The Impact of *National Railroad Passenger Corporation v. Morgan* on the Scope-of-the-Charge Defense

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Before proceeding with an employment discrimination claim under equal employment opportunity statutes such as Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA"), a potential plaintiff must first exhaust administrative remedies. 42 U.S.C. §2000e-5; 42 U.S.C. §12117; 29 U.S.C. §626(d). The pre-suit administrative process is initiated by the filing of a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") or, in "deferral states," by filing a charge of discrimination with the state fair employment practice agency. Generally speaking, the administrative prerequisites to an employment discrimination lawsuit serve two primary purposes: (1) to encourage pre-suit conciliation; and (2) to notify the employer of the alleged discriminatory practices in question.

"The starting point for determining the permissible scope of a judicial complaint is the EEOC charge and investigation." *Eastland v. Tennessee Valley Auth.*, 714 F.2d 1066, 1067 (11th Cir. 1983). A plaintiff cannot maintain a claim for discrimination under Title VII, the ADA or the ADEA in court if the claim was not contained in a charge of discrimination previously filed with the EEOC and/or a state deferral agency. Such claims are beyond the scope of the charge.

This article will examine the impact of the United States Supreme Court's decision in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), on the "scope-of-the-charge" defense. More specifically, discussion will involve how the Court's definition of "discrete acts" of discrimination is now being relied on by an increasing number of federal courts in determining whether the allegations contained in a complaint filed in court have been fully exhausted.

The *Morgan* "Discrete Acts" Rule

In *Morgan*, the Court defined the parameters of the "discrete acts" rule. The Court explained that "discrete acts" of alleged discrimination are those that "are easy to identify," and include distinct acts "such as termination, failure to promote, denial of transfer, or refusal to hire…" *Morgan*, 536 U.S. at 114. The *Morgan* Court applied the discrete acts rule to bar a plaintiff from maintaining claims based on incidents that had occurred more than 300 days *before* the plaintiff filed her charge of discrimination. However, the rule announced in *Morgan* "is equally applicable, however, to discrete claims based on incidents occurring *after* the filing of [a plaintiff's] EEO complaint." *Martinez v. Potter*, 347 F.3d 1208, 1210–11 (10th Cir. 2003) (emphasis in original). Stated differently, *Morgan* applies to determinations of whether a discrete act alleged in a judicial complaint is properly within the scope of a plaintiff's charge of discrimination. *Id.* (citing *Morgan*, 536 U.S. at 113) ("[t]he existence of past acts…does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed.").

Accordingly, post-*Morgan*, a plaintiff who files a charge of discrimination alleging a discrete act of discrimination (*e.g.*, failure to promote) and is then subjected to another alleged discrete act of discrimination (*e.g.*, termination), but who does not file a separate charge alleging the subsequent act, will be precluded from maintaining a claim based on the subsequent act in court. In such a circumstance, the subsequent discrete act of discrimination (termination in the above example) has not been exhausted and is therefore beyond the scope of the charge.

The Tenth Circuit appears to have

taken the lead on applying the discrete acts rule announced in *Morgan* to the scope-of-the-charge defense. Finding that *Morgan* "has effected fundamental changes to the doctrine allowing administratively unexhausted claims in Title VII actions," in *Martinez*, *supra,* the Tenth Circuit held that "unexhausted claims involving discrete employment actions are no longer viable." *Id.* at 1210. The court found that the rule announced in *Morgan* applied not only to unexhausted claims occurring more than 300 days *prior* to the filing of a charge of discrimination, but also "to discrete claims based on incidents occurring *after* the filing of Plaintiff's EEO complaint." *Id*. at 1210–11 (emphasis supplied).

The Tenth Circuit extended and reaffirmed Martinez in *Annett v. Univ. of Kansas*, 371 F.3d 1233 (10th Cir. 2004). In so doing, the court noted that the previous "line of inquiry" employed in pre-*Martinez* cases (and which is also employed by virtually all circuits) that asks whether the noncharged allegations were "like or reasonably related to the allegations of the EEOC charge" was no longer applicable in light of *Morgan*. *Id. at 1238*, quoting Ingels v. Thiokol Corp., 42 F.3d 616, 625 (10th Cir. 1994); see also, *Uriostegui v. Klinger Constructors Inc.*, 2004 WL 1551595 at *10 (10th Cir. 2004) and *Tucker v. Colorado Dep't of Pub. Health and Env't*, 2004 WL 1632805 at *4–5 (10th Cir. 2004).

District courts within the Tenth Circuit have followed the holding in *Martinez. See, Zartman v. Coffey County Hosp.*, 2004 WL 877667 at *2 (D. Kan. 2004) (plaintiff's failure to include allegations regarding termination and constructive discharge were beyond scope of charge of discrimination that alleged plaintiff had been subjected to a hostile work environment); *Jones v. Mineta*, 2004 WL 1534177 at *6 (D. Kan. 2004) (plaintiff who failed to file separate EEO complaint regarding alleged retaliatory acts did not exhaust administrative remedies). However, at least two federal district courts from outside the Tenth Circuit have reached the same conclusion, suggesting that the issue is now ripe in other circuits. In *Bowie v. Ashcroft*, 283 F. Supp. 2d 25 (D.D.C. 2003), a Title VII case, the District Court for the District of Columbia relied on the "clear directive" announced in *Morgan*, and held that discrete acts of discriminatory or retaliatory treatment that were not part of an administrative charge of discrimination "simply do not survive." *Id.* at 34. Interestingly, *Morgan* and *Martinez* have also been relied on in applying the scope-of-the-charge defense to unexhausted claims brought under the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 800. *See, Willis v. Vie Financial Group, Inc.*, 2004 WL 1774575 at *5 (E.D. Pa. 2004).

Retaliation Claims

Many federal courts have been reluctant to apply the scope-of-the-charge defense to retaliation claims. Prior to *Morgan*, there was an "array of seemingly contrary authority" regarding whether claims for retaliatory discharge were subject to the scope-of-the-charge defense. *Robinson v. Dalton*, 107 F.3d 1018, 1024 (3rd Cir. 1997); *McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 482 (7th Cir. 1996) (collecting cases). For example, Fifth Circuit precedent holds that retaliation claims growing out of previously filed charges generally do not require exhaustion. *See, Gupta v. East Texas State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981).

After *Morgan*, cases (such as *Gupta*) holding that claims based on acts of retaliation that occur after the filing of a discrimination charge need not be exhausted are no longer good law. Indeed, several courts recently have applied *Morgan* to retaliation claims, finding that the *Morgan* discrete acts rule makes no distinction between claims based on discrimination and those based on allegations of retaliation. Thus, relying on *Morgan*, these courts have held that discrete retaliatory acts must be exhausted through the filing of a separate or amended charge of discrimination. Those courts reaching this conclusion have generally relied on that portion of the *Morgan* decision that finds "[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Morgan*, 536 U.S. at 114. *See*, *Menendez v. Scotiabank of Puerto Rico, Inc.*, 321 F. Supp. 2d 273, 280 (D. Puerto Rico 2004) (stating that following *Morgan*, "[a] plaintiff raising claims of discrete discriminatory or retaliatory acts, such as termination…must file a charge within the appropriate one hundred eighty (180) or three hundred (300) day period with the EEOC or lose the ability to recover."); *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1292 (11th Cir. 2002) (discrete act of failure to reinstate time-barred); *see also*, *Martinez*, 347 F.3d at 1211; *Annett*,

371 F.3d at 1238; *Bowie*, 283 F. Supp. 2d at 34-35; *Uriostegui*, 2004 WL 1551595 at *9-10; *Zartman*, 2004 WL 877667 at *1–2; *Jones*, 2004 WL 1534177 at *6.

Conclusion

The utility of the *Morgan* decision has taken on added importance and may be used broadly by defense counsel in raising the scope-of-the-charge defense. Discrete acts of discrimination and retaliation that are not alleged in a plaintiff's charge of discrimination may not be pursued in a judicial forum. From a litigation perspective, one of the first steps counsel should take in responding to the complaint is to determine whether the allegations are broader than those contained in the charge of discrimination and whether the complaint includes discrete acts of discrimination or retaliation not alleged in the charge. Where counsel represents the employer at the charge stage, to the extent possible, special care should be taken to ensure that the employer's response does not address uncharged discrete acts. If it does, the employer may be estopped from raising the discrete act rule to its scope-of-the-charge defense.