Timeliness Issues in EEO Cases
EXCEL 2013

Presented by the

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Morgan, Ledbetter and Reasonable Accommodation

TIMELINESS

Regulatory Time Frames

- Complainant must initiate counseling within 45 days of:
  - Effective date of personnel action
  - Date of incident or event alleged to be discriminatory
  - Knew or should have known that personnel action, incident or event was discriminatory

29 CFR 1614.105(a)(1) & (2)

Regulatory Time Frames

- "The agency or the Commission shall extend the 45-day limit . . . when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission."

Id. at (a)(2)

Regulatory Exceptions

- Time limit is subject to:
  - Waiver
  - Tolling
  - Estoppel, and
  - Notice and awareness of time limit

Posting Requirements

- EEOC requires agencies to post time limit for initiating counseling.

  29 CFR § 1614.102(b)(7)

- Even if notice not posted, complainant must show he or she was otherwise unaware of time limit.

  See, e.g., *Gomes-Battle v. Secretary of Transportation*, EEOC Appeal No. 0120073604 (2007)

Posting Requirements

- Burden of proof is on the Agency to prove untimeliness.
- Agency must provide, in complaint file, specific evidence that time limit was posted.

Gomes-Battle; Mixon v. Postmaster General,

EEOC Appeal No. 01A11674 (2002)

Posting Requirements

- Standards of notice may be more stringent for applicants.

Bartolome v. Postmaster General,
EEOC Appeal No. 01A11004 (2001)
(notice must be in place applicant likely to see)

- Also, must show applicant otherwise knew of timeframe.

LeVan v. Tennessee Valley Authority, EEOC Appeal No. 0120113518 (2012) (dismissal reversed where agency did not demonstrate applicant had knowledge)

Posting Requirements

- Training can suffice in lieu of posting time limits, but only if time limits are specifically covered in training.

Romanition v. Postmaster General,

EEOC Appeal No. 01A12020 (2001)

Posting and Notice

- Agency must demonstrate that notice of final interview was received by someone of suitable age and discretion.

Meza v. Postmaster General, EEOC Appeal No. 0120103757 (2012) (Commission reversed dismissal of untimely formal complaint where complainant's 15 year-old daughter signed for certified mail receipt, holding daughter was not of suitable age and discretion to accept important legal documents)

Waiver of Time Frame

- Waiver:
  - Complainant prevented from timely initiating counseling for reasons beyond his or her control
- Examples:
  - Death in family
  - Mental or physical incapacitation, or
  - Natural disaster

Waiver of Time Frame

- Mental or physical incapacity must be such that complainant was not capable to initiating counseling.

Butler v. Postmaster General, EEOC Appeal No. 0120113723 2012) (Commission found complainant was incapacitated due to break down at work and subsequent diagnosis of major depression with acute anxiety and PTSD related to sexual harassment in workplace and excused untimely EEO contact)

Waiver of Time Frame

- *Albright v. VA,* 0120110509 (March 18, 2011) (Commission reversed agency's dismissal of formal complaint as untimely where complainant's medical condition (multiple sclerosis) prevented her from retrieving her own mail and required her to rely upon third party)
-

Tolling of Time Frame

- Tolling:
  - Complainant reasonably unaware of discrimination.
- Examples:
  - Complainant was unaware that personnel action, incident or event took place at time it occurred; or
  - Complainant was aware of action, incident or event, but had no reason to believe it was discriminatory.

Tolling of Time Frame

- "Reasonable suspicion" standard.

  Cottman v. Defense Investigative Service,

  EEOC Petition No. 05880312 (1988)

- Mere inquiry into race and age of selectee did not trigger time limit; knowledge of race and age did.

Tolling of Time Frame

- "Reasonable suspicion arises when one has reason to support the belief that prohibited discrimination has occurred, *i.e.*, facts and/or circumstances."

Royster v. Secretary of Treasury,
EEOC Petition No. 05910690 (1991)

Tolling of Time Frame

- Time limit ran from when black physician assistant discovered that white assistant was not terminated for distributing a drug without a physician's prescription.

Stevens v. Secretary of Veterans Affairs,
EEOC Appeal No. 0120064118 (2007)

Doctrine of Estoppel

- Equitable Estoppel:
  - Reliance on agency advice
  - Does not require bad faith

Doctrine of Estoppel

- "Equitable estoppel is the principle by which a party is precluded by his own acts, words, or silence from asserting a right to which he would otherwise be entitled against another who rightfully relied on the party's acts, words or silence to his detriment."

Compton v. Smithsonian Institution,
EEOC Appeal No. 01A50809 (2005)

Timeliness after *Morgan*

- *National Railroad Passenger Corp. v. Morgan*, 122 S.Ct. 2061 (2002)
  - Continually disciplined more harshly than white employees
  - Subjected to hostile environment harassment

Timeliness after *Morgan*

- *Morgan:*
  - Statute of limitations for Title VII is 180 days after "unlawful employment practice."
  - "We have repeatedly interpreted the term 'practice' to apply to a discrete act or single 'occurrence,' even when it has a connection to other acts."
  - Each discrete act starts the limitations period.

Discrete Discriminatory Acts

- *Morgan:*
  - Continuing Violations -- Discrete Acts:
  - General rule is that "discrete discriminatory acts are not actionable if timebarred, even when they are related to acts alleged in timely filed charges."

Hostile Environment Claims

- *Morgan*
- "Hostile environment claims are different in kind . . . Their very nature involves repeated conduct . . . Such claims are based on the cumulative affect of individual acts."
- "A hostile work environment claim is comprised of a series of separate acts that collectively constitute one 'unlawful employment practice.'"

Hostile Environment Claims

- *Morgan* -- Result
- Hostile environment claim is timely if any act furthering environment occurred within 45 days of counseling.
- Employer may have defenses that limit period of damages;
- Two-year limitation on back pay.

Hostile Environment Claims

- Hostile environment claim spanning three years that included discrete personnel acts, such as performance rating, position assignment and proposed termination.

Hubbard v. Secretary of Homeland Security,
EEOC Appeal No. 0120053612 (2007)

Hostile Environment Claims

- *Hubbard* (con't):
- Where discrete acts were part of pattern combined with sexual comments, the "discrete acts of discrimination were in fact within the relevant time period and are evidence, if proven, of harassment . . . not discrete acts of discrimination."

Hostile Environment Claims

- "A discrete act may be part of a hostile work environment claim . . . [I]f an untimely discrete act is part of a timely hostile work environment claim, complainant may only challenge the act as part of a hostile work environment claim. Recovery for the discrete act is unavailable for the act in and of itself, but is available for the act as part of the hostile work environment." (Citation omitted).

Rolison v. Attorney General,
EEOC Appeal No. 0120073281 (2007)

Timeliness after *Morgan*

- *Morgan* did not address
  - *Systemic pattern or practice claims, or*
  - *Reasonable accommodation claims*

Systemic or Recurring Violations

- Systemic Violations:
  - EEOC View: Each act was new violation and restarted limitations period.
  - *E.g.*, EPA violation, every paycheck constituted new violation.

Systemic or Recurring Violations

- Ledbetter brought EPA and Title VII claim alleging she was paid less than male counterparts.
- Paid less based on previous evaluations.

Ledbetter v. Goodyear Tire and Rubber Co.,
127 S.Ct. 2162 (2007)

Systemic or Recurring Violations

- Ledbetter did not allege discrimination in evaluations within limitations period;
- Only the lingering effects of past discrimination.
- EPA claim was dismissed, only Title VII claim went to Supremes.

Systemic or Recurring Violations

- *Ledbetter:*
  - *"Morgan* is perfectly clear that when an employee alleges 'serial violations', *i.e.*, a series of actionable wrongs, a timely EEOC charge must be filed with respect to each discrete alleged violation."

Systemic or Recurring Violations

- Lilly Ledbetter Fair Pay Act or 2009, Pub. L. 111-2.
  - Reversed *Ledbetter*
  - Reinstated EEOC view

Systemic or Recurring Violations

- "[A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice."

Reasonable Accommodation

- What is reasonable accommodation claim?
  - Is it systemic or recurring violation?
  - Is it continuing violation?
  - Is it one unlawful employment practice?

Reasonable Accommodation

- "Because the record does not establish that the agency specifically denied complainant's requests . . . thereby triggering the time limit . . . Complainant's EEO contact was timely."
- Characterized as "recurring" violation.

McGreevy v. Postmaster General,
EEOC Appeal No. 01A43361 (2004)

Reasonable Accommodation

- Denial of accommodation continued through date of counselor contact because "there is no indication . . . that complainant was informed she would not be accommodated."

Coddington v. Postmaster General,
EEOC Appeal No. 01A40149 (2004)

Reasonable Accommodation

- Complaint timely where agency simply ignored complainant's requests for accommodation.

Bergman v. Postmaster General,
EEOC Appeal No. 01A61204 (2006)

Reasonable Accommodation

- Accommodation denied March 6, and May 29, 1998
- Counseling initiated May 28, 1998
- Claim on first denial untimely; second denial timely.

Porter v. Postmaster General,
EEOC Appeal No. 01994911 (2003)

Reasonable Accommodation

- *Porter v. USPS*:
- "The duty to reasonably accommodate...is an ongoing one, and each denial...restarts the time period for contacting an EEO counselor."

See also Kirkland v. Secretary of Army,
EEOC Appeal No. 01A42874 (2005)

Reasonable Accommodation

- Complainant should have reasonably suspected accommodation denied when agency offered position he believed was outside restrictions.
- Accepted "under protest."

Sipple v. USPS,

EEOC Appeal No. 01A43420 (2004)

Reasonable Accommodation

- Complainant requested accommodation of telework in April 2004, denied in August 2004.
- Requested accommodation of transfer in August, denied in November 2004.
- Initiated counselor contact in January 2005.

Noda v. Secretary of Housing and Urban Development,

EEOC Appeal No. 0120070309 (2009)

Reasonable Accommodation

- Commission found denials were “discrete events” that triggered 45-day period for counselor contact.
- Counselor contact untimely.

Reasonable Accommodation

- "The Supreme Court has held that a Complainant alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one falls within the filing period. . . This principle applies to this case as it is clear that Complainant initiated contact with an EEO Counselor within the regulatory time frame, at a minimum, in regard to the above referenced reasonable accommodation issue."

Hackney v. Secretary of Homeland Security,

EEOC Appeal No. 0120093106 (2011)

Reasonable Accommodation

- Rules to extract:
  - Express denial of accommodation requests starts time running.
  - Express grant of accommodation requests starts time running if complainant believes it is less than reasonable accommodation.

Reasonable Accommodation

- Rules to extract
  - Claim can be revived by subsequent request and denial.
  - But, initial claim remains untimely.

Thanks for attending
EEOC Law Week:

Basic EEO Nuts & Bolts

Good luck out there.

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