

Where the Continuing Violation Theory Ends Under the LAD

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The continuing violation theory—an equitable exception to the two-year statute of limitations applicable to claims brought under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49 (LAD)—has been described by our New Jersey Supreme Court as “one of the most confusing theories in employment discrimination law.” *Shepherd v. Hunterdon Dev. Ctr.*, 174 N.J. 1, 18 (2002).

A recent and informal survey of members of the Sidney Reitman Employment Law American Inn of Court—whose members include leading employment law practitioners throughout the state—echoes the Supreme Court’s conclusion. The survey asked Inn members whether they believe the continuing violation theory only applies to hostile work environment claims under the LAD, and to elaborate upon any ruling they received in the law division concerning the doctrine’s application. The results revealed a sharp divide among these employment lawyers regarding the limits of the continuing violation theory. A very slight majority (52 percent) opined that the doctrine is limited to hostile work environment claims. The remaining responses did not believe any such limitation exists. The survey results further indicated that trial judges throughout the state variably apply the doctrine, with some limiting the theory’s application to hostile work environment claims and others applying it more expansively. The result of the confusion and inconsistent rulings is that the LAD’s statute of limitations is unpredictably applied in the trial courts, rendering as viable, claims that otherwise would be stale.

Both the confusion and the rulings are troublesome, primarily because the Supreme Court of New Jersey has rendered a trilogy of decisions, culminating in *Alexander v. Seton Hall Univ.*, 204 N.J. 219 (2010), which, when read collectively, limit the continuing violation theory to hostile work environment claims. Yet, four years later, continued confusion as to the proper application of the doctrine prevails.

This article explicates the continuing violation theory’s evolution before the Supreme Court of New Jersey in an effort to shed light on the doctrine’s limits and, in turn,

preserve the two-year statute of limitations set forth over 20 years ago in *Montells v. Haynes*, 133 N.J. 282, 286 (1993). (A caveat: this article does not address other equitable exceptions to the LAD's statute of limitations, such as the discovery rule, which is most commonly found in personal injury actions. See *Henry v. N.J. Dep't of Human Servs.*, 204 N.J. 320, 335-37 (2010). The discovery rule can toll the statute of limitations until a plaintiff discovers or reasonably should have discovered the harm alleged. *Id.*)

The Trilogy

In *Shepherd; Roa v. Roa*, 200 N.J. 555 (2010); and *Alexander*, the Supreme Court of New Jersey held that the continuing violation theory is limited to hostile work environment claims.

Before jumping into the trilogy, a bit of background is necessary.

There are two broad categories of employment discrimination claims that an employee can bring under the LAD. First, there are the traditional employment discrimination claims that involve what the courts have termed "discrete" employment decisions, such as hiring, firing, paying, promoting and transferring employees. Second, there are hostile work environment claims, which generally involve a series of non-discrete acts (or a single egregious non-discrete action) that are not employment decisions per se, but that sufficiently alter working conditions, such as off-color comments and/or gestures, so as to give rise to a cause of action under the LAD.

Two months before the court's decision in *Shepherd*, the Supreme Court of the United States explored the continuing violation theory's limits under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17, a federal employment discrimination law, in *Nat'l R.R. Passenger Corp. (AMTRAK) v. Morgan*, 536 U.S. 101 (2002). In *Morgan*, the court distinguished employment discrimination claims based upon discrete acts, from hostile work environment claims based upon non-discrete acts, in applying the continuing violation theory. The court held that the continuing violation theory did not apply to discrete acts brought under Title VII, but did apply to hostile work environment claims.

Shepherd

Soon after *Morgan*, the New Jersey Supreme Court in *Shepherd* faced a statute of limitations challenge in an LAD case that involved discrete acts, namely a job transfer and constructive discharge, as well as a hostile work environment claim based upon non-discrete acts, including threats, some of which occurred outside the two-year statute of limitations. The plaintiffs in *Shepherd* were former employees of a state-owned and -operated facility that provides long-term care to mentally and physically disabled people. Two of the plaintiffs' colleagues alleged their supervisors discriminated against them due to their race, and the plaintiffs outwardly supported their colleagues' claims. Thereafter, the plaintiffs alleged that they became subject to a pattern of harassment, which required one of them to transfer to a new location at the facility and the other to resign.

Looking to *Morgan*, the Supreme Court of New Jersey separately addressed the discrete acts, namely the job transfer and constructive discharge, from the non-discrete acts that formed the basis for the hostile work environment claim in *Shepherd*. 174 N.J. at 21-22; see *Carmona v. Resorts Int'l Hotel*, 189 N.J. 354, 370 (2007) (citations omitted) (explaining that New Jersey courts "frequently look[] to case law under Title VII ... for guidance in developing standards to govern the resolution of LAD claims"). In so doing, the New Jersey Supreme Court decided that the continuing violation doctrine applied to the hostile work environment claim, so as to render the non-discrete acts that occurred outside the two-year statute of limitations timely because at least one such non-discrete act occurred within the limitations periods. As far as the discrete acts, the Supreme Court of New Jersey decided the job transfer and constructive discharge were timely because they occurred within the LAD's two-year statute of limitations, but dismissed the discrimination claims premised on those acts for substantive reasons.

Roa

Eight-and-a-half years after *Shepherd*, the New Jersey Supreme Court in *Roa* explored whether the continuing violation theory could revive a discrete act, namely, a discharge, that occurred outside the LAD's two-year statute of limitations in light of a different and more recent discrete act, namely, the cancellation of a plaintiff's health insurance policy that occurred within the limitations period pursuant the discovery rule. 200 N.J. at 561, 572.

The plaintiffs in *Roa* were a husband and wife who were supervised by the plaintiff-husband's brother. Allegedly, this supervisor was romantically involved with two female subordinates, and the plaintiffs were subject to a pattern of harassment at work culminating in their terminations after the plaintiff-husband notified his sister-in-law about his brother's purported infidelity. After the plaintiff-wife's termination, but before her husband's, she underwent a surgery, and was surprised to learn that her health insurance would not cover her procedure because the plaintiff-husband's employer had cancelled the policy.

The New Jersey Supreme Court decided that the continuing violation theory could not revive the discrete act that occurred outside the two-year limitations period, namely the discharge, even though another discrete act, namely the cancellation of the health insurance policy, was timely: "[w]hat the doctrine does not permit," announced the court, "is the aggregation of discrete discriminatory acts for the purpose of reviving an untimely act of discrimination" 200 N.J. at 569; see also *Johnson v. N.J.*, No. 3736-07, 2012 N.J. Super. LEXIS 262 at *25 (App. Div. Feb. 8, 2012) (stating that the continuing violation theory "may not ... be exploited to bring discrete time-barred discriminatory acts within the statute of limitations simply because they are followed by discriminatory actions that are not so barred").

Alexander

About a year after *Roa*, the Supreme Court of New Jersey addressed whether the continuing violation theory could apply to a series of discrete acts that were closely related in *Alexander*, specifically, the issuance of paychecks emanating from pay-setting decisions that impacted the same people.

The plaintiffs in *Alexander* were three female university professors. They alleged that the university discriminated against them by paying them less than younger and/or male professors, and sought damages spanning several decades pursuant to the continuing violation theory, claiming “that the most current periods of discriminatory pay (i.e., the allegedly discriminatory wages paid within two years of the filing of the complaint) should have the effect of sweeping in, and including as timely, all prior periods of discriminatory disparate pay [d]ating back to their dates of initial hire” 204 N.J. at 230.

The New Jersey Supreme Court rejected the “plaintiffs’ attempt to convert the references to the continuing nature of the wrongs ... into something more binding in respect of modern limitations-tolling jurisprudence, specifically the ‘continuing violation’ doctrine.” 204 N.J. at 233. It explained that the original pay-setting decision as well as each paycheck an employee receives is a discrete act and, therefore, the original pay-setting decision and every paycheck the plaintiffs received outside the LAD’s two-year statute of limitations were time barred.

Conclusion

Read together, the New Jersey Supreme Court’s decisions in *Shepherd*, *Roa* and *Alexander* demonstrate that the continuing violation theory only applies to hostile work environment claims, which are premised upon non-discrete acts. The decisions make clear that the sheer number of discrete acts does not render them any less discrete. See also *Williams v. Costco Wholesale Corp.*, No. 2255-10, 2012 N.J. Super. LEXIS 533, at *22-23 (App. Div. Mar. 12, 2012) (separately examining the timeliness of a series of denied promotions, and holding those promotions that occurred outside the LAD’s two-year statute of limitations untimely). Thus, there should be no situation under which the continuing violation theory would apply outside of the hostile work environment context because the doctrine unequivocally cannot apply to discrete acts *no matter how closely related*.

Practitioners and trial judges should take into account this trilogy of New Jersey Supreme Court cases when considering arguments relating to the proper application of

the continuing violation theory and limit that application to hostile work environment claims under the LAD.

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