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A Door Left Open? National Railroad Passenger Corporation v. Morgan and Its Effect on Post-Filing Discrete Acts in Employment Discrimination Suits

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A DOOR LEFT OPEN? *NATIONAL RAILROAD PASSENGER CORPORATION V. MORGAN* AND ITS EFFECT ON POST-FILING DISCRETE ACTS IN EMPLOYMENT DISCRIMINATION SUITS

I. INTRODUCTION

Imagine that you are an employer and have been sued by one of your employees, *T*, who is an African-American supervisor at your company. *T* claims he was retaliated against because he participated as a witness in an Equal Employment Opportunity (EEO) proceeding in 2003. The complaint filed by *T* alleges that you have engaged in a "discrete act"[1] of retaliation for his EEO participation, which is a protected activity under Title VII.[2]

You soon learn that *T* plans to amend his complaint to include fourteen additional discrete acts. *T* alleges he was denied seven promotion opportunities, five of which were given to less qualified white males, and told by his supervisor that because he was in the "doghouse," his opportunities for promotion would be limited for some time. Further, *T* claims he was denied training on three occasions, which made him less eligible for certain promotions, and denied details[3] on four occasions.

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1. Discrete acts have been characterized as denial of training, "termination, failure to promote, denial of transfer, [and] refusal to hire." Nat'l R.R. Passenger Corp. v. Morgan (*Morgan*), 536 U.S. 101, 114 (2002). Courts have subsequently expanded this list. *See, e.g.*, Del. State Coll. v. Ricks, 449 U.S. 250, 257-58 (1980) (denying tenure to college professor); United Air Lines, Inc. v. Evans, 431 U.S. 553, 554 (1977) (forcing a female employee to resign because she violated a policy prohibiting marriage); Porter v. Cal. Dep't of Corr., 419 F.3d 885, 893 (9th Cir. 2005) (refusing to grant vacation requests, requiring plaintiff to obtain medical tests by her own physician, leaving negative performance evaluations in plaintiff's personnel file, and instructing plaintiff to enter work site through a back gate); Lyons v. England, 307 F.3d 1092, 1108 (9th Cir. 2002) (denying favorable assignment of details).

2. *See infra* notes 28-30 and accompanying text.

3. Details are opportunities to temporarily work at a higher level position in order to gain experience needed for promotions. *Lyons*, 307 F.3d at 1101.

You are aware that prior to this lawsuit, *T* had filed a charge with the Equal Employment Opportunity Commission (EEOC).[4] However, that charge only complained of one specific discrete act of retaliation, a lower than usual performance evaluation in late 2004. You want to resolve the lawsuit with *T*, but you have a problem. Depending on which federal judicial circuit in which your business resides and where *T* decides to file suit, you can be held liable for a different number of the charges brought by *T*.

Federal jurisdiction is a prerequisite to filing a Title VII claim.[5] In order to establish jurisdiction for a discrimination or retaliation claim in federal court, a plaintiff must "exhaust his or her administrative remedies before seeking adjudication of a Title VII claim."[6] To consider the administrative remedies exhausted, a plaintiff must file a charge with the EEOC within the requisite charge-filing period, either 180 or 300 days after the discrete act occurred; this gives the EEOC a chance to investigate the charge.[7]

Prior to *National Railroad Passenger Corp. v. Morgan*,[8] the Supreme Court had not addressed the circumstances required for a Title VII[9] plaintiff to file suit on discrete acts that occurred outside the charge-filing period.[10] In *Morgan*, the plaintiff, Abner Morgan, was an African American who had been employed by Amtrak for five years.[11] After he was terminated, he filed a charge with the EEOC alleging he was subjected to racial discrimination and retaliation repeatedly dur-

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4. Title VII of the Civil Rights Act of 1964 created the EEOC, comprised of a five-member panel appointed by the President, to interpret and administer Title VII's provisions. JOEL W. FRIEDMAN & GEORGE M. STRICKER, JR., THE LAW OF EMPLOYMENT DISCRIMINATION 17 (Robert C. Clark et al. eds., 5th ed. 2001).

5. *See Lyons*, 307 F.3d at 1103-04.

6. *Id.* at 1103 (citing B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1099 (9th Cir. 2002)).

7. *Id.* at 1104; 42 U.S.C. § 2000e-5(e)(1) (2000); *see also* U.S. Equal Employment Opportunity Comm'n, *Filing a Charge of Employment Discrimination* [hereinafter *Filing a Discrimination Charge*], http://www.eeoc.gov/charge/overview_charge_filing.html (last visited Jan. 21, 2007).

8. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

9. *See* 42 U.S.C. § 2000e-1 to -17 (2000).

10. Vincent Cheng, National Railroad Passenger Corporation v. Morgan*: A Problematic Formulation of the Continuing Violations Theory*, 91 CAL. L. REV. 1417, 1423 (2003).

11. *Morgan*, 536 U.S. at 105.

ing those five years.[12] The Court unanimously held that a plaintiff is barred from "recovery for discrete acts of discrimination and retaliation" that do not occur within the statute of limitations period required by Title VII, in this case 300 days.[13] The Court's holding applied to facts that involved discrete acts that occurred prior to the initial EEOC complaint.[14] Thus, the door has been left open for circuit courts to disagree on how, if at all, the application of the Court's holding in *Morgan* should be applied to post-filing discrete acts.

Since *Morgan* was decided in 2002, the circuit courts have reached different conclusions on whether a plaintiff must first exhaust his or her administrative remedies as applied to post-filing discrete acts before he or she is allowed to seek recovery and hold the employer liable for damages in federal court. Thus, a circuit split has developed between those courts that believe the administrative exhaustion principles the *Morgan* Court applied to pre-filing discrete acts should similarly apply to discrete acts occurring after the filing of an administrative charge[15] and those courts that believe this standard is too rigid to promote the policy goals underlying Title VII.[16] The confusion over the application of *Morgan* has gone as far as creating a split within the Sixth Circuit at the appellate court level and the Third Circuit at the district court level.[17]

This Comment addresses the issues underlying this circuit split and proposes a new standard under which future cases should be con-

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12. *Id.*

13. *Id.*

14. *Id.* at 114.

15. The Tenth, Eleventh, and District of Columbia Circuits subscribe to this view. *See* discussion *infra* Part IV.A.

16. The Second, Eighth, and Ninth Circuits and the EEOC subscribe to this view. *See* discussion *infra* Part IV.B.

17. For splits in the Sixth Circuit, see *Delisle v. Brimfield Township Police Department*, 94 F. App'x 247, 252-54 (6th Cir. 2004), *Sherman v. Chrysler Corp.*, 47 F. App'x 716, 720-21 (6th Cir. 2002), *Mullins v. Potter*, No. 04-72966, 2005 WL 3556198, at *1-2 (E.D. Mich. Dec. 29, 2005), and *Jordan v. U.S. Department of Education*, No. 1:05CV1066, 2006 WL 1305073, at *1-2, 5 (N.D. Ohio May 10, 2006). For splits in the Third Circuit, see *Patsakis v. Eastern Orthodox Foundation*, No. 04-1662, 2006 WL 2087513, *7 (W.D. Pa. May 17, 2006), *Allen v. National Railroad Passenger Corp.*, No. 03-CV-3497, 2005 WL 2179009, at *10-11 (E.D. Pa. Sept. 6, 2005), and *Crumpton v. Potter*, 305 F. Supp. 2d 465, 474-76 (E.D. Pa. 2004).

sidered, taking into account the policy and intent of Title VII and the policy arguments of both employers and employees involved in this type of suit. Part II of this Comment discusses a brief history of the EEOC and the purpose, goals, and procedural requirements, including the administrative exhaustion requirement, embodied in Title VII. Part III discusses the Supreme Court's decision in *Morgan*. Part IV comments on the current state of the law as applied to the exhaustion requirement for post-filing discrete acts and the circuit split that has developed since *Morgan*. Part V investigates the impact of the circuit split on employers and employees and the policy considerations on both sides of the issue. Part VI proposes a consistent and workable standard to address future claims regarding post-filing discrete acts. This standard is a middle ground between the two viewpoints that takes into account the arguments of the various circuits and the implications for both employers and employees discussed in Parts IV and V. Finally, Part VII concludes with the application of the proposed standard to the opening hypothetical and its impact on that case.

II. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TITLE VII

A. *History of the Equal Employment Opportunity Commission*

The EEOC was created by the Civil Rights Act of 1964, which focused on eliminating the workplace discrimination brought to the forefront during the civil rights protests in the early 1960s.[18] Congress intended the EEOC to be "the lead enforcement agency in the area of workplace discrimination."[19] However, when first created, the EEOC lacked real enforcement authority because it only had the power to "receive, investigate, and conciliate complaints."[20] By 1971, many had come to see the EEOC as a "toothless tiger" because discrimination was still rampant in both the public and private sector, and minorities were still struggling to make significant inroads against the entrenched

18. Equal Employment Opportunity Comm'n, *Pre 1965: Events Leading to the Creation of EEOC*, http://www.eeoc.gov/abouteeoc/35th/pre1965/index.html (last visited Jan. 21, 2007).

19. *Id.*

20. *Id.*

white male majority.[21] As a result, Congress conducted public hearings to consider potential amendments to Title VII.[22] After the hearings, Congress passed the Equal Employment Opportunity Act of 1972[23] to give the EEOC its "teeth"—power to litigate against public and private employers and labor unions.[24] With the changes in place, the EEOC was better suited to promote the Congressional intent of Title VII.

B. *The Purpose and Goals of Title VII*

The passage of Title VII of the Civil Rights Act of 1964[25] is considered a "watershed development in the national commitment to making equality in the workplace a reality,"[26] and a "landmark in employment discrimination legislation."[27] Title VII prohibits an em-

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21. Equal Employment Opportunity Comm'n, *The 1970s: The "Toothless Tiger" Gets Its Teeth—A New Era of Enforcement* [hereinafter *Toothless Tiger*], http://www.eeoc.gov/abouteeoc/35th/1970s/index.html (last visited Jan. 21, 2007).

22. *Id.*

23. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

24. *Toothless Tiger*, *supra* note 21. There were five major provisions of the Equal Employment Opportunity Act of 1972:

> [the] EEOC received litigation authority to sue nongovernmental 'respondents[,]' employers[,] unions, and employment agencies; [the] EEOC could file pattern or practice lawsuits; Title VII coverage was expanded to include Federal Government and state and local governments, as well as elementary, secondary, and higher educational institutions; [t]he number of employees needed for Title VII coverage over employers was reduced from 25 to 15; and [t]he Equal Employment Opportunity Coordinating Council was established, composed of [the] EEOC, the Departments of Justice and Labor, the Civil Service Commission, and the Civil Rights Commission to 'maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency' among the various federal programs.

Id.

25. 42 U.S.C. § 2000e-1 to -17 (2000).

26. Tara-Ann Topputo, *In Opposition to Applying the Continuing Violation Doctrine to Hostile Work Environment Claims:* National Railroad Passenger Corp. v. Morgan, *536 U.S. 101 (2002)*, 28 U. DAYTON L. REV. 449, 452 (2002) (quoting Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 669 (2000)).

27. Michael W. Roskiewicz, *Title VII Remedies: Lifting the Statutory Caps*

ployer from discriminating against an employee on the basis of the employee's race, color, religion, sex, or national origin.[28] The statute provides two main theories for recovery: disparate treatment and disparate impact.[29] The statute also protects employees from discrimination in the form of retaliation for participation in an EEO protected activity or opposition to an employment practice made unlawful by Title VII.[30] The goal of Title VII was to rectify past and prevent future workplace discrimination and to provide a remedy for economically injured employees.[31] Title VII sought to accomplish this goal by providing economic and injunctive relief to injured employees, remedial incentives aimed at getting employers to eliminate discriminatory employment practices.[32]

C. *The Procedural and Administrative Exhaustion Requirements of Title VII*

Title VII requires plaintiffs to exhaust his or her administrative remedies as a jurisdictional prerequisite to filing a claim for discrimination or retaliation in federal court.[33] To satisfy this requirement, plaintiffs must file a charge with the EEOC within the statutory filing period.[34] The exhaustion requirement plays an important role of encouraging settlement through conciliation and voluntary compliance during administrative proceedings, which "would be defeated if a complainant could litigate a claim not previously presented to and investigated by the EEOC."[35]

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from the Civil Rights Act of 1991 to Achieve Equal Remedies for Employment Discrimination, 43 WASH. U. J. URB. & CONTEMP. L. 391, 391 (1993).

28. § 2000e-2(a)(1).

29. *See* § 2000e-2(a)(1) (covering disparate treatment); § 2000e-2(a)(2) (covering disparate impact).

30. § 2000e-3(a).

31. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

32. *Id.*

33. Lyons v. England, 307 F.3d 1092, 1103-04 (9th Cir. 2002) (citing B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1099 (9th Cir. 2002)); *see also Filing a Discrimination Charge*, *supra* note 7.

34. *Lyons*, 307 F.3d at 1104; *see also* § 2000e-5(b).

35. Miller v. Int'l Tel. & Tel., 755 F.2d 20, 26 (2d Cir. 1985).

A plaintiff is only entitled to a hearing on the merits of his or her claim if the complaint complies with EEOC guidelines.[36] The requirements an employee must follow for filing a timely charge with the EEOC are listed in Title VII.[37] An employee must file his or her charge with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred."[38] However, if the employee is located in a state with an agency "with [the] authority to grant or seek relief from such practice or to institute criminal proceedings," the charge must then be filed "within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law."[39] Federal sector employees are subject to an additional requirement; they must contact an EEO counselor within forty-five days of the alleged unlawful employment practice.[40] "[I]f the matter is not resolved, the employee may submit a formal administrative complaint."[41] After the charge is filed, the employee must wait 180 days before requesting a right to sue letter, and once the letter is issued, an employee has only 90 days to file a lawsuit.[42]

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36. "There are substantive elements that must be met for a charge under Title VII to be valid: 1) it must be timely; 2) it must be filed by a covered person claiming to be aggrieved, a person filing on behalf of such an aggrieved person, or a member of the Commission; 3) it must be filed against a covered respondent: an employer, a union, an apprenticeship training program, or an employment agency; 4) it must allege discrimination on a basis covered by Title VII: race, color, religion, sex, national origin, or retaliation; and 5) it must allege an issue, i.e. an adverse employment action." Topputo, *supra* note 26, at 480 n.31 (citing Kathryn Doi, *Equitable Modification of Title VII Time Limitations to Promote the Statute's Remedial Nature: The Case for Maximum Application of the* Zipes *Rationale*, 18 U.C. DAVIS L. REV. 749, 751, 754 n.29 (1985)).

37. *See* § 2000e-5(e)(1).

38. *Id.*

39. *Id.*; *see also* U.S. Equal Employment Opportunity Comm'n, *Filing a Charge*, http://www.eeoc.gov/facts/howtofil.html (last visited Jan. 21, 2007).

40. *See* 29 C.F.R. § 1614.105(a)(1) (2006).

41. Sommatino v. United States, 255 F.3d 704, 708 (9th Cir. 2001).

42. Doi, *supra* note 36, at 752. EEOC guidelines require the issuance of a right to sue letter upon a finding of no reasonable cause, a failure of the EEOC in its conciliation attempts, or if the EEOC does not sue the complaint respondent directly. *See* 29 C.F.R. §§ 1601.19(a), 1601.28(b) (2006).

Failure to comply with these filing requirements can be fatal to a Title VII discrimination claim.[43] The Supreme Court has noted that the time period for filing a discrimination claim represents a value judgment by Congress "concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."[44] Therefore, an employee who files his or her claim outside of the required time period faces the unpleasant and unfortunate result of the claim being time-barred.

III. THE SUPREME COURT'S DECISION IN *NATIONAL RAILROAD PASSENGER CORPORATION V. MORGAN*

A. *The Facts*

Abner Morgan was an African-American man hired by National Railroad Passenger Corp. (Amtrak) in August of 1990.[45] He was terminated on March 3, 1995, because of an incident with one of his supervisors.[46] The supervisor alleged that Morgan had threatened him, which led to the supervisor demanding to talk to Morgan in the supervisor's office.[47] Morgan refused to discuss the incident with his supervisor without union representation present.[48] When the supervisor denied this request for representation at the meeting, Morgan left the jobsite.[49] Morgan was suspended, charged with violating company rules, and subsequently terminated following a hearing.[50]

Morgan alleged that he was subjected to racially motivated, discriminatory, and retaliatory acts by his supervisors, and that the supervisors subjected him to a "racially hostile work environment" during

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43. Cherosky v. Henderson, 330 F.3d 1243, 1245 (9th Cir. 2003) (quoting Lyons v. England, 307 F.3d 1092, 1105 (9th Cir. 2002)).

44. Del. State Coll. v. Ricks, 449 U.S. 250, 259-60 (1980) (quoting Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 463-64 (1975)).

45. Morgan v. Nat'l R.R. Passenger Corp. (*Amtrak*), 232 F.3d 1008, 1010-11 (9th Cir. 2000), *aff'd in part, rev'd in part*, Nat'l R.R. Passenger Corp. v. Morgan (*Morgan*), 536 U.S. 101 (2002).

46. *Id.* at 1013.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

the entire course of his employment with Amtrak.[51] Morgan believed he was being hired as an electrician; however, Amtrak classified him as an "Electrician Helper," the first person ever hired with that classification.[52] This resulted in Morgan being paid less than the electricians.[53] He alleged that he continually performed the work of an electrician, and that less qualified whites were subsequently hired as electricians.[54] Morgan also alleged other acts of discrimination and retaliation by Amtrak, most notably being reprimanded and terminated for refusal to follow orders and being denied the opportunity to participate in an electrician apprenticeship program in 1991.[55] Amtrak also denied him opportunities to attend training sessions that were scheduled for December 1993 and October 1994.[56] When he complained about the training being cancelled, Amtrak never responded.[57] Finally, Morgan complained of numerous written warnings for his absenteeism, despite some of these days being excused, and his managers' use of racial epithets against him, including calling him "boy" and telling him to get his "'black ass' into the office."[58]

On at least six different occasions between October 1991 and October 1994, Morgan sent letters to Amtrak's EEO office complaining of various acts by his superiors.[59] However, Morgan never received a formal response from Amtrak to any of these complaints and obtained only partial redress from his union.[60] Finally, after his suspension and just a week prior to his final termination, Morgan filed a charge

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51. *Id.* at 1010-11.

52. *Id.* at 1011.

53. *See id.* ("Eventually, Morgan's position was reclassified and his pay brought in line with that of electricians in April 1992.")

54. *Id.*

55. *Id.* This termination was subsequently reduced to a suspension and denial of pay for ten days, upon Morgan's filing of a grievance. *Id.*

56. *Id.* at 1013.

57. *Id.*

58. *Id.* at 1011-13.

59. *Id.*

60. *Id.* The complaints included racial discrimination for being told he stood "a snowball's chance in hell of becoming an electrician" at his yard, discrimination in the form of a fifteen day suspension for missing one day of work, discrimination and retaliation for being denied training three times, and an alleged assault by one of his supervisors. *Id.*

against Amtrak with the EEOC and cross-filed with the California Department of Fair Employment and Housing.[61] The charge complained of racial discrimination and retaliation during his five-year employment with Amtrak because he was disciplined more harshly and constantly harassed on account of his race.[62] Morgan received a right to sue letter from the EEOC on July 3, 1996.[63] Morgan filed suit in the U. S. District Court for the Northern District of California on October 2, 1996, alleging that he was the victim of discrete acts of discrimination and retaliation and had been subjected to a "racially hostile work environment" since Amtrak hired him.[64] While some of the alleged discriminatory acts contained in Morgan's complaint had occurred within the three hundred-day window prior to the filing of the EEOC charge, many of the acts occurred outside of that period, or before May 3, 1994.[65]

B. *Procedural History*

In response to the lawsuit, Amtrak filed a motion for summary judgment, arguing it was entitled to judgment for all of the alleged acts that occurred prior to May 3, 1994, or 300 days prior to Morgan's EEOC charge.[66] On September 11, 1998, the district court agreed with Amtrak and granted the motion in part, holding that Amtrak was not liable for any acts that occurred prior to May 3, 1994, because the conduct occurred outside the filing period.[67] The decision was based on a "reasonable person" test established by the Seventh Circuit that did not allow a suit to be filed on acts that occurred outside of the statute of limitations period if a reasonable person would have be-

61. *Id.* at 1014.

62. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 105 (2002).

63. *Id.* at 106.

64. *Id.* at 104, 106.

65. *Id.* at 106.

66. *Id.*

67. Morgan v. Nat'l R.R. Passenger Corp. (*Amtrak*), 232 F.3d 1008, 1014 (9th Cir. 2000), *aff'd in part, rev'd in part*, *Morgan*, 536 U.S. 101. The district court denied summary judgment to Amtrak on the acts that had occurred within the three hundred-day window; the remaining claims went to trial where a jury returned a verdict in favor of Amtrak. *Morgan*, 536 U.S. at 107 n.2.

lieved he was discriminated against at the time the acts occurred.[68] Thus, "'because Morgan believed that he was being discriminated against at the time that all of these acts occurred, it would not be unreasonable to expect that [he] should have filed an EEOC charge on these acts before the limitations period on these claims ran.'"[69] Morgan appealed the decision to the Ninth Circuit Court of Appeals.[70]

The Ninth Circuit reversed the district court's decision.[71] It held that the acts that occurred prior to, and within, the three hundred-day window were "sufficiently related" and allowed Morgan to state his claim by relying on the continuing violation doctrine.[72] The court based its holding on *Anderson v. Reno*, where the court stated that the continuing violation doctrine allowed consideration of conduct ordinarily time barred, "'as long as the untimely incidents represent an ongoing unlawful employment practice.'"[73] The court of appeals considered each of Morgan's three claims—discrimination, retaliation, and hostile environment—separately and found in all three instances that the pre-limitations conduct was sufficiently related to the post-limitations conduct for the continuing violations doctrine to apply.[74] Based on this finding, the case was reversed and remanded to the district court to allow the jury to consider the pre-limitations period acts not only as background evidence, but also for potential liability on the part of Amtrak.[75] The U.S. Supreme Court granted certiorari in light of the circuit split that had developed over the application of the continuing violation doctrine.[76]

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68. *Morgan*, 536 U.S. at 106 (citing Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164 (7th Cir. 1996)).

69. *Id.* at 106 (quoting the district court's holding in its application to petition for certiorari).

70. *Id.*

71. *Id.*

72. *Id.* at 106-07.

73. *Id.* (quoting Anderson v. Reno, 190 F.3d 930, 936 (9th Cir. 1999), *abrogated by Morgan*, 536 U.S. 101.)

74. *Id.* at 108.

75. *Id.*

76. *See id.* at 107-08.

C. *The Supreme Court's Opinion as Applied to Discrete Acts*

The key issue decided by the U.S. Supreme Court was the application of the continuing violation doctrine to discrimination claims. The Court addressed what constitutes an "unlawful employment practice" and when it occurs for purposes of determining timeliness of these claims.[77] The majority decided to terminate the use of the continuing violation doctrine as applied to Title VII claims involving discrete acts of discrimination and retaliation, while allowing the doctrine's continued use in conjunction with hostile work environment claims.[78] In defining "unlawful employment practice," the Court distinguished between discrete discriminatory acts and hostile work environment claims.[79] According to the Court, "[a] discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.' A party, therefore, must file a charge within either 180 or 300 days of the date of the act or lose the ability to recover for it."[80] It further explained:

> Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice." [Therefore,] Morgan can only file a charge to cover discrete acts that "occurred" within the appropriate time period.[81]

The Court also emphasized that discrete acts of discrimination and retaliation "are not actionable if time barred, even when they are related to acts alleged in timely filed charges."[82] Rather, "[e]ach discrete

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77. *Id.* at 110.

78. *Id.* at 122. The decision to abrogate the continuing violation doctrine as applied to discrete acts was unanimous, while the decision to allow it to continue to be used for hostile work environment claims was a five to four split. *Id.* at 104-05, 123. Further discussion of the Court's holding and rationale for the decision regarding the continuing violation doctrine and hostile work environment claims is beyond the scope of this Comment.

79. *Id.* at 110.

80. *Id.*

81. *Id.* at 114.

82. *Id.* at 113; *see also* Del. State Coll. v. Ricks, 449 U.S. 250, 257-58 (1980) (denying a professor's timely claim for allegedly discriminatory termination as a basis to pull a time-barred act, the denial of tenure, into the actionable pre-limitations

discriminatory act starts a new clock for filing charges alleging that act."[83] Additionally, the Court emphasized that an employee's knowledge of past discrete acts would not bar an employee from filing charges "about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed."[84] Finally, the Court noted that while an employee can use prior pre-limitations discrete acts as "background evidence in support of a timely claim," these same acts could not be used as a basis for independent liability.[85]

Contrary to a claim based on a discrete act, the *Morgan* Court described a hostile work environment claim as one comprised of "a series of separate acts that collectively constitute one 'unlawful employment practice.'"[86] It explained that the very nature of a hostile work environment claim "involves repeated conduct," adding that "[t]he 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, *in direct contrast to discrete acts*, a single act of harassment may not be actionable on its own."[87] Unlike discrete acts, events occurring outside the filing period may still be part of a single hostile work environment claim, as long as an act contributing to the claim occurs within the filing period.[88]

The Court's holding regarding the use of discrete acts in discrimination lawsuits was based upon the application of both Supreme Court precedent and a critical analysis of the statutory language in section 2000e-5(e)(1) of Title 42 of the United States Code.[89] The majority believed that none of the lower courts that had considered the issue of whether acts falling outside a statutory filing period are actionable had

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period).

83. *Morgan*, 536 U.S. at 113; *see also* United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977) (allowing treatment of allegedly discriminatory acts as lawful if an employee failed to file a charge of discrimination within the time allowed, because the timely filing window for a past discrete act is not reset by the occurrence of an additional timely discrete act).

84. *Morgan*, 536 U.S. at 113.

85. *Id.*

86. *Id.* at 117 (quoting 42 U.S.C. § 2000e-5(e)(1)).

87. *Id.* at 115 (emphasis added).

88. *Id.* at 117-18, 122.

89. *Id.* at 108-10.

reached a solution "compelled by the text of the statute."[90] Writing for the majority, Justice Thomas noted that the Court had previously refused to alter the filing requirements of Title VII, stating that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."[91] Thus, the legislature had clearly intended for employees to promptly file claims of employment discrimination when they imposed what can be considered a short statute of limitations period as compared to other types of claims.[92]

Justice Thomas believed that the critical language of the statute was found in section 2000e-5(e)(1): "'A charge under this section *shall be filed* within one hundred and eighty days *after the alleged unlawful employment practice occurred.*'"[93] The Supreme Court had previously determined that this section "'specifies with precision'" the charge filing requirements a plaintiff must follow when filing a Title VII claim.[94] Following standard rules of statutory construction, and giving words their "'ordinary, contemporary, common meaning,'"[95] Justice Thomas focused his analysis on the operative terms "'shall,' 'after . . . occurred,' and 'unlawful employment practice.'"[96] Congress's use of "shall" makes the statute's command mandatory and impervious to judicial decision; therefore, an employee is commanded to file his or her charge within a stated time period.[97] "Occurred" means that something happened in the past or already took place.[98]

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90. *Id.* at 108.

91. *Id.* (quoting Mohasco Corp. v. Silver, 447 U.S. 807, 824-25 (1980) (rejecting arguments that strict adherence was unfair, or that "a less literal reading of the Act would adequately effectuate the policy of deferring to state agencies")); *see also* Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1984) ("Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants.").

92. *Morgan*, 536 U.S. at 109 (citing *Mohasco Corp.*, 447 U.S. at 825).

93. *Id.* at 109 (quoting 42 U.S.C. § 2000e-5(e)(1)).

94. *Morgan*, 536 U.S. at 109 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974)).

95. *Morgan*, 536 U.S. at 109 n.5 (quoting Walters v. Metro. Ed. Enters., Inc. 519 U.S. 202, 207 (1997)).

96. *Morgan*, 536 U.S. at 109.

97. *Id.* (citing Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998)).

98. *Morgan*, 536 U.S. at 109, 109 n.5 (citing WEBSTER'S THIRD NEW

Therefore, Justice Thomas concluded that the statute required an employee to file the charge "after" the employment practice "occurred," thereby giving the employee 180 or 300 days "after" the occurrence to contact the EEOC.[99] Claims filed outside of these time limits will be barred as untimely.[100]

The final step in the analysis required clarification of what was meant by an "unlawful employment practice."[101] Morgan argued that a series of discrete acts could be viewed together to constitute an "unlawful employment practice" that endures over time as a single "practice."[102] He contended that the language of the statute did not require a charge to be filed within 180 or 300 days of each act.[103] Again Justice Thomas turned to the language of the statute to resolve this problem. Citing section 2000e-2(a),[104] Justice Thomas stated that the statute included numerous discrete acts that qualify as "unlawful employment practices," but found no indication in the statute that "the term 'practice' converts related discrete acts into a single unlawful practice for the purposes of timely filing."[105] The opinion reinforced this argument with citations to *Electrical Workers v. Robbins and Meyers, Inc.*, and *Bazemore v. Friday*.[106] In those cases, the Court had "interpreted the term 'practice' to apply to a discrete act or single 'oc-

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INTERNATIONAL DICTIONARY 1561 (1993)).

99. *Id.* at 110.

100. *Id.* at 109.

101. *Id.* at 110.

102. *Id.*

103. *Id.*

104. "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1) (2000).

105. *Morgan*, 535 U.S. at 111.

106. *Id.* at 111-12 (citing Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 234-35 (1976) (concluding that the discriminatory act occurred on the date of the employee's discharge rather than on the date the grievance arbitration proceeding ended because that was the date that the parties understood the discharge was final); Bazemore v. Friday, 478 U.S. 385, 395 (1986) (*per curiam*) (holding that weekly paychecks that paid less to a black than to a similarly situated white were individually actionable under Title VII, even though they were related acts)).

currence,' even when it [had] a connection to other acts."[107] After this analysis, Justice Thomas determined that Morgan's claims for discrete acts of discrimination and retaliation, even though related, were separate incidents for which independent EEOC filings would have to be made and that his claims for acts falling outside of the pre-limitations period were untimely and no longer actionable.[108]

IV. POST-FILING DISCRETE ACTS: THE CIRCUIT SPLIT OVER THE EXHAUSTION OF ADMINISTRATIVE REMEDIES

Since *Morgan* was decided in June 2002, there has a been a two-way split in the circuit courts over the impact of the abrogation of the continuing violation doctrine as applied to claims based on discrete acts of discrimination and retaliation. *Morgan* held that a plaintiff is barred from recovery for discrete acts that do not occur within the statute of limitations period required by Title VII.[109] The decision in *Morgan* was based on facts that involved discrete acts occurring prior to the initial EEOC complaint filed by the plaintiff. Because the court did not have before it a case that involved post-filing acts, the door has been left open for the circuits to reach differing conclusions on the applicability of *Morgan* to cases based on discrete acts that occur after a complaint is filed.

One of the key issues courts have addressed following *Morgan* is whether a Title VII plaintiff is required to file an additional EEOC or state agency charge based on the post-filing discrete acts before recovery for those acts can be pursued in a district court suit. Prior to *Morgan*, the circuits required administrative exhaustion of claims prior to filing a suit in district court. This requirement was jurisdictional, and failure to file a timely charge would prevent subsequent review of the claim by the district court.[110] Generally, courts used a variation of the "like or reasonably related" test to determine whether post-filing discrete acts were sufficiently related to those contained in

107. *Morgan*, 536 U.S. at 111.

108. *Id.* at 110, 114-15.

109. *Id.* at 105.

110. *See* Seymore v. Shawver & Sons, 111 F.3d 794, 799 (10th Cir. 1997); *see also* Sommatino v. United States, 255 F.3d 704, 708 (9th Cir. 2001) ("[C]ompliance with the presentment of discrimination complaints to an appropriate administrative agency *is* a jurisdictional prerequisite.").

an exhausted charge such that they too could be considered exhausted.[111] In determining whether this standard was satisfied, any new charge would need to be encompassed within the scope of the prior EEOC investigation.[112] However, after *Morgan*, the Tenth, Eleventh, and District of Columbia Circuits have held that *Morgan* applies with equal force to all discrete acts, and that each act requires separate administrative exhaustion regardless of whether or not it is related to acts contained in a prior charge.[113] On the other hand, the Second, Eighth, and Ninth Circuits and the EEOC hold that *Morgan* should be strictly construed and only apply as a bar to recovery for discrete acts that occurred prior to the filing period, and that post-filing acts can still be considered exhausted by using the "like or reasonably related" standard.[114]

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111. *See, e.g.*, Annett v. Univ. of Kan., 371 F.3d 1233, 1238 (10th Cir. 2004) (quoting Ingels v. Thiokol Corp., 42 F.3d 616, 625 (10th Cir. 1994) (stating that alleged employment actions that occurred after a previous EEOC charge was filed were examined to determine if the action was "like or reasonably related" to the allegations of the prior charge)); Green v. L.A. County Super. of Sch., 883 F.2d 1472, 1475-76 (9th Cir. 1989) ("Incidents of discrimination not included in an EEOC charge may not be considered by a federal court unless the new claims are 'like or reasonably related to the allegations contained in the EEOC charge.'") (quoting Brown v. Puget Sound Elec. Apprenticeship & Training Trust, 732 F.2d 726, 729 (9th Cir. 1984)). The Second Circuit gave a concise definition of the claims it considered sufficiently related:

> 1) where "the conduct complained of would fall within the 'scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination'"; 2) where the complaint is "one alleging retaliation by an employer against an employee for filing an EEOC charge"; and 3) where the complaint "alleges further incidents of discrimination carried out in precisely the same manner alleged in the EEOC charge."

Terry v. Ashcroft, 336 F.3d 128, 151 (2d Cir. 2003) (quoting Butts v. City of N.Y. Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 1402-03 (2d Cir. 1993)).

112. *See Green*, 883 F.2d at 1476 (citing Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970)).

113. *See* discussion *infra* Part IV.A.

114. *See* discussion *infra* Part IV.B.

A. *The Tenth, Eleventh, and District of Columbia Circuits:* Morgan *Applies with Equal Force to Post-Filing Discrete Acts*

The Tenth, Eleventh, and District of Columbia Circuits, as well as parts of the Third[115] and Sixth[116] Circuits, extend the rationale behind

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115. The issue of post-filing discrete acts has not been addressed by the Court of Appeals for the Third Circuit since *Morgan* was decided. Patsakis v. E. Orthodox Found., No. 04-1662, 2006 WL 2087513, at *7 (W.D. Pa. May 17, 2006). However, with cases being decided both ways in the district courts, it is likely this will happen soon. For example, the Eastern District of Pennsylvania is falling in line with the viewpoint of the Tenth, Eleventh, and District of Columbia Circuits, while the Western District of Pennsylvania seems to lean towards the rationale of the Second, Eighth, and Ninth Circuits. *See* Allen v. Nat'l R.R. Passenger Corp., No. 03-CV-3497, 2005 WL 2179009, at *10-11 (E.D. Pa. Sept. 6, 2005) (finding that the Plaintiffs failed to exhaust their administrative remedies because the acts forming the basis for their retaliation claims occurred several months after the EEOC closed its investigation); Crumpton v. Potter, 305 F. Supp. 2d 465, 474-76 (E.D. Pa. 2004) (finding that administrative remedies were not exhausted for a claim occurring on November 7, 2002, after the EEOC had issued a final investigative decision on November 1, 2002). *But see Patsakis*, 2006 WL 2087513, at *7 (finding *Morgan* not to affect post-filing acts and allowing plaintiffs' claim for retaliation to survive because it grew out of a prior charge and thus should be considered "reasonably related").

116. The leading appellate cases on either side of the issue are *Delisle v. Brimfield Township Police Department* and *Sherman v. Chrysler Corp. See* Delisle v. Brimfield Twp. Police Dep't, 94 F. App'x 247, 253 (6th Cir. 2004) (finding that *Morgan* did not address the issue of whether courts lacked jurisdiction to hear claims based on post-filing discrete acts that are not the subject of an administrative claim); Sherman v. Chrysler Corp., 47 F. App'x 716, 721 (6th Cir. 2002) (finding that *Morgan*'s principles relating to pre-filing discrete acts should apply equally to post-filing discrete acts, and that the same rationale underlying a Title VII claim should be extended to claims pursuant to the Age Discrimination in Employment Act). Because both of these decisions are unpublished, the Sixth Circuit has yet to set a solid precedent for post-filing claims. However, several of the district courts in the Sixth Circuit have since followed the *Sherman* court and have not allowed recovery for discrete acts if they are not separately exhausted. *See* Jordan v. U.S. Dep't of Educ., No. 1:05CV1066, 2006 WL 1305073, at *1-2, 5 (N.D. Ohio May 10, 2006) (determining that Plaintiff's claim of retaliatory termination was not properly exhausted because it was not part of her prior EEOC charge and had occurred four years after the prior charge was filed); Mullins v. Potter, No. 04-72966, 2005 WL 3556198, at *1-2 (E.D. Mich. Dec. 29, 2005) (finding a retaliation claim based on a failure to promote to not be exhausted and therefore, not properly before the court because it was not included in the original or amended EEOC charge of discrimination). The *Mullins* court acknowledged that previously, this claim might have been considered "like or reasonably related" to the initial charge, but based its decision on *Sherman* and *Morgan* and concluded that Plaintiff's reliance on *Delisle* was

Morgan's treatment of discrete acts as separate individually actionable events and mandate that a Title VII plaintiff must file a separate EEOC or state agency charge for each discrete act of discrimination or retaliation. Therefore, separate charges are required for post-filing discrete acts. Only discrete acts for which this requirement has been satisfied can be included in a plaintiff's district court lawsuit, and discrete acts can no longer be considered administratively exhausted, even if they are "like or reasonably related" to prior charges.

One of the leading and most frequently cited cases on this side of the circuit split is *Martinez v. Potter*.[117] The case involved a United States Postal Service (USPS) carrier who filed an EEO charge in July 1999 and subsequently sued USPS for unlawful retaliation based on the previous EEO charge that he filed in 1998.[118] During the litigation Martinez attempted to add allegations regarding a September 2000 reprimand and his April 2001 termination to his case.[119] No formal EEO charge had ever been filed by Martinez for the September 2000 reprimand or the April 2001 termination, and Martinez had not attempted to amend his prior EEO charge.[120]

The Tenth Circuit Court of Appeals discussed the impact of *Morgan* on the circuit's law regarding discrete acts of discrimination and retaliation.[121] The court believed that *Morgan* had fundamentally changed how administratively unexhausted claims would be handled

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unfounded. *Id.* at *1-2.

117. Martinez v. Potter (*Martinez II*), 347 F.3d 1208 (10th Cir. 2003).

118. Martinez v. Henderson (*Martinez I*), 252 F. Supp. 2d 1226, 1227-28 (D.N.M. 2002), *aff'd sub nom. Martinez II*, 347 F.3d 1208. Martinez alleged that his supervisor had issued unnecessary letters of warning (internal USPS discipline), modified his delivery route, and subjected him to continuous "harassment, intimidation, and discrimination," all as retaliation for his first EEO charge. *Id.* at 1228.

119. *Martinez II*, 347 F.3d at 1210. The reprimand was for unsafe driving, which led to another letter of warning and a two-week suspension, and the termination was for alleged insubordination. *Martinez I*, 252 F. Supp. 2d at 1230-31.

120. *Martinez II*, 347 F.3d at 1210. The district court held that USPS was entitled to summary judgment on Martinez's claims that were not included in the July 1999 EEO charge. *Martinez I*, 252 F. Supp. 2d at 1234. This decision was based on a finding that Martinez had not exhausted his administrative remedies as to these additional claims because no additional EEO charge was filed and the additional claims were not "like or reasonably related" to the claim in the July 1999 charge. *Id.*

121. *See Martinez II*, 347 F.3d at 1210.

in Title VII cases.[122] The Supreme Court's abrogation of the continuing violation doctrine as applied to discriminatory and retaliatory discrete acts and the decision that each discrete act must be treated as an "unlawful employment practice" for which administrative exhaustion is required were the basis for this belief.[123] However, the *Martinez II* court took the decision a step further when it ruled that *Morgan*, which applied to discrete acts that occurred prior to the charge filing period, applied with equal force to incidents occurring after an EEOC charge was filed.[124] The decision was based on recent Tenth Circuit case law.[125] Thus, even though a plaintiff in the Tenth Circuit was previously able to use the "like or reasonably related" test to argue that post-filing discrete acts, for which no new EEOC charge had been filed, were administratively exhausted, *Martinez II* and *Morgan* foreclosed that line of argument.[126]

The *Martinez II* decision was guided not only by *Morgan*, but also by the court's belief that its application of the rule to post-filing discrete acts was consistent with Title VII's policy goals.[127] Requiring an employee to file the additional EEO charge puts the employer on notice of the additional violation before a formal lawsuit is commenced.[128] Once informed, the employer can attempt internal resolution of the dispute, which is preferred over time-consuming and expensive litigation.[129] The court believed notice to the employer was crucial in this case because USPS could have faced liability for various actions by its supervisors, each with a different factual basis and a

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122. *Id.*

123. *Id.*

124. *Id.* at 1210-11.

125. *See id.* at 1211 (citing Davidson v. America Online, Inc., 337 F.3d 1179, 1184 (10th Cir. 2003) (rejecting the continuing violation theory and finding that a claimant must file a charge after discrete acts occur within the required limitations period)).

126. *See* Annett v. Univ. of Kan., 371 F.3d 1233, 1238 (10th Cir. 2004) (applying *Morgan* and *Martinez II* in declining to review a petitioner's claim that "receiving an adjunct lecturer versus an adjunct professor position constitutes an adverse employment action" because this particular charge was not included in her EEOC complaint).

127. *Martinez II*, 347 F.3d at 1211.

128. *Id.*

129. *See* Brown v. Gen. Servs. Admin., 425 U.S. 820, 832-35 (1976).

different functional form, but would only have notice of the allegations from the 1999 EEOC charge.[130] Many of the courts that have decided to apply *Morgan* in this manner have looked to the Tenth Circuit for guidance.[131]

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130. *Martinez II*, 347 F.3d at 1211. The three key policy reasons stated in *Martinez II*—employer notice, less costly resolution of claims, and opportunity for internal resolution of disputes prior to a lawsuit being filed—have also been used to support decisions in the District of Columbia Circuit. *See* Romero-Ostolaza v. Ridge, 370 F. Supp. 2d 139, 149 (D.D.C. 2005). However, the court in *Romero-Ostolaza* also noted that requiring the same administrative exhaustion requirements for post-filing acts "ensures that only claims [a] plaintiff has diligently pursued will survive." *Id.* (quoting Velikonja v. Mueller, 315 F. Supp. 2d 66, 74 (D.D.C. 2004). Other District of Columbia Circuit cases have cited these and other policy reasons for this take on the administrative exhaustion requirement. One of the key rationales is that federal courts should only be burdened with these types of suits when reasonably necessary and when promoting internal resolution of disputes satisfies this goal. *See* Brown v. Marsh, 777 F.2d 8, 14 (D.C. Cir. 1985). Also, the courts have favored short deadlines, wanting to encourage prompt investigation of claims in order to prevent the evidence from becoming stale. *See Velikonja*, 315 F. Supp. 2d at 71-72 (citing Del. State Coll. v. Ricks, 449 U.S. 250, 256-57 (1980)). Finally, the District of Columbia Circuit has noted that the administrative charge requirement provides the charged party "notice of the claim and [it]'narrow[s] the issues for prompt adjudication and decision.'" Park v. Howard Univ., 71 F.3d 904, 907 (D.C. Cir. 1995) (quoting Laffey v. Nw. Airlines, Inc., 567 F.2d 429, 472 n.325 (D.C. Cir. 1976)).

131. *See* Casiano v. Gonzales, No. 3:04CV67/RV/MD, 2005 WL 229956, at *16-17 (N.D. Fla. Jan. 31, 2006) (dismissing ten allegations of retaliation for the previous filing of an EEO charge because only two of the twelve instances of alleged discrimination were included in the prior charge). It is interesting to note that just a month after *Morgan* was decided, the Eleventh Circuit Court of Appeals referenced the Court's decision in *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1271-72 (11th Cir. 2002). Although the issue of post-filing discrete acts was not directly before the court, it mentioned the effect *Morgan* would have on a post-filing claim if brought before the panel. *Joe's Stone Crabs*, 296 F.3d at 1272 n.5. The court cited the same key language from *Morgan* as the Tenth Circuit would in *Martinez*, inferring that it would find the same way when the issue arose. *Id.* Similarly, in *Romero-Ostolaza*, the District of Columbia District Court granted summary judgment to the Department of Homeland Security when the plaintiffs' claim for retaliatory termination had been raised for the first time in district court and was not the subject of a new administrative charge or contained in an amendment to an earlier charge. *Romero-Ostolaza*, 370 F. Supp. 2d at 148-51. The court reasoned that *Morgan*'s emphasis on strict adherence to legislatively mandated procedural requirements and rejection of the continuing violation doctrine as applied to discrete acts allowed the rationale to be stretched and applied to discrete acts occurring after the charge was filed. *Id.* at 148-49. The judge specifically noted that prior to *Morgan*, most courts would have found a retaliation claim for filing an EEO charge of

B. *The EEOC and the Second, Eighth, and Ninth Circuits: The Continued Use of the Sufficiently Related Test and the Strict Application of* Morgan

The Second, Eighth, and Ninth Circuits and the EEOC believe that the holding in *Morgan* regarding charges filed for discrete acts should be strictly construed. Thus, pre-charge filing acts occurring before the charge-filing period of 180 or 300 days prior to the charge are barred from inclusion in the plaintiff's district court case because they are not administratively exhausted. However, relief for post-filing discrete acts can be pursued without further administrative filing if the acts are "like or reasonably related" to those contained in the original EEOC complaint.[132] The exact definition of "like or reasonably related" varies between the circuits that subscribe to this view.[133] However, the following three factors are consistently used to determine if the standard is met, and if the post-filing discrete act falls within any of them, the act can be considered administratively exhausted:

> 1) [whether] "the conduct complained of would fall within the 'scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination'"; 2) [whether] the complaint is "one alleging retaliation by an employer against an employee for filing an EEOC charge"; and 3) [whether] the com-

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discrimination to be "like or reasonably related" to the first charge, and thus, administratively exhausted; however, this was no longer the case. *Id.* at 148. The District of Columbia District Court has held in other cases that subsequent similar acts included in amendments to EEO charges were properly exhausted because this satisfied the notice requirements the courts deemed necessary for employers to have. *See Velikonja*, 315 F. Supp. 2d at 74; Bowie v. Ashcroft, 283 F. Supp. 2d 25, 34 (D.D.C. 2003).

132. *See* Lyons v. England, 307 F.3d 1092, 1104 (9th Cir. 2002).

133. *Compare* Terry v. Ashcroft, 336 F.3d 128, 151 (2d Cir. 2003) (defining like or reasonably related as "sufficiently related to the allegations in the charge" (quoting Butts v. City of N.Y. Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 1402 (2d Cir. 1993))), *with* EEOC v. Farmer Bros., 31 F.3d 891, 899 (9th Cir. 1994) (defining like or reasonably related as those allegations falling "within the scope of the EEOC's *actual* investigation or an 'EEOC investigation which *can reasonably be expected* to grow out of the charge of discrimination'" (quoting Sosa v. Hiraoka, 920 F.2d 1451, 1456 (9th Cir. 1990))).

> plaint "alleges further incidents of discrimination carried out in precisely the same manner alleged in the EEOC charge."[134]

These circuits still hold the plaintiff to some form of the administrative exhaustion requirement;[135] however, by using the "like or reasonably related" test for post-filing acts, they are continuing the jurisprudence that the majority of the circuits used prior to the *Morgan* decision. The continuation of the use of the pre-*Morgan* standard is consistent with the viewpoint of the EEOC, which believes that *Morgan* does not affect post-filing discrete act claims.[136]

In July 2005, the EEOC updated its compliance manual to comment on the current state of the law regarding the timeliness requirements for filing charges based on discrete acts.[137] In the update, the EEOC discussed the effect that *Morgan* had on these filing requirements and concluded that "[a] timely charge also may challenge inci-

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134. *Terry*, 336 F.3d at 151 (quoting *Butts*, 990 F.2d at 1402-03). The decision in *Terry*, which was decided more than a year after *Morgan*, made no reference to *Morgan* or that *Morgan* could possibly have an effect on post-filing discrete act claims. As a result, other district court cases in the Second Circuit have continued to apply the three-factor standard used prior to *Morgan* and have not addressed the possible implications of *Morgan* on post-filing act claims. *See* Mathirampuzha v. U.S. Postal Serv., No. 3:04CV841 (JBA), 2006 WL 2458669, at *4-5 (D. Conn. Aug. 21, 2006) (rejecting plaintiff's hostile work environment and retaliation claims because they were not reasonably related to the underlying charge of national origin discrimination, but continuing to use the three-factor test from *Terry*); Fleming v. Verizon N.Y., Inc., 419 F. Supp. 2d 455, 462-63 (S.D.N.Y. 2005) (dismissing plaintiff's retaliation claims because under the three-factor test from *Terry*, they cannot be seen as reasonably related, and therefore, cannot have been administratively exhausted); Whitlow v. Visiting Nurse Ass'n of W. N.Y., 420 F. Supp. 2d 92, 100-02 (W.D.N.Y. 2005) (finding constructive discharge and harassment claims to be reasonably related to EEOC charge because they could be "expected to stem from the matters set forth" in it).

135. *See* Brown v. Puget Sound Elec. Apprenticeship & Training Trust, 732 F.2d 726, 730 (9th Cir. 1984) (noting that for claims which "are not so closely related that agency action would be redundant, the EEOC must be afforded an opportunity to consider [the] dispute before [a] federal suit[] [is] initiated," thus an additional EEOC charge is required).

136. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMPLIANCE MANUAL SECTION 2: THRESHOLD ISSUES § 2-IVC (2005) [hereinafter EEOC MANUAL], *available at* http://www.eeoc.gov/policy/docs/threshold.html#2-IV-C.

137. *Id.*

dents that occur after the charge is filed."[138] The commission noted this position was consistent with the view held by the Second, Fourth, and Eighth Circuits prior to *Morgan* and pointed out that *Morgan* had no effect on those decisions.[139] The commission discussed the countervailing view that was developing in the Tenth and Eleventh Circuits in *Martinez v. Potter* and *EEOC v. Joe's Stone Crabs, Inc.*, but declined to agree with those decisions, believing *Morgan* did not have the effect on post-filing discrete acts recognized in those cases.[140] Nothing in *Morgan* suggested to the EEOC that a new administrative filing would be necessary when prior related acts had already been challenged in a charge.[141] As support for this belief, the EEOC cited the majority opinion in *Delisle v. Brimfield Township Police Department.*[142] By taking this view on the issue, the EEOC was trying to reduce the number of administrative hurdles that employees would confront when faced with a discriminatory or retaliatory work environment and with an additional claim based on post-filing discrete acts.

Two notable examples of appellate court cases that continue to confine the holding of *Morgan* to the facts before it are *Lyons v. England*[143] and *Wedow v. City of Kansas City, Missouri.*[144] In both of these cases the court continued to use some form of the "like or reasonably related" test to find some of the plaintiffs' claims, not included in EEOC charges, to be administratively exhausted. The issue in *Lyons* was whether four male African-American Navy employees were required to file additional EEO complaints after not being promoted by the Navy in 1997 after filing EEO complaints as to allegedly discriminatory failures-to-promote in 1996.[145] The plaintiffs did not seek EEO counseling or file formal charges as to the 1997 non-

138. *Id.*

139. *Id.* at n.186 (citing *Butts*, 990 F.2d at 1402-03; Nealon v. Stone, 958 F.2d 584, 590 (4th Cir. 1992); Anderson v. Block, 807 F.2d 145, 148 (8th Cir. 1986)).

140. EEOC MANUAL, *supra* note 136, at n.186.

141. *Id.*

142. *Id.*; *see also* Delisle v. Brimfield Twp. Police Dep't, 94 F. App'x 247 (6th Cir. 2004).

143. Lyons v. England, 307 F.3d 1092 (9th Cir. 2002).

144. Wedow v. City of Kansas City, Mo., 442 F.3d 661 (8th Cir. 2006).

145. *Lyons*, 307 F.3d at 1102-03.

selections prior to filing their lawsuit in 1998.[146] The court concluded that the employees were not required to exhaust their administrative remedies regarding the 1997 promotions because they "clearly articulated in their charges their theory that the appellee[147] had systematically restricted the access of African-American employees to positions at the GS-13 level or above."[148] The court's decision was based on the belief that the 1997 charge would reasonably be expected to have grown out of the 1996 allegation of discrimination that was included in the earlier EEO complaint.[149]

The court looked to pre-*Morgan* Ninth Circuit cases and applied the policy from these cases consistently to the post-filing discrete acts, believing that *Morgan* did not apply in this situation.[150] The court was influenced by the argument that after additional occurrences of similar discriminatory acts, requiring employees to restart the administrative process in order to have their claims considered by the district court "'would erect a needless procedural barrier,'" even though administra-

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146. *Id.* at 1102-04.

147. The appellee was Naval Aviation Depot North Island. *Id.* at 1100.

148. *Lyons*, 307 F.3d at 1105.

149. *Id.* at 1104. The decision on this issue also rested on the belief that the 1997 claims were consistent with the plaintiffs' original theory of the case as stated in the factual allegations of the 1996 charge and, therefore, would have been not just consistent with but also within the scope of the 1996 EEOC investigation. *Id.* When considering whether claims are "like or reasonably related," the Ninth Circuit has also said consideration should be made of "such factors as the alleged basis of the discrimination, dates of discriminatory acts specified within the charge, perpetrators of discrimination named in the charge, and any locations at which discrimination is alleged to have occurred." B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1100 (9th Cir. 2002).

150. The Sixth Circuit Court of Appeals also reached this conclusion. Delisle v. Brimfield Twp. Police Dep't, 94 F. App'x. 247 (6th Cir. 2004). The majority noted that *Morgan* did not stand for the proposition that jurisdiction is lacking for post-filing discrete acts unless new administrative charges have been filed because that issue was not squarely before the court. *Id.* at 252-53. As a result, the majority believed it was able to address the plaintiff's claim for retaliatory demotion for filing an initial charge, even though the demotion was never the subject of its own charge. *Id.* at 250-52. But this view was not unanimous. The dissent stated that Delisle's demotion in 1999 was a discrete act, and therefore, under *Morgan*, recovery was possible only if a second EEOC charge had been filed by the plaintiff. *Id.* at 260-61 (Batchelder, J., dissenting). Further, according to the dissent, the majority's opinion was unequivocally barred by the rationale of the Supreme Court in *Morgan*, and thus the majority's reliance on the circuit's precedent was erroneous. *Id.*

tive exhaustion was generally a prerequisite.[151] Further, the court believed that because EEOC charges are generally filed by laypersons who are "'unschooled in the technicalities of formal pleading,'" they must be construed with the "'utmost liberality'" when determining what they should encompass.[152] It was these policy considerations and the determination that *Morgan* did not squarely address the post-filing issue that allowed the *Lyons* plaintiffs' claims to survive. However, these are not the only policies on which courts on this side of the split have relied.[153]

As opposed to *Lyons* and other decisions on this side of the circuit split, the court in *Wedow* took a more limited view of the "like or reasonably related" standard, but nonetheless refused to directly apply

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151. *Lyons*, 307 F.3d at 1104 (quoting Anderson v. Reno, 190 F.3d 930, 938 (9th Cir. 1999), *abrogated by* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002)).

152. *Lyons*, 307 F.3d at 1104 (quoting *B.K.B.*, 276 F.3d at 1100); *see also* Love v. Pullman Co., 404 U.S. 522, 527 (1972) ("Such technicalities are particularly inappropriate in a statutory scheme [such as Title VII] in which laymen, unassisted by trained lawyers initiate the process.").

153. Procedural barriers could have a chilling effect on discrimination litigation and thus undermine one of the fundamental goals of Title VII. Therefore, retaliation for a prior substantive discrimination claim should always be foreseeable to the employer and, thus, within the scope of an EEOC investigation. *See Delisle*, 94 F. App'x at 254. In these situations, a second filing would be redundant because the employer would have been on notice of a potential additional claim, and the EEOC would already have had an opportunity to investigate or conciliate the claim. *Id.* Two key policy considerations guide this belief:

> "[D]ue to the very nature of retaliation, the principle benefit of EEOC involvement, mediation and claims of conciliation, are much less likely to result from a second investigation" . . . [and] "[r]equiring a plaintiff to file a second EEOC charge [for retaliation after an initial administrative claim has been filed] could have the perverse result of promoting employer retaliation in order to impose further costs on plaintiffs and delay the filing of civil actions relating to the underlying acts of discrimination."

Id. at 254 (quoting Butts v. N.Y. Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 1402 (2d Cir. 1993)). The purpose for the retaliation exception is to prevent "rewarding employers who successfully intimidate their employees into not filing further EEO charges." Mathirampuzha v. U.S. Postal Serv., No. 3:04CV841(JBA), 2006 WL 2458669, at *5 (D. Conn. Aug. 21, 2006). This rationale removes a barrier an employee would face when filing a retaliation claim in a circuit that applies the second factor of the *Terry* three-factor test for relatedness. *See supra* note 134.

Morgan to post-filing discrete acts.[154] The notable difference between *Wedow* and other cases was the content of the 1997 EEOC charges filed by the plaintiffs.[155] Each charge alleged *continuing discrimination and retaliation* when the city continued to provide them with inadequate protective clothing and inadequate shower and changing facilities.[156] Both plaintiffs prevailed in a jury trial based on the EEOC charge and other claims of retaliation.[157] The retaliatory conduct alleged by the plaintiffs occurred from 1998 to 2000, after the prior EEOC filing and the prior charge had not been amended to include these allegations.[158]

Like the Sixth Circuit in *Delisle v. Brimfield Township Police Department*,[159] Eighth Circuit precedent prior to *Morgan* held that subsequent retaliation claims based on a prior EEOC charge were per se sufficiently related, and thereby considered administratively exhausted without a second charge.[160] The Eighth Circuit has now "considerably narrowed" what it considers "like or reasonably related" to prior EEOC charges.[161] However, while the court narrowed its view of

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154. Wedow v. City of Kansas City, Mo., 442 F.3d 661, 672-73 (8th Cir. 2006).

155. The two plaintiffs in *Wedow* were both female battalion chiefs in the Kansas City Fire Department and had both been promoted to that rank after a prior discrimination lawsuit filed against the city in 1994. *Id.* at 666. In the prior suit, the plaintiffs alleged that the Fire Department had failed to provide adequate protective clothing because only male uniforms were provided and had failed to provide adequate shower and bathroom facilities because those provided were not private. *Id.* While only one of the plaintiffs prevailed in her prior suit, they both were promoted. *Id.*

156. *Id.* at 667 (emphasis added).

157. *Id.* The city appealed the verdict on the retaliation claims, claiming it was entitled to judgment as a matter of law because the 1997 EEOC charge did not mention certain retaliatory acts, and therefore, the plaintiffs had not exhausted their administrative remedies for those claims. *Id.* at 672.

158. *Id.* at 672.

159. Delisle v. Brimfield Twp. Police Dep't, 94 F. App'x 247, 254 (6th Cir. 2004).

160. *Wedow*, 442 F.3d at 672-73 (citing Wentz v. Md. Cas. Co., 869 F.2d 1153, 1154 (8th Cir. 1989)); *see also* cases cited *supra* note 153.

161. *Wedow*, 442 F.3d at 672. Two years previously the Eighth District Court of Appeals had recognized that "retaliation claims are not reasonably related to underlying discrimination claims." *Id.* at 673 (quoting Duncan v. Delta Consol. Indus., Inc., 371 F.3d 1020, 1025 (8th Cir. 2004)). Additionally, after *Morgan*, the circuit

which acts are within the scope of prior EEOC charges, it refused to completely abandon its prior jurisprudence.[162] Therefore, a small exception to the exhaustion requirement was left open to plaintiffs, "where the subsequent retaliatory acts were of a like kind to the retaliatory acts alleged in the EEOC charge, *which were specified to be of an ongoing and continuing nature*."[163]

In light of this reasoning, the court of appeals in *Wedow* affirmed the judgment of the district court.[164] The plaintiffs' 1997 EEOC charge alleged that retaliation occurred and *continued* to occur during the course of their employment, and the allegations in the complaint were for *ongoing* retaliation, taking the same form as in the charge.[165] Because the original claim was for *continued* retaliation and not just for a specific incident, as in *Parisi v. Boeing Company*,[166] requiring a second EEOC charge would simply erect a needless procedural barrier for the plaintiffs.[167] Under these facts, the employer and the EEOC would already be on notice of this type of claim because the allegations were not close-ended. Although it simply came down to the semantics of the wording in the charge, the Eighth Circuit did not completely close the door on an exception to the administrative exhaustion requirement.

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further limited the administrative exhaustion exception, finding subsequent refusals-to-hire to be discrete acts that would require additional EEOC charges because the prior charge specified a single refusal-to-hire on a specific date. Parisi v. Boeing Co., 400 F.3d 583, 586 (8th Cir. 2005). The court has also held that "subsequent refusals to hire were not like or reasonably related where the EEOC charge identified a specific time period in which the alleged conduct occurred, and that time period ended four months before the date on which the EEOC questionnaire was submitted." *Wedow*, 442 F.3d at 673 (citing Shelton v. Boeing Co., 399 F.3d 909, 912-13 (8th Cir. 2005)).

162. *Wedow*, 442 F.3d at 674.

163. *Id.* (emphasis added).

164. *Id.* at 677.

165. *Id.* at 674. More specifically, the plaintiffs alleged being denied the opportunity to work out-of-class (temporary assignments of higher rank to gain experience) and denial of tactical shifts (temporarily working as a Safety Officer or Interior Sector Officer) and that this led to denial of promotion opportunities. *See id.* at 674-75.

166. *Parisi*, 400 F.3d at 583.

167. *Wedow*, 442 F.3d at 674-75.

V. THE IMPACT OF THE CIRCUIT SPLIT ON EMPLOYERS AND EMPLOYEES AND IMPORTANT POLICY CONSIDERATIONS

The ramifications of this issue significantly impact both employees and employers at the administrative and district court level. Most notably, where employees choose to file their lawsuit will affect the jurisdictional basis for discrete acts not included in administrative charges when the courts determine employer liability and damages. Additionally, depending on the circuit, employees can face greater procedural barriers when seeking relief for discrimination and retaliation claims. Because of this, it is likely that employers, especially national companies, would seek a change of venue to a circuit more favorable to their position in an attempt to exclude as many employee claims as possible. To combat this procedural ploy, employees would need to artfully craft their administrative charge filings and court pleadings. Depending on the circuit, employees would either be compelled to file an additional administrative charge for any believed discriminatory or retaliatory discrete act which took place after their first charge was filed, or be taught to include extremely broad allegations, alleging every type of discrimination and retaliation possible, so that their later claims would be seen as "like or reasonably related" to their previous charge. Both of these choices pose problems for the administrative agencies involved. The agencies would either be unnecessarily bogged down investigating redundant charges or would waste resources investigating allegations made solely for the purpose of protecting the employee from having potential subsequent claims dismissed if the case proceeded to trial.

Because the filing deadlines for claims based on post-filing discrete acts are not specifically addressed in Title VII, the resolution of this problem rests on two important questions. First, should the decision on the continued use of the "like or reasonably related" test as applied to post-filing discrete acts be guided by strict statutory interpretation, as *Morgan* evaluated the continuing violation doctrine, or by policy considerations behind each of the opposing viewpoints? Second, is there a compelling argument for why a different test should continue to be used for post-filing acts, when, in *Morgan*, a relationship test, the continuing violation doctrine, was abandoned for claims based on discrete acts occurring prior to the charge filing period?

In light of the fact that the Court in *Morgan* did not directly consider the implications of Title VII on post-filing acts, the policy considerations behind the opposing viewpoints should take precedence when determining the continued use of the "like or reasonably related" test. Consideration of these policies will be the best approach to answering the first question because it factors in the impact on both the employers and the employees involved.

The decisions coming out of the Tenth, Eleventh, District of Columbia, and parts of the Sixth and Third Circuits since *Morgan* strongly favor the employer.[168] These courts based their decisions on the consideration of multiple policy concerns. First and foremost, an additional administrative charge provides employers with adequate notice of the behavior alleged to be discriminatory or retaliatory by their employees and provides warning of potential increased liability.[169] Sufficient notice allows employers to investigate the situation quickly, while the evidence is still fresh, and witnesses are readily available.[170] The additional charge also puts the EEOC or agency on notice of the allegations and provides the necessary opportunity for additional investigation and potential conciliation of the claim or for internal resolution between employers and employees.[171] This allows employers to avoid the high cost and time required by litigation.[172] The agency and employer investigatory process is important because it allows the issues between employees and employers to be narrowed, allowing for prompt adjudication, and ensures that the Federal Court dockets are only burdened when reasonably necessary.[173] Finally, if employee lawsuits were allowed to encompass allegations not in-

168. *See* discussion *supra* Part IV.A. These circuit courts hold that many of the employees' claims were not properly before the federal courts because they were not the subject of administrative charges, no matter how related they might have been to the acts contained in the complainants' prior charge. *Id.*

169. *See* Martinez v. Potter (*Martinez II*), 347 F.3d 1208, 1211 (10th Cir. 2003).

170. *See* Del. State Coll. v. Ricks, 449 U.S. 250, 256-57 (1980).

171. *See Martinez II*, 347 F.3d at 1211; Seymore v. Shawver & Sons, 111 F.3d 794, 799 (10th Cir. 1997).

172. *See Martinez II*, 347 F.3d at 1211.

173. *See* Park v. Howard Univ., 71 F.3d 904, 907 (D.C. Cir 1995) (citing Laffey v. Nw. Airlines, Inc., 567 F.2d 429, 472 n.325 (D.C. Cir. 1976)); *see also* Velikonja v. Mueller, 315 F. Supp. 2d 66, 71 (D.D.C. 2004).

cluded in a prior EEOC charge, the investigatory and conciliatory role of the EEOC would be circumvented, thus depriving the agency of one of its key functions.[174] All of these policy considerations make a strong argument for why a new administrative charge is required when employees want to file a complaint about subsequent post-filing discrete acts in their case.

On the other hand, there are also strong policy considerations underlying the decisions emerging from the Sixth, Eighth, and Ninth Circuits that are supported by the EEOC's own interpretation of the effect of *Morgan* on post-filing discrete act claims.[175] These circuits take a view that is more favorable to the employee, loosening the administrative requirements for employees to successfully bring a claim regarding post-filing discrete acts in district court. One of the key policies in the pro-employer cases is the idea of giving employers adequate notice of the claims against them. However, pro-employee courts find that the filing of a first administrative charge adequate to relieve employees of this burden. The first charge serves to put employers on notice of a possible situation regarding a particular employee and gives employers and the EEOC a chance to investigate the circumstances surrounding the charge.[176] The pleading requirements for employees at the administrative level should be no more burdensome than if they were filing a complaint not covered by Title VII in district court, where the standard is simple notice pleading.[177] Further, under the Federal Rules of Civil Procedure, claimants are not required to set out the exact legal theory that they believe entitles them to relief.[178] Therefore, if analogized to the administrative charge requirement, employees would not have to specify if they were claiming discrimination or retaliation, as long as the proper basis for the allegation is specified—that they are members of a protected class under Title VII.[179] Simple notice is all that should be required of employees in an

174. Babrocky v. Jewel Food Co., 773 F.2d 857, 863 (7th Cir. 1985).

175. *See* EEOC MANUAL, *supra* note 136.

176. Delisle v. Brimfield Twp. Police Dep't, 94 F. App'x 247, 253-54 (6th Cir. 2004).

177. *See* FED. R. CIV. P. 8(a)(2); *see also* 35A C.J.S. *Federal Civil Procedure* § 303 (2003) (stating that all the Federal Rules require in a complaint is a "short and plain statement of the claim showing the pleader is entitled to relief").

178. 35A C.J.S. *Federal Civil Procedure* § 303 (2003).

179. The five protected classifications under Title VII are race, color, religion,

administrative charge, and the charge should be construed liberally because administrative charges are generally filed by laypersons that are unskilled in the technicalities of formal pleading.[180] If this was all that was required, employers would still get the necessary notice and employees would have a much easier time bringing subsequent post-filing acts into their lawsuit because many more claims would be seen as "like or reasonably related" to the prior charges.

Requiring employees to file new charges for additional post-filing discrete acts of discrimination in order to be considered by the courts does erect additional procedural barriers between aggrieved employees and judicial relief.[181] The courts have recognized the procedural requirements of Title VII as important, but the exhaustion doctrine was not designed to "become a massive procedural roadblock to access to the courts. Therefore, where the ends of administrative exhaustion have been served . . . separate initiation of administrative exhaustion for related post-[filing] conduct is not required."[182] This roadblock seems particularly inappropriate because the EEOC does not have to address or actually investigate a complainant's claim for it to be considered administratively exhausted; the claim simply has to be filed.[183] In light of this fact, requiring employees to file an additional charge is a procedural barrier that does not necessarily produce any potential benefit other than allowing employers to wiggle out from under potential allegations. Further, it is unlikely that Congress intended to place such a high burden on employees trying to recover for workplace discrimination by requiring employees to file a separate charge for every post-filing discrete act they believe is a violation of Title VII.

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sex, and national origin. 42 U.S.C. § 2000e-2(a)(1) (2000).

180. *See supra* note 152 and accompanying text.

181. *See* Anderson v. Reno, 190 F.3d 930, 938 (9th Cir. 1999), *abrogated by* Nat'l R.R. Passenger Corp. v. Morgan (*Morgan*), 536 U.S. 101 (2002).

182. Velikonja v. Mueller, 315 F. Supp. 2d 66, 74 (D.D.C. 2004) (citations and quotation marks omitted).

183. *See* Yamaguchi v. U.S. Dep't of the Air Force, 109 F.3d 1475, 1480 (9th Cir. 1997) (finding that the EEOC's failure to address a claim to have no bearing on the consideration of administrative exhaustion); *cf.* Martin v. Nannie & the Newborns, Inc., 3. F.3d 1410, 1413, 1416 n.7 (10th Cir. 1993) (finding that a plaintiff succeeded in exhausting her claims reasonably related to the allegation in the EEOC charge when the EEOC did not complete its investigation).

Finally, in response to the second question, a compelling argument can be made as to why some claims should be allowed under a relationship test and why applying the standard discussed below would not be a resurgence of the continuing violation doctrine. The decision in *Morgan* was based on the idea that Congress intended discrimination claims be filed and processed promptly.[184] The two key policies underlying this rationale are employer notice and the gathering of evidence before it gets stale. These two policy goals are not as important when considered in light of post-filing discrete acts. The *Morgan* Court did not want to allow the plaintiff to recover from Amtrak for acts that took place between two and five years prior to the filing of his EEOC charge. In that situation there was a high risk that evidence would be stale and of the defendant facing prejudice by being forced to defend against charges of which it had no reasonable notice.

In most of the cases discussed above regarding post-filing discrete acts, the subsequent acts occurred either during the investigation of pending EEOC charges or after the employee had already filed the initial district court suit. With the discrete acts occurring at these times, the two policy concerns of employer notice and fresh evidence are not as critical. First, the employee in question would already have put the employer on notice with the prior administrative charge, thereby allowing the employer to keep a more watchful eye on the situation and to have a heightened awareness of the subsequent treatment of the employee that could lead to additional claims. Second, the employer would already be in the process of gathering evidence in order to investigate the claim or to defend the company in the anticipated lawsuit derived from the first administrative charge. Additionally, since the employer was put on notice by the first charge, it is likely that the employer, who is on heightened alert, would be keeping better records and documenting the course of events between the employee and employer. In light of these reasons, the underlying policy concerns behind the decision regarding pre-filing period acts are simply not as compelling when applied to post-filing discrete acts.

184. *Morgan*, 536 U.S. at 109.

VI. THERE IS A BETTER WAY: THE EIGHTH CIRCUIT'S STANDARD IN *WEDOW V. CITY OF KANSAS CITY, MISSOURI*

It is unlikely that both employees and employers will be content with whatever standard is determined to be most suitable because some of their policy interests will necessarily be slighted. However, a consistent position needs to be adopted by the circuit courts or mandated by the U.S. Supreme Court on this issue. The determination of what claims can be brought in a district court suit should not depend on the circuit in which the case is filed. One possible option, which portrays a reasonable middle ground, is similar to the standard set forth by *Wedow v. City of Kansas City, Missouri*.[185] The only exception to the administrative exhaustion requirement for post-filing discrete acts would be for subsequent retaliation claims that derive from an underlying discrimination or retaliation charge specifically stating that the retaliatory behavior was *continuous and ongoing*. This would be the only time a post-filing discrete act could be considered "like or reasonably related" to the prior administrative charge, and therefore, would be exempt from the requirement of being the subject of an administrative charge.

This standard would be consistent with the essential policy goals on each side of the issue while not completely taking either the hardline view of the pro-employer circuits, or the more liberal view of the pro-employee circuits. It would ensure that employers had notice of the potential for a subsequent claim and ensure that employees would not have to file an additional charge in all cases where further discrimination is most foreseeable by both parties—situations in which there is continuous retaliation for prior EEO activity such as the filing of a prior discrimination or retaliation charge, participation in a protected activity, or opposition to an unlawful employment practice.

This standard works due to the nature of a retaliation claim. One of the key elements of a retaliation claim is that the employee must have participated in some form of activity protected under Title VII.[186]

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185. Wedow v. City of Kansas City, Mo., 442 F.3d 661, 673-74 (8th Cir. 2006) (retaining a very limited "like or reasonably related" test in light of *Morgan*).

186. To establish a prima facie case of retaliation, a plaintiff must show that he or she engaged in a protected activity and suffered an adverse employment action, and that there was a causal link between the two. Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1064 (9th Cir. 2002); Smalley v. City of Eatonville, 640 F.2d

Generally that activity is the filing of a prior administrative charge which the employer is subsequently made aware of by the administrative agency. Once the employer is on notice of a charge that claims *continuing and ongoing* adverse treatment, the employer could not argue it had no notice of post-filing discrete acts the employee might also see as adverse, as long as they are based on the same underlying claim as in the prior charge. If the charge complained of is *ongoing* discrimination, not an isolated incident that happened in the past that the employer might not expect to happen again in the future, the employer could be liable for future claims without further administrative charges by the employee. However, those claims would be limited to discrete acts identical in nature to those identified in the charge as being *continuous and ongoing*. Thus, if the retaliation took another form, an additional charge would be required, but if it continued in identical form, those discrete acts could be brought in a suit without prior administrative exhaustion.

This standard also does not allow an employer to delay an employee's case getting to court. If additional administrative charges were required for each subsequent act that fell within this standard, the employer might be encouraged to continuously retaliate against the employee with the goal of forcing them to file more and more charges. This could have the effect of discouraging the employee from pursuing the litigation because of lack of resources, most notably, time and money. This is an effect that the courts should not allow because it conflicts with the policy goals of Title VII, which include ensuring an avenue for aggrieved employees to seek relief for workplace discrimination.

Allowing employees that truly are being subjected to *continuous and ongoing* retaliatory discrimination easier access to the district courts and providing assurances that when they get there legitimate claims will not be dismissed on an administrative technicality comport with Title VII. At the same time, this standard assures that employers will have notice, prior to the lawsuit, of the basis of potential claims against them and gives employers a chance to change their ways before employees suffer further harm. This standard would not allow employees' discrete act claims not specifically mentioned in the prior administrative charge to be a part of the suit without additional admin-

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765, 769 (5th Cir. 1981).

istrative exhaustion. However, it would allow *ongoing* claims of retaliation to be included in the suit without unnecessary procedural barriers. This is unlike the continuing violation doctrine, which was designed to cover acts that happened prior to charge filing and to make discrete acts on which the filing period had already expired timely. This standard does not make discrete acts that occur before the filing period timely, rather it simply removes a procedural roadblock to recovery for a much more recent and foreseeable violation.

VII. CONCLUSION

If this standard were applied to the hypothetical lawsuit discussed at the opening of this Comment, the outcome is just. The employer would not be liable for discrete acts for which it had no notice, the additional fourteen post-filing discrete acts that *T* attempted to add to his lawsuit based on the original EEOC complaint regarding the single performance evaluation. First, *T* had not complained of any subsequent poor performance evaluations, and second, *T* did not allege the employer's behavior leading to his first EEOC charge was *continuous or ongoing*; in fact, it was an isolated event. The employer and the EEOC only had notice of the single incident in the first charge, so the EEOC would not have investigated other issues, thus depriving the employer of notice of additional liability and robbing the EEOC of its investigatory and conciliatory role. The difference between a negative performance evaluation and being passed over for promotion seven times because *T* was in the "doghouse" is vast. If *T* knew to contact an EEOC counselor for the performance evaluation, *T* should also be held to know further EEOC contact was necessary for the non-promotions, what many would consider a more serious retaliatory adverse employment action. However, if *T* did file a second charge for the first non-promotion and complained of denial of promotions as *ongoing* retaliation for his prior EEOC activity, *T* would not have been required to file an additional charge for the other six non-promotions that followed.

While implementation of this standard would require a change in the pleading requirements for employees at the administrative level, the change is not drastic. The federal agency EEO counselors or the EEOC intake employees would simply have to inform the employees of the potential effect of how they word their administrative com-

plaints. Employees would have to play a greater role in being aware of and taking action to protect their rights, and employers would not be liable for allegations of which they had no notice. This would allow for a very narrow range of post-filing claims to be included in an exception to the administrative exhaustion requirement yet would not force employers to defend against sweeping allegations in a lawsuit when only on notice of a very narrow administrative charge.

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