Discrimination Claims

The *Waffle House* decision does not significantly diminish the protections that mandatory arbitration agreements provide to employers. The likelihood is small that the EEOC will itself bring an action based on any given complaint made by an employee, since the EEOC chooses to sue in very few cases from among the hundreds of thousands of charges filed each year.

But what happens when the employer and employee have already settled the claim? Can the EEOC bring suit in that situation? Although the Court has left open the possibility that the existence of a settlement agreement might still not preclude an EEOC enforcement action based on the same complaint, again, the likelihood that the EEOC would file suit in any given case remains small.

Nevertheless, any North Carolina public employer entering into a settlement of an employment dispute – whether in the context of an arbitration agreement or not -- should ensure that the settlement agreement contains not only a covenant not to sue, but a more specific provision whereby the employee promises not to file a charge with the EEOC in connection with any aspect of his or her employment. While that might not prevent the EEOC from investigating a charge that is nonetheless filed, the filing of the charge would constitute a breach of contract that could allow the employer to seek the return of any money paid in settlement of the dispute. If settlement is reached after the employee has already filed an EEOC charge, the agreement should require the employee to provide the employer with a duly executed withdrawal of the charge simultaneously with the execution of the settlement agreement.

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[23] *See Waffle House*, 122 S.Ct. at 759, 762.

[24] The Sixth Circuit had held that the existence of an arbitration agreement did not preclude the EEOC from seeking either injunctive relief or backpay and damages, while the Second and Eight Circuits had held that the EEOC could seek injunctive relief, but not money damages. *See Waffle House*, 122 S.Ct. at 759, *citing* EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999), EEOC v. Kidder, Peabody Y Co., 156 F.3d 298 (2d Cir. 1998), and Merrill, Lynch, Pierce, Fenner and Smith, Inc., v. Nixon, 210 F.3d 814 (8th Cir.), *cert. denied*, 531 U.S. 958 (2000).

[25] *See* 42 U.S.C. § 1981a(a)(1), (a)(2).

[26] *See Waffle House*, 122 S.Ct. at 762-63.

[27] *See Waffle House*, 122 S.Ct. at 766.

[28] *See Waffle House*, 122 S.Ct. at 766.

Title VII of the Civil Rights Act of 1964

National Railroad Passenger Corp. v. Morgan, 536 U.S. __, 122 S.Ct. 2061 (June 10, 2002).

Holding: 1) For most discrimination claims, Title VII plaintiffs must file charges within 180 or 300 days of the illegal employment action; 2) For hostile work environment claims, Title VII plaintiffs may include acts that took place outside the 180- or 300-day filing period so long as they are part of a single unlawful practice and one of the acts comprising the practice has taken place within the filing period.

Title VII requires employees alleging an illegal discriminatory employment practice to file a charge with the EEOC within 180 days of the alleged conduct.[29] Where state law also prohibits discrimination in employment and authorizes a state agency to grant relief to a plaintiff, Title VII requires an employee to file a charge with the state agency first, and the statutory time period within which the employee must file a charge with the EEOC is then extended to 300 days after the alleged conduct.[30]

Employees filing Title VII discrimination complaints often allege numerous discrete incidents of discriminatory conduct, some falling within the statutory filing period, others falling outside the period. The federal courts took varying approaches to this problem: some simply dismissed any allegations falling outside the filing period; others applied a multifactor test to each individual complaint; still others applied the so-called "continuing violations doctrine," under which courts may consider time-barred incidents when they are part of an ongoing illegal employment practice. In *National Railroad Passenger Corp. v. Morgan*, the Supreme Court resolved the split among the federal Courts of Appeal. It held that Title VII does not ordinarily allow recovery for individual acts of discrimination for which the filing period has run, but that in the context of a hostile environment discrimination claim, a court may consider conduct alleged to have taken place outside the filing period — so long as at least one act contributing to the hostile environment occurred within the filing period.[31]

The Facts of Morgan

Abner J. Morgan, Jr., an African-American electrician helper, filed a charge against his employer, National Railroad Passenger Corporation (Amtrak), with both the EEOC and the appropriate California state agency. The extended 300-day filing period therefore applied to his charge. Morgan alleged that he had suffered race discrimination, a hostile work environment, and retaliation, all in violation of Title VII. He claimed that Amtrak discriminated against him from the very moment of his hiring in 1990, when he was expected to perform the job duties of an electrician, but was given the job title "Electrician Helper" and a lower salary than Amtrak's Caucasian electricians. Morgan further alleged that Amtrak did not allow him to participate in an apprenticeship program, failed to promote him and subjected him to discriminatory disciplinary decisions throughout his career at Amtrak.[32]

Some of the discriminatory acts of which Morgan complained took place more than 300 days before the date on which Morgan filed his charge, while others took place within the 300-day period. The trial court found that Morgan had not timely filed charges with respect to each of the incidents that took place outside the 300-day filing period. The Ninth Circuit Court of Appeals reversed, holding that under the continuing violations doctrine, the court could consider conduct that would ordinarily be time-barred if the untimely incidents were part of an ongoing unlawful employment practice. In this case, the Court said, a jury should have been given the opportunity to consider all of the incidents alleged by Morgan, not just the ones within the limitations period.[33]

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[29] 42 U.S.C. § 2000e-5(e)(1) (2002).

[30] 42 U.S.C. § 2000e-5(e)(1) (2002). In North Carolina, the Equal Employment Practices Act, N.C. GEN. STAT. §§ 143-422.1 – 143-422.3 (hereinafter G.S.) declares discrimination on the basis of race, religion, color, national orgin, age, sex or handicap to be against the public policy of the State, but provides no enforcement mechanism. The State Personnel Act (SPA), G.S. Ch. 126, prohibits discrimination in state employment and provides an administrative procedure through which employees may seek redress. Hence, state SPA employees have 300 days in which to file with the EEOC (provided that they have appealed the allegedly discriminatory act through the State Personnel Commission first), while most other North Carolina public employees have 180 days in which to file an EEOC charge.

[31] *See Morgan*, 122 S.Ct. at 2077.

[32] Morgan v. National Railroad Passenger Corporation, 232 F.3d 1008, 1010-1013 (9th Cir. 2000).

[33] *See Morgan*, 122 S.Ct. at 2069; *Morgan*, 232 F.3d at 1017- 18.

The Supreme Court's Decision

The Supreme Court identified two questions as critical to analyzing the issues presented by the case:

> [First, w]hat constitutes an "unlawful employment practice" and [second,] when has that practice "occurred"? Our task is to answer these questions for both discrete discriminatory acts and hostile work environment claims**.** The answer varies with the practice.[34]

Discrete Acts of Discrimination

The Court concluded that for the purposes of filing an EEOC charge, a discrete act of employment discrimination (for example, a failure to hire or promote, or a termination) occurs on the day it actually happens, and that a complainant must file a charge within either 180 or 300 days of the date of the act.[35] Morgan had argued that the language of Title VII's provision for filing an EEOC charge --

> A charge under this section shall be filed within one hundred and eighty days after the alleged *unlawful employment practice* occurred (emphasis added) [36]

-- supported the Ninth Circuit's application of the continuing violation doctrine because the term "unlawful employment practice" can denote a violation that either continues or recurs over time**.** The Court rejected this interpretation, noting that it has repeatedly interpreted the term "practice" to refer to a discrete act or single occurrence, even when that act is related to other acts.[37] Thus, each individual act of discrimination starts a new limitations clock running**.** An act falling outside the limitations period cannot form the basis of Title VII liability even if it is related to alleged acts that fall within the 180 or 300-day period.[38] The Court therefore reversed the Ninth Circuit's decision as it applied to those individual acts of discrimination Morgan alleged that fell outside the 300-day period.[39]

[34] *Morgan*, 122 S.Ct. at 2070.
[35] *See Morgan*, 122 S.Ct. at 2071-72.
[36] 42 U.S.C. § 2000e-5(e)(1).
[37] *See Morgan*, 122 S.Ct. at 2071.
[38] *Morgan*, 122 S.Ct. at 2072.
[39] *See Morgan*, 122 S.Ct. at 2073, 2077.

Hostile Work Environment

The Court came to a different conclusion in cases involving claims that the employee has been subject to a hostile work environment**.** A hostile work environment results from a series of separate actions that collectively comprise one "unlawful employment practice."[40] As the Court noted, in contrast to a single act of discrimination, a hostile work environment cannot be said to occur on one day, as opposed to another, and without more, a single act of harassment, even if it were to occur within the filing period, might not be sufficient to impose liability on an employer.[41] Rather, the standard developed by the Court for determining whether a hostile work environment exists instructs courts to look at all of the circumstances, including:

- the frequency of the discriminatory conduct;
- the severity of the discriminatory conduct;
- whether the conduct is physically threatening or humiliating, or is just an "offensive utterance";
- whether the conduct has unreasonably interfered with the complainant's work performance; and
- whether the complainant has suffered any psychological harm.[42]

In light of this standard, the Court held that all of the allegedly harassing conduct, even acts falling outside the filing period, may be considered in assessing whether a complainant has been subject to a hostile work environment. The only requirement is that at least one of the alleged acts contributing to the existence of the abusive environment fall within the 180 or 300-day filing period.[43]

Abner Morgan's complaint alleged violations of Title VII based on theories of racial discrimination, hostile work environment, and retaliation. In support of his claim that he had endured a hostile

[40] *See Morgan*, 122 S.Ct. at 2074.
[41] *See Morgan*, 122 S.Ct at 2073.
[42] *See Morgan*, 122 S.Ct. at 2074; Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22, 114 S.Ct. 367 (1993); *Brown v. Perry*, 184 F.3d 388, 393 (4th Cir. 1999).
[43] *See Morgan*, 122 S.Ct. at 2074. Again, attorneys should note that the Court was sensitive to employer concerns about having to defend against stale claims, and held that an employer may raise a laches defense where an employee has unreasonably delayed in filing suit and the employer is harmed as a result. *See Morgan* at 2077.

environment, Morgan presented evidence that his managers made racial jokes, performed racially derogatory acts, made negative comments about the capacity of African-Americans to be supervisors, and used various racial epithets. Many of these acts alleged to have contributed to the hostile work environment occurred outside the limitations period, but some took place within it. In assessing the evidence, the Supreme Court agreed with the Ninth Circuit, finding that the conduct alleged in support of Morgan's hostile environment claim involved the same type of employment actions, occurred frequently and were the actions of the same individuals, both within and without the limitations period. They were thus part of a one, long unlawful practice.

What Morgan Means for Employers

Morgan allows employment discrimination plaintiffs alleging workplace harassment to include in their complaints all acts of harassment, so long as at least one incident occurs within the 180-day filing period (in North Carolina, 300 days for state employees).[44] For plaintiffs alleging other forms of discrimination, such as failures to hire or promote, discriminatory disclipline or termination, *Morgan* represents a significant curtailment of the right to sue, because the Fourth Circuit had been one of the circuits that recognized the continuing violations doctrine. It had allowed acts falling outside the filing period to be considered as part of a discrimination claim where those acts formed a a "series of separate but related acts" amounting to a continuing violation.[45]

Morgan may nevertheless have relatively little impact on the amount of damages successful plaintiffs recover in discrete incident cases, because the Supreme Court explicitly held that plaintiffs may use time-barred incidents as evidence to support a claim that is timely filed. [46] Whether juries will award a lesser amount in emotional distress or punitive damages where additional discriminatory acts are offered as supporting evidence, rather than as a basis for liability in their own right, remains to be seen.

Edelman v. Lynchburg College, 535 U.S. ___, 122 S.Ct. 1145 (March 19, 2002).

Holding: A complainant who has timely filed an EEOC discrimination charge may verify the charge after the filing period has expired.

As noted above in the discussion of *National Railroad Passenger Corp. v. Morgan*, section 706(e)(1) of Title VII of the Civil Rights Act of 1964 requires that a charge of employment discrimination must be filed with the Equal Employment Opportunity Commission (EEOC) within 180 days (in certain cases within 300 days) after the alleged discriminatory practice occurred.[47] In a separate section, Title VII requires a complainant to swear that the allegations made in the charge are true, but Title VII does not set forth a time within which the charge must be so verified.[48] One hundred-sixty days after he was denied tenure by Lynchburg College, Professor Leonard Edelman sent a letter to the EEOC alleging that he had been denied tenure on account of his gender, national origin and religion. Edelman filed EEOC Form 5, with his notarized signature verifying his allegations, 313 days after he was denied tenure. The issue in *Edelman* was the validity of 29 C.F.R. § 1601.12(b), an EEOC regulation allowing complainants who have *filed* charges within the 180-day time period *to verify or swear* to the truth of the charge after 180 days have passed.[49]

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[44] See footnote 30.

[45] *See* Beall v. Abbott Laboratories, 130 F.3d 614, 620 (4th Cir. 1997). The Fourth Circuit never articulated a standard of its own for determining what was a continuing violation. *See, e.g.,* Emmert v. Runyon (4th Cir. 1999), an unpublished decision referenced at 178 F.3d 1283, where the court cites the tests developed by each of the First, Fifth and Seventh Circuits and finds that the plaintiff cannot establish a continuing violation under any of the three tests. Most of the cases in which the Fourth Circuit applied the continuing violations doctrine were harassment cases. *See, e.g.*, Conner v. Schrader-Bridgeport Internat'l, Inc., 227 F.3d 179 (4th Cir. 2000). Note that in at least one case, the Fourth Circuit was willing to apply the theory to discrete acts alleged to have been in violation of both Title VII and the Equal Pay Act. *See* Becker v. Gannett Satellite Information Network, Inc., 10 Fed.Appx. 135, 138 (4th Cir. 2001).

[46] *See Morgan*, 122 S.Ct. at 2072. Attorneys should also note that the Court also held that the limitations period for filing an EEOC charge is subject to waiver, estoppel and equitable tolling. *See Morgan* at 2072.

[47] 42 U.S.C. § 2000e-5(b) (2002).

[48] 42 U.S.C. § 2000e-5(e)(1) (2002).

[49] 29 C.F.R. § 1601.12(b) provides in pertinent part that "a charge may be amended to cure technical defects or

The Supreme Court's Decision

The Supreme Court upheld the validity of the regulation, calling it an "unassailable interpretation" of Title VII.[50] The Court noted that the requirement that complainants file their charges within 180 days was meant to encourage them to raise discrimination complaints before they become stale, "for the sake of a reliable result and a speedy end to any illegal practice that proves out."[51] The purpose of the verification requirement, on the other hand, is to protect employers from the disruption and expense of responding to a claim where the complainant is not serious or sure enough to support the allegations by an oath made subject to the penalties for perjury.[52] The Court concluded that because the filing and verification requirements have two very different objectives, and neither incorporates the other, reading the deadline for filing a charge into the verification requirement (as the Fourth Circuit had done below) was "a doubtful structural and logical leap."[53] The Court noted approvingly that the regulation protects employees who may not know at the time they file a charge that a sworn statement or verification is required,allowing them to correct the deficiency without inadvertently forfeiting their rights.[54] At the same time, the regulation recognizes employer interests by not requiring a response to a complaint until the employee has sworn to its accuracy.[55]

The Consequences of Edelman

From a practical standpoint, Edelman does not change the timing or the procedure under which North Carolina public employees may file charges alleging illegal discrimination or the manner in which employers are to respond to such charges. Local government employees who believe that they are the victims of illegal discrimination must file charges directly with the EEOC within 180 days of the alleged discriminatory act or practice. State employees and local government employees subject to the State Personnel Act must first file discrimination complaints with the Civil Rights Division of the Office of Administrative Hearings (OAH), which has a worksharing agreement with the EEOC pursuant to which OAH first investigates and considers such claims.[56] When an employer receives a charge, it should follow the instructions for responding to the allegations, checking first to make sure that it has indeed received a verified charge. If the employee has not sworn or affirmed the truth and accuracy of the allegations, the employer need not respond until the employee does so, [57] although it would be wise to contact the regional EEOC office to confirm that the complaint has not yet been verified.

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 122 S.Ct. 992 (February 26, 2002).

Holding: An employment discrimination complaint does not have to contain specific facts establishing a *McDonnell Douglas prima facie* case. It has only to give the employer reasonable notice of the nature and grounds of the plaintiff's claim.

Swierkiewicz will be of special interest to attorneys and to human resources professionals supervising the litigation of employment discrimination lawsuits**.** The courts have recognized that is often difficult for employees to find direct evidence than an employer intentionally discriminated against them**.** They have therefore developed a frameworked based on the United State Supreme Court's decision in *McDonnell Douglas Corp. v. Green*[58] by which an employee may prove the employer's discriminatory intent *indirectly*.

Under McDonnell Douglas, a plaintiff who shows that 1) he or she is a member of a protected class; 2) he or she is qualified for the job in question; 3) the employer has taken an adverse employment action against him or her under 4) circumstances that support an interence of discrimination, has proven a *prima facie* case of discrimination (the Latin phrase *prima facie* may be translated as "at first blush" or "on its face"). Once the employee has established a

omissions, including failure to verify the charge, or to clarify and amplify allegations made therein."

[50] *See Edelman*, 122 S.Ct. at 1152.

[51] *See Edelman*, 122 S.Ct. at 1149.

[52] *See Edelman*, 122 S.Ct. at 1149.

[53] *See Edelman*, 122 S.Ct. at 1152.

[54] *See Edelman*, 122 S.Ct. at 1150.

[55] *See Edelman*, 122 S.Ct. at 1149, 1150.

[56] Title VII authorizes the EEOC to enter into worksharing agreements with state and local agencies charged with the administration of state fair employment practices laws. *See* 42 U.S.C. § 2000e-8(b) (2002). N.C. Gen. Stat § 7A-759 designates OAH as North Carolina's deferral agency for cases deferred by the EEOC pursuant to 42 U.S.C**. §§** 2000e-5(c), (d) and 2000e-8(b).

[57] *See* 29 U.S.C. § 2000e-5(b); *Edelman*, 122 S.Ct. at 1149.

[58] 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

prima facie case, the employer is given an opportunity to assert a legitimate, non-discriminatory reason for the employment action in question**.** It is then up to the employee to show that the employer's explanation is a pretext and that the most likely reason for the action is discrimination.[59] But does an employee need to allege the elements of a *prima facie* case when filing a complaint in a Title VII lawsuit? This was the issue before the Supreme Court.

Akos Swierkiewicz, the Hungarian-born plaintiff, alleged that Sorema, N.A., his French-owned employer, had terminated him on the basis of both his national origin and his age, in violation of Title VII and the Age Discrimination in Employment Act**.** Swierkiewicz's complaint set forth the events leading up to this termination, provided relevant dates, and, as appropriate to claims of national origin and age discrimination, included the ages and nationalities of some of the persons involved**.** The complaint did not, however, allege *all* of the facts which, if proven at trial, would establish a *prima facie* case of discrimination under *McDonnell Douglas,* and the employer moved to dismiss**.** The trial court granted the motion to dismiss, finding that Swierkiewicz had failed adequately to allege "circumstances that would support an inference of discrimination," and the Second Circuit affirmed. [60] The Supreme Court agreed to review the case to decide the proper pleading standard applicable in employment discrimination cases.

The Court held that an employment discrimination plaintiff does not have to plead a *prima facie* case of discrimination, and that employment discrimination cases are to be governed by the ordinary rules for assessing the sufficiency of a civil complaint brought in federal court**.** Those rules provide that a complaint filed in federal court need include only "a short and plain statement of the claim showing that the pleader is entitled to relief."[61] The Court noted that the *McDonnell Douglas* prima facie case is an evidentiary standard designed to make clear the order and allocation of proof in the trial of an employment discrimination case in which the plaintiff lacks direct evidence of discrimination.[62] Turning the requirements for proving a prima facie case into a heightened pleading standard, as the Second and Sixth Circuits had done,[63] was in direct conflict with the Federal Rules of Civil Procedure's entire pleading system, which was adopted to focus litigation on the merits of a claim, rather than on the technical aspects of pleading and motion practice. The Court emphasized that the Federal Rules of Civil Procedure establish a pleading standard in which the likelihood of a claim's succeeding on the merits is irrelevant; under this system, a liberal discovery process and motions for summary judgment are provided as a way of testing and disposing of unmeritorious claims prior to trial.[64] Akos Swierkiewicz's complaint gave his employer fair notice of his claims and thus satisfied the pleading requirements of the Federal Rules of Civil Procedure.[65]

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[59] *See McDonnell Douglas*, 411 U.S. at 802.

[60] *See Swierkiewicz*, 122 S.Ct. at 996.

[61] *Swierkiewicz*, 122 S.Ct. at 997- 99. *See also* FED. R. CIV. P. 8(a).

[62] *Swierkiewicz*, 122 S.Ct. at 997.

[63] For the Sixth Circuit, *see* Jackson v. Columbus, 194 F.2d 737, 751 (6th Cir. 1999). The majority of Courts of Appeals had held that employment discrimination plaintiffs were not required to plead the elements of a *McDonnell Douglas* prima facie case.

[64] *Swierkiewicz*, 122 S.Ct. at 998-99.

[65] *Swierkiewicz*, 122 S.Ct. at 999.