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Cover Page Footnote

The author wishes to thank her family, friends and editors for support. She also wishes to thank Professor Perna and Professor Cochran for their insight and suggestions.

IN OPPOSITION TO APPLYING THE CONTINUING VIOLATION DOCTRINE TO HOSTILE WORK ENVIRONMENT CLAIMS: *NATIONAL RAILROAD PASSENGER CORP. V. MORGAN*, 536 U.S. 101 (2002)

Tara-Ann Topputo[*]

I. INTRODUCTION

Imagine you are an employer and your employee, A, files a hostile work environment claim against you. Employee A alleges discriminatory conduct by supervisors dating back over seven years within the workplace. Employee A alleges a hostile work environment, including denied career opportunities, exposure to derogatory language, and verbal and written gender motivated reprimands throughout the course of employment. However, although A claims to have been exposed to this alleged harassment since the start of employment, A waits seven years to file a claim regarding the discriminatory conduct. Remember that for A to recover for discrimination claims within the state jurisdiction where you maintain your business, the hostile work environment claim must be filed within 300 days of the alleged discriminatory conduct or the employee loses the ability to recover. Should A be able to recover monetary damages from you for all seven years of exposure to the hostile work environment, even when A can show that only one of the discriminatory acts falls within the 300-day filing period? Employers beware: the Supreme Court answers this question with "an unqualified yes."[1]

In *National Railroad Passenger Corp. v. Morgan*,[2] the Supreme Court established a bright line rule[3] for the timely filing of discrimination charges under Title VII of the Civil Rights Act of 1964.[4] In *Morgan*, the

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[1] Jeffrey M. Schlossberg, *Continuing Violation Doctrine and Hostile Work Environment Cases* ¶ 1 <http://www.ruskinmoscou.com/article-continuing%20violation%20doctrine.htm> (accessed Feb. 26, 2003); *see Natl. R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061 (2002). Three hundred days equals approximately ten months.

[2] 536 U.S. 101, 122 S. Ct. 2061.

[3] A "bright-line rule" is a judicial decision that resolves issues and ambiguities in the law that may at times sacrifice fairness for equity. *Black's Law Dictionary* 187 (Brian A. Garner ed., 7th ed., West 1999).

[4] 42 U.S.C. § 2004-5(e)(1) (2003). *See infra* pt. II A and accompanying text (discussing the history, purpose, and filing requirements for Title VII discrimination claims).

Court unanimously held that plaintiffs seeking to recover for discrete acts[5] of discrimination must file charges within the requisite limitations filing period. However, the Court was divided sharply on the issue of discrimination charges based upon hostile work environment claims.[6] In a 5-4 decision, the Court allowed recovery for hostile work environment claims falling outside the limitations filing period by applying the continuing violation doctrine to extend the statute of limitations. The Supreme Court carved out an exception to the statute of limitations by applying the continuing violation doctrine[7] to hostile work environment claims.[8]

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[5] The *Morgan* Court described discrete acts as "termination, failure to promote, denial of transfer, or refusal to hire." 122 S. Ct. at 2073.

[6] The *Morgan* majority cites to *Harris v. Forklift Sys.* to characterize hostile work environments: "when the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." *Morgan*, 122 S. Ct. at 2074 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)) (internal citations omitted). The Supreme Court in *Harris* stated that an environment can only be determined to be hostile by looking at all of the circumstances including the "frequency of the discriminatory conduct; its severity; whether [the conduct] is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. Frequently cited Supreme Court hostile work environment cases include: *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris*, 510 U.S. 17; *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

[7] The continuing violation doctrine is judicial-made law that, when applied, "overrides" or extends the statute of limitations for discrimination actions brought under Title VII. Jackson Lewis LLP, *"Continuing Violation" Theory Overrides Time Limit for Filing Hostile Environment Charges Under Title VII* ¶ 2 <http://www.jacksonlewis.com/publications/articles/20020613/default.cfm> (June 13, 2002); Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* vol. 2, ch. 31, 1351 (3d ed., ABA 1996) (determining that a continuing violation generally refers to a "defendant's alleged maintenance over time of a discriminatory policy or system"); Thelma A. Crivens, *The Continuing Violation Theory and Systemic Discrimination: In Search of Judicial Standard for Timely Filing*, 41 Vand. L. Rev. 1171, 1172 (1988) (stating that the continuing violation doctrine "is a procedural theory developed by courts that modifies the normal statute of limitations when the employer's discrimination exists prior to and during the limitations period"); *see e.g.* Lisa S. Tsai, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 Tex. L. Rev. 531, 534 (2000). For historical development of the continuing violation theory *see generally* A. Larson & L. Larson, *Employment Discrimination* § 48.13(f) (2d ed., Matthew Bender 1987); B. Schlei & P. Grossman, *Employment Discrimination Law* 1042-53 (2d ed., Bureau of Natl. Affairs 1983 & Supp. 1983-1984).

[8] *Morgan*, 122 S. Ct. at 2077. The *Morgan* Court interpreted the statute of limitations for these types of discrimination claims to resolve the confusion among the Circuits over when a plaintiff may file timely charges and pursue relief for alleged discriminatory acts under Title VII. *Id.* at 2070. Before this decision, the Courts of Appeals employed three different tests to apply the continuing violation theory as an exception to the statute of limitations to permit plaintiffs to file discrimination charges that would otherwise be time-barred. *Berry v. Bd. of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983) (applying a multifactor test looking at subject matter, frequency and permanence) (*infra* n. 67 for further explanation); *Galloway v. GM Serv. Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996) (applying a reasonable person test) (*infra* n. 60

Although the Court correctly decided the continuing violation doctrine does not apply to claims for discrete acts of discrimination, the Court incorrectly applied the doctrine to hostile work environment claims. The Court erroneously applied the continuing violation doctrine for several reasons. First, applying the continuing violation doctrine to hostile work environment claims undermines the purpose and ignores the importance of the statute of limitations for discrimination claims.[9] Second, applying the continuing violation doctrine to hostile work environment claims fails to further the purpose and statutory text of Title VII.[10] Further, applying the continuing violation doctrine to hostile work environment claims is unsound and without significant supporting policy concerns.[11] Finally, the decision will leave the courts in a state of confusion.[12]

Section II of this Note discusses the Civil Rights Act of 1964, outlines the background of *Morgan*, and details the majority holding and dissenting opinion. Section III questions the Court's application of the continuing violation doctrine to hostile work environment claims. This section distinguishes between discrete acts of discrimination and hostile work environment claims by analyzing the Court's statutory interpretation of both types of claims and concluding that the Court selectively applied the intent of Congress in its decision to apply the continuing violation doctrine to hostile work environment claims. This section then contends that by overlooking the competing public policy concerns in applying the continuing violation doctrine to hostile work environment claims, the Court causes a disruption in the balance struck between employees' and employers' public policy interests in the workplace. Finally, Section III concludes by addressing the questions left unanswered by the Court in the aftermath of the *Morgan* decision.

II. BACKGROUND

The Background section of this Note first looks at the development and purpose of the Civil Rights Act of 1964 and Title VII.[13] Next, the factual details[14] and procedural history of the *Morgan* case are provided.[15] The

for further explanation); *Anderson v. Reno*, 190 F.3d 930, 939 (9th Cir. 1999) (requiring a plaintiff to demonstrate that the time barred incidents were part of a pattern of discrimination and that the pattern continued into the relevant limitations period) (*infra* n. 65 for further explanation).

[9] *See infra* pt. III A.

[10] *See infra* pt. III B.

[11] *See infra* pt. III C.

[12] *See infra* pt. III D.

[13] *See infra* pt. II A.

[14] *See infra* pt. II B.

Supreme Court's holding and reasoning concerning both discrete discriminatory acts and hostile work environment claims are explained.[16] Finally, this section discusses the dissenting opinion and it's reasoning.[17]

A. The Civil Rights Act of 1964 and Title VII: Eliminating Workplace Discrimination

This section examines the history, purpose and primary focus of Title VII of the Civil Rights Act of 1964. This section will then discuss the filing and recovery provisions to be followed by an aggrieved individual against an employer for a Title VII discrimination claim.

1. The Purpose of Title VII

The enactment of Title VII of the Civil Rights Act of 1964[18] ("Title VII") has been described as a "watershed development in the national commitment to making equality in the workplace a reality."[19] Title VII prohibits employment discrimination based on race, color, national origin, religion, and sex.[20] The primary focus of Title VII is to eliminate workplace discrimination and to restore injured employees to their pre-discrimination status,[21] not by providing redress, but by preventing the harm caused by discrimination altogether.[22] The secondary purpose of Title VII is to compensate victims of discrimination.[23]

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[15] *See infra* pt. II C.

[16] *See infra* pt. II D 1.

[17] *See infra* pt. II D 2.

[18] 42 U.S.C. §§ 2000e-1-17 (1994).

[19] Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 Mercer L. Rev. 651, 669 (2000); Michael W. Roskiewicz, *Title VII Remedies: Lifting The Statutory Caps From The Civil Rights Act of 1991 to Achieve Equal Remedies for Employment Discrimination*, 43 Wash. U.J. Urb. & Contemp. L. 391, 391 (1993) (stating that Title VII symbolizes a "landmark in employment discrimination legislation"); *see* Mack A. Player, et al., *Employment Discrimination Law: Cases and Materials* 214 (West 1980) (commenting that Title VII is the "core of employment discrimination law").

[20] 42 U.S.C. § 2000e-2(a)(1) (stating that "[i]t 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").

[21] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

[22] *Faragher*, 542 U.S. at 806 (citing *Albemarle*, 422 U.S. at 417).

[23] *Albemarle*, 422 U.S. at 417.

Title VII's remedial provisions are modeled after the National Labor Relations Act ("NLRA").[24] As a result, Section 706(e)[25] of Title VII, the statute of limitations provision for discrimination claims, resembles the NLRA's statute of limitations.[26] When Congress modeled Title VII's remedial provisions after the NLRA, existing NLRA case law held that the continuing violation doctrine "did not apply to extend the limitations period for discrete events simply because there was more than one allegedly unfair labor practice at issue."[27] However, in order to enjoy the protection of Title VII, a complainant[28] must follow certain procedures.

2. Filing and Recovery Provisions for Title VII Discrimination Claims

Section 705 of Title VII created the Equal Employment Opportunity Commission ("EEOC"), a federal agency formed to review allegations and

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[24] *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 909 (1989); *see infra* n. 26 (discussing the comparison of the NLRA to § 706 of the Civil Rights Act).

[25] Section 706(e) of Title VII sets forth the limitations period and is codified as 42 U.S.C. § 2000e-5(e)(1). Section 706(e)(1) states:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the St ate or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Id.

[26] *Lorance*, 490 U.S. at 909-10. "In 1972, eight years after it drew on the NLRA precedent in drafting Section 706 of the Civil Rights Act, Congress amended Title VII by, among other things, expanding the limitations period to 180 or 300 days, rather than the 90 or 210 days it had specified in 1964." Br. of U.S. as Amicus Curiae Supporting Petr. at 15, *Morgan*, 536 U.S. 101 (available in 2001 WL 1023520). "That amendment did not, however, signal a departure from the NLRA model. To the contrary, the House and Senate committee reports on the 1972 amendments referred to the new 180-day limitations period as being 'similar to' or 'identical to' the six-month limitations period that applied under Section 10(b) of the NLRA." *Id.* (citing Sen. Rpt. 92-415, at 37 (Oct. 28, 1971) and H.R. Rpt. 92-238, at 65 (June 2, 1971) (minority views)). *See generally Mohasco Corp. v. Silver*, 447 U.S. 807, 818-24 (1980).

[27] Reply Br. of Petr. at 11, *Morgan*, 536 U.S. 101 (available in 2001 WL 1597774).

[28] *See infra* n. 30.

charges filed by an aggrieved individual against an employer.[29] A complainant[30] will receive a court hearing on the merits of an employment discrimination claim only when the complainant complies with the EEOC guidelines.[31] Title 42 U.S.C. § 2000e(5)(e)(1) sets out the requirements that a complainant must establish before filing a charge with the EEOC.[32] The requirements state in part "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred."[33] However, the majority of complainants have 300 days to file a charge with the EEOC after a discriminatory act occurs.[34] The employee, as the complainant, must then wait another 180 days before requesting a right-to-sue letter from the EEOC to sue the employer in court after filing the

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[29] 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. Cal. Davis L. Rev. 749, 751 n. 16 (1985) (stating "[t]he Equal Employment Opportunity Commission (EEOC), created by Title VII, is a five member body appointed by the President and confirmed by the Senate") 42 U.S.C. §§ 2000e to 2000e-17. *See* Lindemann & Grossman, *supra* n. 7, at 1205-73 (discussing the administrative process of the EEOC); *id.* at 1335-83 (discussing the timeliness of filing a charge under § 706(e)(1) of Title VII). For more information on the EEOC, *see* U.S. Equal Employment Opportunity Commission, *U.S. EEOC Homepage* <http://www.eeoc.gov> (accessed Feb. 26, 2003).

[30] The term "complainant" is used here to clarify that a discrimination charge with the EEOC has been filed. The term "plaintiff" will be used when referring to a complainant or employee who files a charge with the EEOC and has been granted the right to sue the employer from the EEOC in a court of law.

[31] Doi, *supra* n. 29, at 751. 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.

Lindemann & Grossman, *supra* n. 7, at 1275 (internal citations omitted).

[32] *Morgan*, 122 S. Ct. at 2070. *See supra* note 25 for the exact language of 42 U.S.C. § 2000e-5(e)(1).

[33] 42 U.S.C. § 2000e-5(e)(1); *Morgan*, 122 S. Ct. at 2070.

[34] Whether a plaintiff is required to file either 180 or 300 days after the discriminatory conduct occurs depends on the existence of a state agency considered to be an equivalent or counterpart to the EEOC. If a state agency exists, then the "employee who initially files a grievance with that agency must file the charge with the EEOC within 300 days," while those in states without an agency must file their charge within 180 days. *Morgan*, 122 S. Ct. at 2070; *see* U.S. Equal Opportunity Employment Commission, *Filing a Charge* <http://www.eeoc.gov/facts/howtofil.html> (last updated June 10, 1997). Alabama, Arkansas and Mississippi are the only three U.S. states that do not have Fair Employment Practice Agencies at the state level equal to the EEOC. Equal Employment Opportunity Law Website, *Fair Employment Practice Agencies-Other States and Countries* <http://www.eeolaw.com/states.html> (accessed Feb. 26, 2003).

EEOC charge.[35] If the EEOC issues a right-to-sue letter, the employee then has ninety days to file a lawsuit.[36] An untimely filed complaint that falls outside the limitations period may result in a time barred claim.

The Equal Employment Opportunity Act ("EEOA") of 1972 amended Title VII and expanded the equitable remedies available to victims of workplace discrimination.[37] To further expand the remedies[38] available to plaintiffs under Title VII, Congress enacted the Civil Rights Act of 1991 to allow monetary recovery for compensatory and punitive damages.[39]

B. *The Facts of* Morgan

Abner Morgan, Jr. sued his employer, National Railroad Passenger Corp. ("Amtrak"), under Title VII of the Civil Rights Act of 1964.[40] He alleged he was the victim of discrete and retaliatory acts of discrimination and was exposed to a racially hostile work environment throughout his employment.[41] Amtrak hired Morgan, a black male, in August 1990.[42] Amtrak's alleged racially motivated discrimination against Morgan began when he was hired as an electrician's helper, rather than as an electrician.[43] Although previously trained and experienced in electrical work,[44] Morgan

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[35] Doi, *supra* n. 29, at 752.

[36] *Id.*

[37] Pub. L. No. 92-261, 86 Stat. 103 (1972); 42 U.S.C. § 2000e-5(g) (1989). Prior to the 1972 amendment, back pay and often front pay were "the primary monetary relief available under Title VII and other federal antidiscrimination statutes." Lindemann & Grossman, *supra* n. 7, at 1775. Back pay would include lost wages, lost salary or other benefits (not limited to including vacation pay, pension and retirement benefits, savings plan contributions, or profit sharing). *Id.* at 1779, 1781. Where reinstatement of an employee is not feasible, front pay would be provided to compensate the employee for the "future effects of discrimination." *Id.* at 1815.

[38] Pub. L. No. 102-166, § 102, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981a (1991)).

[39] "Section 102 of the Civil Rights Act of 1991 established 42 U.S.C. § 1981a, which . . . provides for compensatory and punitive damage awards." Lindemann & Grossman, *supra* n. 7, at 1821 (internal citation omitted). Compensatory damages are monetary damages awarded to the injured person sufficient to cover the loss suffered. *Black's Law Dictionary* at 394. Sometimes compensatory damages are also referred to as actual damages. *Id.* Punitive damages are awarded along with compensatory damages when a defendant has acted with "recklessness, malice, or deceit." *Id.* at 396.

[40] *Morgan*, 122 S. Ct. at 2067.

[41] *Id.* at 2068.

[42] *Id.* at 2069 n. 1.

[43] *Id.*; *Morgan v. Natl. R.R. Passenger Corp*, 232 F.3d 1008, 1011 (9th Cir. 2000), *aff'd in part and rev'd in part*, 536 U.S. 101 (2002) ("*Amtrak*").

[44] *Amtrak*, 232 F.3d at 1011.

was the only person ever hired as a "helper" at his location of employment.[45] Other alleged acts include reprimands and termination for refusing to follow orders, a refusal by Amtrak to allow him to participate in an apprenticeship program,[46] written and verbal reprimands for days taken off from work,[47] and the use of "racial epithets" against him by his managers.[48]

On February 27, 1995, Morgan filed a discrimination and retaliation charge against Amtrak with the EEOC and also with the California Department of Fair Employment and Housing.[49] In his complaint, Morgan alleged that during the nearly five years he worked for Amtrak, he suffered harsh discipline and harassment because of his race from his supervisors.[50] While many of Morgan's alleged discriminatory events took place within 300 days of the time he filed an EEOC claim, many of the alleged acts also took place before the 300-day filing period.[51]On March 3, 1995, Amtrak terminated Morgan's employment.[52] The EEOC issued a "Notice of Right to Sue"[53] on July 3, 1996. Morgan filed his lawsuit on October 2, 1996.[54]

C. *Procedural History of* Morgan

Morgan originally brought suit against Amtrak in the United States District Court for the Northern District of California alleging that he experienced discrimination, retaliation, and suffered exposure to a hostile work environment because of his race.[55] In response, Amtrak filed a motion for summary judgment relating to all incidents occurring more than 300 days before Morgan filed his EEOC charge.[56] The District Court used a

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[45] *Id.* (stating that Morgan's position and pay were brought in line with the other electricians he worked with in April 1992).

[46] *Id.* However, Amtrak claimed Morgan was scheduled the following year to go through the apprentice program but the program was discontinued before he was to start training. *Id.* at n. 6.

[47] *Id.* Morgan contends that part of the absenteeism at issue with his managers included several months of previously approved leave he was granted to care for his son. *Id.*

[48] *Morgan*, 122 S. Ct. at 2069 n. 1.

[49] *Id.* at 2068.

[50] *Id.* Morgan contends other employees were not as harshly treated or harassed. *Id.* at 2068.

[51] *Id.* at 2065. For more in-depth details regarding Morgan's alleged acts of discrimination by Amtrak, *see* Br. of U.S. as Amicus Curiae Supporting Petr. at 3-6, *Morgan*, 536 U.S. 101; Br. of Petr. at 2-6, *Morgan*, 536 U.S. 101 (available in 2001 WL 995298).

[52] *Morgan*, 122 S. Ct. at 2073 n. 8.

[53] *See supra* pt. II A 2 for information regarding an EEOC Right-to-Sue letter.

[54] *Morgan*, 122 S. Ct. at 2068.

[55] *Amtrak*, 232 F.3d at 1010.

[56] *Morgan*, 122 S. Ct. at 2068.

"reasonable person" test established in *Galloway v. General Motors*[57] to apply the continuing violation doctrine to Morgan's discrimination claims.[58] The District Court granted Amtrak partial summary judgment and ruled Amtrak was not liable for conduct that occurred before May 3, 1994, because that conduct fell outside the 300-day filing period.[59] Thus, Amtrak was held responsible only for alleged discriminatory conduct occurring 300 days or ten months before Morgan filed his administrative charge on February 27, 1995, but not for any events that took place before May 3, 1994.[60] The remaining claims that the District Court found timely filed proceeded to trial, resulting in a jury verdict in favor of Amtrak.[61] Morgan appealed the District Court's summary judgment ruling[62] and the jury verdict judgment[63] to the Ninth Circuit Court of Appeals.

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[57] *Galloway*, 78 F.3d at 1167. *Galloway*, applying a "reasonable person" test, states:

> [T]he plaintiff may not base [the] suit on conduct that occurred outside the statute of limitation unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations.

Id.

[58] *Morgan*, 122 S. Ct. at 2068.

[59] *Id.*

[60] The District Court did not find it "unreasonable to expect that Morgan should have filed an EEOC charge on these acts before the limitations period on these claims ran." *Id.* at 2068-69. The lower court held that "Morgan was not entitled to invoke the continuing violation doctrine because as early as 1991 he claimed to be the victim of discrimination and retaliation by Amtrak and yet he did not file his administrative charge until 1995." Br. of Petr. at 6, *Morgan*, 536 U.S. 101. In applying the *Galloway* test, the district court held that a plaintiff cannot base a suit on conduct that:

> occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of statute of limitations.

Morgan, 122 S. Ct. at 2068-69 (quoting *Galloway*, 78 F.3d at 1167).

[61] *Morgan*, 122 S. Ct. at 2069 n. 2. The remaining claims of alleged discrimination that went before the district court jury are: 1) suspension in Sept. 1994; 2) denial of training in Oct. 1994; 3) suspension in Feb. 1995; and 4) termination in 1995. Br. of Petr. at 6, *Morgan*, 536 U.S. 101.

[62] Morgan argued that the district court erred in limiting judgment regarding the liability time frame. *Amtrak*, 232 F.3d at 1010.

[63] Morgan claimed the district court erred in four ways as to the jury verdict:

> 1) instructing the jury that evidence of pre-limitations period conduct was for "background" or "context" only; 2) excluding certain testimony by Morgan and co-workers regarding the racially hostile environment; 3) improperly instructing the jury on the hostile environment claim; and 4) imposing improper time limits on the presentation of Morgan's case.

Id.

The Court of Appeals considered each of Morgan's three types of Title VII claims separately.[64] In relying on a test established in *Anderson v. Reno*,[65] the Ninth Circuit concluded that the pre-limitations conduct[66] in all three claims was sufficiently related to the post-limitations acts to apply the continuing violation doctrine.[67] The Court of Appeals held that the District Court should have allowed certain events occurring in the pre-limitations period to be put before the jury for liability purposes.[68] The Court of Appeals reversed the District Court's ruling and remanded the case for a new trial.[69]

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[64] The three types of Title VII claims alleged by Morgan were discrete discriminatory acts, retaliation, and hostile environment. *Morgan*, 122 S. Ct. at 2068. For the purposes of this Note, however, only discrete acts and hostile work environment will be discussed further. *See supra* n. 5 (defining discrete discriminatory acts); *supra* n. 6 (defining hostile work environment). Acts of retaliation by an employer would occur in response to the employee's conduct (e.g., such as reporting an unlawful activity by the employer) that violates public policy in some way. *Black's Law Dictionary* at 206 (defining "retaliatory discharge").

[65] 190 F.3d 930, 936 (9th Cir. 1999) (stating a plaintiff must demonstrate that the time barred incidents were part of a pattern of discrimination and that the pattern continued into the relevant limitations period. This can be demonstrated by showing evidence that the defendant "engaged in a 'systematic policy of discrimination' or by presenting evidence of a series of related discriminatory acts directed" at the plaintiff by the defendant.). *Anderson* established a continuing violation doctrine that "allows courts to consider conduct that would ordinarily be time barred 'as long as the untimely incidents represent an ongoing unlawful employment practice.'" *Morgan*, 122 S. Ct. at 2069 (quoting *Anderson*, 190 F.3d at 936).

[66] These pre-limitation claims included Amtrak's decision to hire an African-American employee at a lower level of pay than others in comparable positions performing the same job duties, Morgan's multiple disciplines and denial of training, supervisors' use of racially derogatory language toward Morgan among other things the Court of Appeals believed to occur relatively frequently. *Amtrak*, 232 F.3d at 1017.

[67] *Morgan*, 122 S. Ct. at 2069. The Ninth Circuit, in relying on *Anderson v. Reno*, rejected both the *Galloway* test and the Fifth Circuit's *Berry* multifactor test. *Id.*; *Amtrak*, 232 F.3d at 1014-16. The *Berry* multifactor test is as follows:

> The first [*Berry* factor] is *subject matter*. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is *frequency*. Are the alleged acts recurring (*e.g.*, a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of *permanence*. Does the act have the degree of permanence that should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

Berry, 715 F.2d at 981 (emphasis added).

[68] *Morgan*, 122 S. Ct. at 2069 (citing *Amtrak*, 232 U.S. 1017-18).

[69] *Morgan*, 122 S. Ct. at 2069. Before *Morgan*, there were two ways a plaintiff within the Ninth Circuit could establish a continuing violation and be allowed to recover on claims filed outside the statutory period. *Id.* A plaintiff could show either "a series of related acts [of discrimination] one or more of which are within the limitations period" or "a systematic policy or practice of discrimination that operated, in part, within the limitations period—a systemic violation." *Id.*

Because of the split in the Circuit decisions,[70] the Supreme Court granted certiorari on the issues in this case.

D. The Supreme Court's Decision in Morgan

1. The Majority Opinion

The *Morgan* Court unanimously reversed the Ninth Circuit Court of Appeals holding that charges for discrete discriminatory acts must be filed within the appropriate 180 or 300-day filing period as required by the EEOC.[71] In contrast, the Supreme Court then affirmed, in a sharply divided 5-4 decision, the Ninth Circuit's ruling on Morgan's hostile work environment claims.[72] The Court held that a charge of hostile work environment will not be time barred if all of the acts constituting the claim are part of the same "unlawful practice" and at least one act falls within the requisite filing period.[73]

The majority defined the issue as "whether, and under what circumstances" a claim of racial discrimination may be pursued against an employer when some of the alleged discriminatory acts fall outside the statutory filing period.[74] Justice Thomas, writing for the majority, initially focused on the language of the statutory text, but then discussed what comprises an "unlawful employment practice" and when the unlawful employment practice actually "occur[s]."[75] He commented that, although the Courts of Appeals had offered reasonable solutions, none of these solutions were based on the text of the statute.[76] For Justice Thomas, the statutory text was the most significant source for guiding the Court.[77]

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[70] Prior to the *Morgan* ruling, the continuing violation theory existed as one of the most troublesome and confusing areas of employment discrimination law. *See e.g.* Lindemann & Grossman, *supra* n. 7, at 1351 (stating the continuing violation theory has been "the most muddled area in all of employment discrimination law"); Crivens, *supra* n. 7, at 1172 (calling the doctrine "one of the most confusing theories in employment discrimination law").

[71] *Morgan*, 122 S. Ct. at 2068; *see* Gibson, Dunn & Crutcher LLP, *Supreme Court Considers the Continuing Violation Doctrine: Mixed News for Employers* ¶¶ 1-2 <http://www.gdclaw.com/practices/publications/detail/id/624/?pubItemId=6450> (June 21, 2002).

[72] *Morgan*, 122 S. Ct. at 2068, 2076.

[73] *Id.* at 2075-76.

[74] *Id.* at 2067-68.

[75] *Id.* at 2070.

[76] *Id.* at 2069.

[77] *Id.* at 2070.

The Supreme Court relied upon *Mohasco Corp. v. Silver*[78] to conclude that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."[79] As Justice Thomas observed, the key or 'operative' statutory terms of 42 U.S.C. § 2000e(5)(e)(1) are "shall," "after . . . occurred," and "unlawful employment practice."[80] The Court concluded that a discrete discriminatory or retaliatory act "occurred" on the day it "happened."[81] Therefore, the Court determined, a party must file his charge within either 180 or 300 days of the date of the alleged discriminatory conduct or forfeit their ability to recover.[82] The *Morgan* Court further determined that even when discrete discriminatory acts are related to other timely filed alleged acts, they are not actionable claims.[83] The statute does, however, allow an employee to use previous acts that are time barred as background evidence to support timely acts.[84]

In *Morgan*, the Court clearly distinguished between discrete discriminatory acts and hostile work environment claims: "[h]ostile environment claims are different in kind from discrete acts" because the nature of hostile work environment claims involves "repeated conduct."[85] The Court noted that termination, failure to promote, denial of transfer, and refusal to hire are all easily identifiable acts of discrete discriminatory conduct.[86] It held that as long as any act that contributes to a hostile work environment happens within the charge filing period, behavior alleged outside the filing period and the entire scope of the hostile work environment claim might be considered to assess liability.[87] The Court found that when an unlawful employment practice occurs over a period of days, perhaps even years, it cannot then be said to occur on any one specific day.[88] The Court finally determined that a hostile work environment comprises a "single unlawful employment practice."[89]

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[78] *Mohasco*, 447 U.S. at 826; *Morgan*, 122 S. Ct. at 2070.

[79] *Morgan*, 122 S. Ct. at 2070 (quoting *Mohasco*, 447 U.S. at 826).

[80] *Morgan*, 122 S. Ct. at 2070; 42 U.S.C. § 2000e-5(e)(1) (*see supra* n. 25 for exact language of the statute).

[81] *Morgan*, 122 S. Ct. at 2070.

[82] *Id.* at 2071.

[83] *Id.* at 2072.

[84] *Id.*

[85] *Id.* at 2073.

[86] *Id.*

[87] *Id.* at 2068.

[88] *Id.* at 2073.

[89] *Id.* at 2075. The following excerpt is offered by the *Morgan* majority to explain why hostile work environment claim acts are all part of one recoverable claim:

Although the Court's ruling on discrete acts is a victory for employers in guarding against defending claims from the past, the distinction made for hostile work environment claims leaves employers vulnerable to claims arising years before they are actually filed. As a token "peace offering"[90] to employers, the *Morgan* Court reasoned it had not left employers "defenseless" against employee hostile work environment claims extending over lengthy periods of time.[91] Employers have "recourse" against unreasonably delayed hostile work environment charges[92] because the filing requirement is subject to equitable defenses such as waiver, estoppel, equitable tolling,[93] and the laches defense.[94] The dissenters in *Morgan*

> The statute does not separate individual acts that are part of a hostile environment claim from the whole for the purposes of timely filing and liability. And the statute does not contain a requirement that the employee file a charge prior to 180 or 300 days "after" the single unlawful practice "occurred." Given, therefore, that the incidents comprising a hostile work environment practice are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim. In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment.

Id. at 2075.

[90] Stephen B. Mead & Christy E. Phanthavong, *High Court Decides that Continuing Violation Doctrine Applies to Environment Claims* ¶ 7 <http://www2.rosshardies.com/publication.cfm? publication_id=208> (accessed on Feb. 26, 2003).

[91] *Morgan*, 122 S. Ct. at 2076.

[92] *Id.* The Court neglected to explain that some of the equitable defenses are difficult to apply. For instance, the doctrine of laches does not bind courts the same way as a statute of limitations. *See e.g.* 51 Am. Jur. 2d *Limitation of Actions* § 8, ¶ 6 (2002) (stating that "laches is open to a reasonableness interpretation"); Schlossberg, *supra* n. 1, at ¶ 19 (observing that a defendant must prove an extraordinary level of prejudice to prove that a plaintiff sat by and did nothing to pursue a claim in establishing a laches defense); Michael Starr & Adam J. Heft, *The Discontinuous Continuing Violation* ¶ 15 <http://www.law.com/jsp/article.jsp?id=1024078997367> (July 17, 2002) (discussing that although the *Morgan* Court offered equitable defenses, they provided no direction to how the defenses would "play out").

[93] *Morgan*, 122 S. Ct. at 2076 (citing, in part, to *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982)). *Waiver* involves the "intentional or voluntary relinquishment of a . . . legal right." *Black's Law Dictionary* at 1574; *see e.g. Atlas Life Ins. Co. v. Schrimsher*, 66 P.2d 944, 948 (Okla. 1937). *Estoppel in pais* is the "doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he would otherwise would have had." *Black's Law Dictionary* at 551; *see e.g. Mitchell v. McIntee*, 514 P.2d 1357, 1359 (Or. App. 1973). Equitable estoppel applies when a defendant "misrepresented or concealed facts, causing plaintiff not to assert his or her statutory rights within the limitations period." Abigail Cooley Modjeska, *Employment Discrimination Law* § 6:04, 12 (3d ed., West 2000); *see e.g. Bennett v. Coors Brewing Co.*, 189 F.3d 1221 (10th Cir. 1999) (discussing allegations that the employer actively deceived employees by making fraudulent misrepresentations concerning downsizing and possible outsourcing). *Equitable tolling* permits a complainant to "avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." *Cada v. Baxter Healthcare*

strongly disagreed with the majority on the hostile work environment decision.

2. The Dissenting Opinion

In writing for the dissent, Justice O'Connor argued against the majority stating "that [42 U.S.C.] § 2000e-5(e)(1) serves as a limitations period for all actions brought under Title VII, including those alleging discrimination by being subjected to a hostile working environment."[95] The dissent used the expression "bootstrapping" to describe how the majority permitted old claims to be tied to more recent claims in attempting to recover for long past conduct alleged to create a hostile environment.[96] One commentator described the dissent's "bootstrap logic"[97] as "a single limitation written into the law [having] two different results, depending on how the Court, not the Congress, views the facts of the situation."[98]

The dissent further stated that Section 2000e-5(e)(1) makes no "distinction" between discrimination claims based on discrete acts and those based on hostile work environment exposure.[99] Justice O'Connor wrote that "each day the worker is exposed to the hostile environment may still be

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Corp., 920 F.2d 446, 451 (7th Cir. 1990) (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)). The doctrine of equitable tolling is appropriate:

> where [a] plaintiff has failed to file within the limitations period because of ignorance of the pertinent facts or the applicable law. Where the employer has posted adequate notices regarding employee statutory rights, knowledge of the statutory time limitations is presumed, but absent such posting, equitable tolling may be permitted if the employee proves lack of knowledge of the time limitations. The employee must . . . bring suit within a reasonable time after he or she has obtained, or by due diligence could have obtained, the necessary information.

Modjeska, *Employment Discrimination Law* at § 6:04, 12.

[94] *Morgan*, 122 S. Ct. at 2077. A laches defense requires proof of a "lack of diligence by the party against whom the defense is asserted" and "prejudice to the party asserting the defense." *Kan. v. Colo.*, 514 U.S. 673, 687 (1995). Laches bars the maintenance of a suit if a plaintiff unreasonably delays filing a suit resulting in harm to the defendant. *Morgan*, 122 S. Ct. at 2077. Laches may be used as a defense in a Title VII action by employers. *See e.g. EEOC v. Dresser Indus., Inc.*, 668 F.2d 1199, 1202-04 (11th Cir. 1982) (resulting in dismissal of action when action was filed more than five years after the employee filed the initial charge because of death and unavailability of witnesses, complete turnover of employer's staff, and loss of records); *but see EEOC v. Great A. & P. Tea Co.*, 735 F.2d 69, 81-84 (3d Cir. 1984) (finding that an inexcusable delay was not established even though more than seven years went by since the initial charge was filed). *See* 51 Am. Jur. 2d, *supra* n. 92; Schlossberg, *supra* n. 1.

[95] *Morgan*, 122 S. Ct. at 2078 (O'Connor, J., dissenting).

[96] *Id.* at 2080.

[97] ACRU-ACLU Watch, *The "'Kitchen Sink' Complaint" Case* ¶ 15 <http://www.civilrightsunion.org/acluwatch/kitchensink.htm> (accessed Feb. 26, 2003).

[98] *Id.*

[99] *Morgan*, 122 S. Ct. at 2078 (O'Connor, J., dissenting).

treated as a separate occurrence," which would make the hostile environment a form of discrimination that occurs everyday, leaving some of the daily occurrences actionable and others time barred.[100] The dissent reasoned that liability should not be assessed, nor should damages be awarded, if a complainant fails to file a charge within the requisite charge filing period.[101]

Turning from the interpretation of the statute and towards employer and employee rights, Justice O'Connor expressed concern that plaintiffs could "sleep on [their] rights for a decade"[102] and yet still be allowed to sue an employer based on stale actions. This raises issues involving the statute of limitations and its purpose: to avoid the problems defendants face in defending stale claims from long ago.[103] Justice O'Connor described her approach as consistent with the limitation provisions in other acts, including ongoing antitrust violations[104] and actions under the Racketeer Influenced and Corrupt Organizations Act ("RICO").[105]

III. ANALYSIS

Justice O'Connor correctly concluded that the continuing violation doctrine should not apply to hostile work environment claims, however, her analysis was left unfinished. To strengthen the dissent's opposition to applying the continuing violation doctrine to hostile work environment claims, this Note argues that the continuing violation doctrine: a) undermines the

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[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 2080 (citing *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997)). Justice O'Connor stated that:

> Each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory limitations period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times. . . . But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.

Id.

[105] *Id.* Justice O'Connor commented that the court:

> rejected a rule that would have allowed plaintiffs to recover for all of the acts that made up the pattern so long as at least one occurred within the limitation period. . . . The plaintiff cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period.

Id. (citing *Klehr*, 521 U.S. at 190).

purpose and ignores the importance of the statute of limitations for discrimination claims, b) fails to further the purpose and statutory text of Title VII, c) is unsound and without significant supporting policy concerns, and d) will leave the courts in a state of confusion. Rather than simply interpret the statute of limitations for hostile work environment claims, the *Morgan* Court overreached in its 'interpretation' and instead rewrote the law.

A. Applying the Continuing Violation Doctrine to Hostile Work Environment Claims Undermines the Purpose and Ignores the Importance of the Statute of Limitations for Discrimination Claims

In writing for the majority, Justice Thomas overlooked the importance of the statute of limitations as a means to protect an employer. Moreover, by ignoring the importance of the limitations filing period, he undermined the purpose of the statute of limitations in the employment setting leaving an employer with a diminished defense against stale, alleged acts of harassment in the workplace.

1. The Importance and Purpose of the Statute of Limitations

Statutes of limitations define a time period within which an individual must assert a claim for the daim to be actionable by law.[106] The primary purpose of limitation periods is to prevent defendants or employers from having to defend against stale claims.[107] Further, statutes of limitations "protect defendants against fraud-minded plaintiffs who may assert fraudulent claims at a time when the true facts can no longer be proved."[108] They also promote efficient judicial administration[109] and provide repose[110] for defendants.

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[106] *See Morgan*, 122 S. Ct. at 2070.

[107] As far back as 1805, a federal cause of action "brought at any distance of time" would be considered "utterly repugnant to the genius of our laws." *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (quoting *Adams v. Woods*, 6 U.S. 336, 342 (1805)). Statutes of limitations still remain strongly in force. *See e.g. Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944); *U.S. v. Kubrick*, 444 U.S. 111, 117 (1979); James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 Va. Envtl. L.J. 589, 591 (1996).

[108] MacAyeal, *supra* n. 107, at 591; *see e.g. Bailey v. Glover*, 88 U.S. 342, 349 (1874).

[109] MacAyeal, *supra* n. 107, at 591-92; Albert C. Lin, *Application of the Continuing Violations Doctrine to Environmental Law*, 23 Ecology L. Q. 723, 756 (1996) ("Statutes of limitations promote judicial efficiency by relieving the courts of the burden of adjudicating relatively inconsequential or tenuous claims and by producing more accurate outcomes based on more reliable evidence.").

Supreme Court jurisprudence supports the importance of enforcing statutes of limitations.[111] In *U.S. v. Kubrick*, the Court stated that "statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose . . . ."[112] The Court further observed that the obvious purpose of limitations periods is to encourage the prompt filing of claims; therefore, courts are not "free" to interpret limitations to defeat this purpose.[113] Additionally, in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*,[114] the Court stated that statutes of limitations serve to:

> promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.[115]

Congress enacted these time limitations, in part, to prevent plaintiffs from litigating stale claims, based on long-past events that could more likely result in judicial speculation, rather than fact finding.[116] Prior to *Morgan*, the Supreme Court held, in *Zipes v. Trans World Airlines, Inc.*, that section 706(e) of Title VII is a statute of limitations for discrimination claims.[117] The statute of limitations exists to avoid the difficult task of accurately measuring long past acts of discrimination in the face of the loss of evidence, faded memories, and missing witnesses.[118] In practicality, the mobility of America's workforce[119] creates an even greater hardship for employers

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[110] *Kubrick*, 444 U.S. at 117. *Repose* is a "statutory period after which an action cannot be brought in court, even if it expires before the plaintiff suffers any injury." *Black's Law Dictionary* at 1303.

[111] For Supreme Court cases focusing on the importance of statutes of limitations, *see supra* note 107.

[112] *Kubrick*, 444 U.S. at 125.

[113] *Id.* at 117.

[114] 321 U.S. 342.

[115] *Id.* at 348-49.

[116] Edward P. O'Keefe, *The Effect of the Continuing Violations Theory on Title VII Back Pay Calculations*, 13 Seton Hall L. Rev. 262, 288-89 (1983).

[117] 455 U.S. at 398.

[118] *Ry. Express Agency*, 321 U.S. at 348-49.

[119] There are approximately 132 million people in the U.S. workforce. Kate Randall, World Socialist Web Site, *U.S. Job Losses Highest Since '91 Recession* ¶ 6 <http://www.wsws.org/articles/ 2001/jul2001/jobs-j13_prn.shtml> (last updated July 13, 2001). Recent employment statistics issued by the Department of Labor demonstrate an increase in

defending against claims that occurred five to ten years in the past because of the loss of records, witnesses, and faded memories.

In general, statutes of limitations were set in place to ensure the timely filing of claims by plaintiffs against defendants. Thus, it makes no difference whether the plaintiff is an employee filing a charge of discrimination or a government agency filing a charge against a company for pollution.[120] In the employment setting, applying the continuing violation doctrine to hostile work environment claims disregards the protection that the discrimination claim statute of limitations gives to employers.

2. The Court's Holding Contravenes the Purpose of the Statute of Limitations in the Employment Setting

Two faulty conclusions seem to support the Supreme Court's decision to apply the continuing violation doctrine to hostile work environment claims but not to discrete acts of discrimination. The Court viewed the statute of limitations charge filing period as either: 1) an expandable statute of limitations, or 2) not a statute of limitations period at all. Such judicial speculation should be avoided in "light of Congress' firm resistance to extend Title VII's time limitations beyond the short period now in force."[121]

Applying the continuing violation theory as an exception to the statute of limitations and thus allowing plaintiffs to recover for otherwise time-barred claims undermines the very purpose of the limitations period within the employment context.[122] Specifically, an employer loses its ability to defend

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employee turnover within the workplace. For example, 13 million people work under alternative employment arrangements such as independent contractors and temporary help. U.S. Dept. of Labor: Bureau of Labor Statistics, *Employment by Type of Work Arrangement* <http://stats.bls.gov/opub/working/page15b.htm> (accessed Feb. 26, 2003). In addition to the millions who are employed on a temporary basis, the average person in the U.S. holds approximately nine jobs between the ages of eighteen and thirty-four. U.S. Dept. of Labor: Bureau of Labor Statistics, *Median Years of Service with Current Employer* <http://stats.bls.gov/opub/working/ page13b.htm> (accessed Feb. 26, 2003). If one averages nine jobs over a span of sixteen years, it means that a person would switch jobs approximately every two years from the time she is eighteen until she is thirty-four. Also, the median length of service with an employer between the ages of thirty-five and thirty-nine is 4.8 years for men; it is 3.7 years for women. *Id.* Although the median length of employment becomes longer later in life, staying with one employer on average four years is still not a significantly long period of time compared to earlier generations of employees who stayed with companies their entire careers.

[120] *See* Robert E. Steinberg & Richard H. Mays, *Brief Supporting Statute of Limitations Defense*, 3 Env. L. Forms Guide pt. V, § 29:6, ¶ 5 (2002).

[121] Thornton H. Brooks, M. Daniel McGinn, & William P. H. Cary, *Second Generation Problems Facing Employers in Employment Discrimination Cases: Continuing Violations, Pendent State Claims, and Double Attorneys' Fees*, 49 L. & Contemp. Probs. 25, 33 (1986); *see* O'Keefe, *supra* n. 116.

[122] *Id.*

itself. With the overturn of management and employees over an extended period of time, it may be impossible to locate these individuals or trust the recollection of their memories for events that may have taken place so far in the past.

Hypothetically, suppose a supervisor subjected an employee to a hostile work environment for nine years and in the tenth year, the employee believes he has been, yet again, exposed to another alleged act of harassment. The employee finally files a complaint. Additionally, the employee is one of relatively few who has maintained long term employment with the employer. Many of the workers who may have witnessed the alleged claims of harassment no longer work with the employee or for the employer and either cannot recall any specific acts of harassment or can no longer be located. Also, since the employee never filed a complaint in the past regarding the alleged harassment, no investigation was ever conducted and there are no records or documentation regarding the employee's claims. This leaves the employer very little with which to defend itself, creating a situation in which it is the employer's word versus that of the employee's, making it difficult without any real evidence to establish a true pattern of harassment creating a hostile work environment for the employee. Without a statute of limitations time filing period, the employer in this situation is put at a great disadvantage. The problems faced by employers in defending old claims is exactly why Congress created the statute of limitations.

Congress clearly intended to encourage the prompt processing of all charges of employment discrimination by creating short filing deadlines.[123] As far back as 1938, the Supreme Court characterized statutes of limitations as a "meritorious defense."[124] Yet, the *Morgan* Court contradicts Congress by giving hostile work environment claims an "elastic statute of limitations."[125] The filing provision, as it applies to hostile work environment claims, should be fixed, not expandable. Furthermore, not only did the *Morgan* Court ignore the importance of the statute of limitations in its analysis, but it also inconsistently interpreted the statutory language of the time filing requirement for discrete acts of discrimination and hostile work environment claims.

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[123] *Mohasco*, 447 U.S. at 826.

[124] *Guarantee Trust Co. v. U.S.*, 304 U.S. 126, 136 (1938).

[125] Gibson, Dunn & Crutcher LLP, *supra* n. 71, at ¶ 3.

B. *Applying the Continuing Violation Doctrine to Hostile Work Environment Claims Fails to Further the Purpose and Statutory Text of Title VII*

The *Morgan* majority began its analysis by strictly interpreting the statutory language of the time filing requirement for discrete acts of discrimination viewing the word "shall" as mandatory. However, the majority, departing from its strict interpretation analysis, then turned to the intent of Congress when discussing hostile work environment claims. By allowing for the application of the continuing violation doctrine to apply to hostile work environment claims, the Court provides flexibility to plaintiffs in filing their claims. However, at the same time, the Morgan Court denies the same elasticity to apply to the statute of limitations for discrete acts of discrimination.

1. Discrete Acts of Discrimination: A Unanimous Strict Interpretation

A 17th century French attorney once wrote "the wording of laws should mean the same thing to all men."[126] In interpreting the language of Section 2000e-5(e)(1) as it applied to hostile work environment claims, the *Morgan* majority crossed the dividing line between enforcing the laws as written by Congress and rewriting the laws to suit its own agendas.[127] In *Morgan*, the same Justices interpreted the same words to have different meanings.

When presented with the plain language of a statute, the court's only function is to enforce the statute according to its words.[128] The *Morgan* majority used a textualist or strict interpretation[129] of the statute in deciding that the continuing violations theory did not apply to discrete discriminatory acts. In relation to discrete discriminatory acts, the *Morgan* Court noted that "words in a statute are assumed to bear their 'ordinary, contemporary,

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[126] Craig D. Tindall, *The Partial Demise of the Continuing Violation Doctrine in Title VII Claims: The Supreme Court's Ruling in National R.R. Passenger Corp. v. Morgan* ¶ 1 <http://www.lawmemo.com/emp/articles/morgan.htm> (accessed Feb. 26, 2003) (quoting Charles-Louis De Secondat, Baron De Montesquieu, *De L'Espirit Des Lois* (interpreted as *The Spirit of Laws*) (1748)).

[127] ACRU-ACLU Watch, *supra* n. 97, at ¶ 13.

[128] *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917); *see U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (discussing rare cases where the literal application of a statute will produce a result that is demonstrated to be at odds with the intentions of the statute's drafters).

[129] William N. Eskridge, Jr. & Phillip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 514 (2d ed., West 1995) (stating that "textualism" is when the interpreter of the statute, in this case the Supreme Court, "follows the 'plain meaning' of the statute's text").

common meaning.'"[130] The Court reasoned that in relation to discrete acts, "'[s]hall' makes the act of filing a charge within the specified time mandatory"[131] and "occurred" means the practice took place in the past.[132] In using this approach, the Court correctly concluded it should not extend the statute of limitations period for these types of claims. The plain words of the statute did not conflict with the interpretation of the rest of the statute. Reading the statute strictly furthered the purpose of Title VII by continuing efforts to eradicate discrimination and by allowing employees ample time to file a claim. This occurs without undermining the purpose of the limitations period Congress created to ensure employers certainty in knowing how far back in time an employee's claims can be extended. The Court, unfortunately, did not apply this same textualist approach to interpret the statute of limitations for hostile work environment claims.

2. Hostile Work Environment Claims: A Divided Court Resulting in an Inconsistent Statutory Interpretation

Although interpreting the same word "shall" in the same statute, the Court found that discrete acts of discrimination claims are defined differently than hostile work environment claims. As a result of the repeated discriminatory conduct involved in hostile work environment claims, the Court found the words "shall be filed" abruptly came to mean "may" be filed.[133] "Shall" expresses an obligation[134] while "may" implies a possibility.[135] Although the words of the statute remain unchanged from one type of discrimination claim to another, by applying the continuing violation doctrine, the majority changed "shall" to mean "may."

Hostile work environment claims are also not "different in kind"[136] from discrete discriminatory acts. The statutory text itself can be interpreted to define a hostile work environment similar to Justice O'Connor's view of a

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[130] *Morgan*, 122 S. Ct. at 2070 n. 5 (quoting *Walters v. Metro. Ed. Enters., Inc.*, 519 U.S. 202, 207 (1997)) (noting further use of dictionary definitions for "occur").

[131] *Morgan*, 122 S. Ct. at 2070; *see e.g. Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (explaining that "the mandatory 'shall,' . . . normally creates an obligation impervious to judicial discretion").

[132] *Morgan*, 122 S. Ct. at 120 n. 5.

[133] ACRU-ACLU Watch, *supra* n. 97, at ¶ 12.

[134] *See supra* n. 131.

[135] "May" is usually employed to imply permissive, optional or discretional, and not mandatory action or conduct. *Black's Law Dictionary* at 993; *see e.g. Shea v. Shea*, 537 P.2d 417, 418 (Okla. 1975).

[136] *Morgan*, 122 S. Ct. at 2073.

hostile environment in the *Morgan* dissent. Each separate act of a hostile environment could be treated as a separate "occurrence." Thus, a hostile environment can be made up of daily "occurrences."[137] Some "daily occurrences may be time barred, while others are not."[138] A hostile work environment, therefore, could be made up of a number of discriminatory acts that can occur each day, eventually becoming severe or pervasive enough to be recognized as a hostile work environment.[139] Justice O'Connor's treatment of a hostile work environment discriminatory act furthers the purpose of the statute, without undermining the intent of Congress, by establishing a charge filing time period that has already been deemed to be a statute of limitations. The majority's decision to consider the intent of Congress for hostile work environment claims but ignore congressional intent for discrete acts of discrimination demonstrates the Court's lack of fear in contradicting itself in order to impose the statute of limitations filing period it deemed appropriate for both types of claims.

3. Selectively Considering the Intent of Congress

Justice Thomas abandoned strictly interpreting the language of the statute as he did to define discrete discriminatory acts and instead provided his own, liberal statutory interpretation that included both the statute's language and the intent of Congress to define a hostile work environment claim.[140] This use of Congress's intent contradicts the strict interpretation analysis used earlier in determining not to extend the statute of limitations for discrete discriminatory acts. Congressional intent went unnoticed in the Court's analysis of discrete discriminatory acts. The addition of Congress's intent to the hostile work environment analysis resulted in the Court reinterpreting other parts of the statute and imposing two very different statutes of limitations for discrimination claims.

For hostile work environment claims, the *Morgan* Court, for the first time, found it unlikely that Congress would have allowed plaintiffs to recover for two years of back pay, if Congress also intended to limit a defendant's liability to discriminatory acts occurring within the charge filing period.[141]

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[137] *Id.* at 2078 (O'Connor, J., dissenting).

[138] *Id.*

[139] A hostile work environment claim requires severe or pervasive harassment. *Meritor*, 477 U.S. at 65-67. For more information regarding hostile work environment claims, *see supra* note 6.

[140] *Morgan*, 122 S. Ct. at 2074-76.

[141] *Id.* at 2075. In the Civil Rights Act of 1991, Congress allowed for recovery for up to two years of back pay. *Id.* There are specific limitations on compensatory and punitive damages as well. *Id.*

Although the *Morgan* majority could have applied this view of recovery to permit extending the statute of limitations periods for discrete acts, they chose not to. The Court further reasoned that the "timely filing provision was not meant to serve as a specific limitation either on damages or the conduct that may be considered for the purposes of one actionable hostile work environment claim."[142] Congress expressly limited the amount of recoverable damages elsewhere in the statute to a particular time period. Again, the Court failed to apply this limitation on damages analysis to discrete discriminatory acts.

Finally, the Court observed that the time filing period varied between 180 and 300 days depending on whether a state has an agency that is equivalent to the EEOC, although this point went unnoticed for discrete acts. The majority concluded that because the charge filing period varied between 180 or 300 days, it made little sense to limit the assessment of liability for hostile work environment claims.[143] Once more, the Court selected language from the statute to support it's reasoning but applied the language's meaning only to hostile work environment claims.

The ruling in *Morgan* represents the latest evidence of the Supreme Court's willingness to give tortured readings to Title VII anti-discrimination law.[144] This ruling also presents the latest conflict between the intent of Congress and the Supreme Court's desire to create its own rule of law by extending Title VII's statute of limitations as it sees fit.[145] The *Morgan*

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[142] *Id.*

[143] *Id.* at 125-27.

[144] The Civil Rights Act of 1991 was enacted partly as a result of significant disagreements between the Supreme Court and Congress. Belton, *supra* n. 19, at 670-71. "Congress enacted the Civil Rights Act of 1991 because it concluded that the Supreme Court had substantially eroded the national commitment to workplace equality." *Id.* at 669. The Civil Rights Act of 1991 reformulated standards of federal discrimination law overturning five of seven Supreme Court decisions prior to the Act. Jeffrey A. Blevins & Gregory J. Schroedter, *The Civil Rights Act of 1991: Congress Revamps Employment Discrimination Law and Policy*, 80 Ill. B.J. 336, 336 (2000). The seven cases include *EEOC v. Arabian A. Oil Co.*, 499 U.S. 244, 259 (1991); *W. Va. Univ. Hosp. v. Casey*, 499 U.S. 83 (1991); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance*, 490 U.S. 900; *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See* Leonard Charles Preserg, *The Civil Rights Act of 1991, Retroactivity, and Continuing Violations: The Effect of Landgraf v. USI Film Products and Rivers v. Roadway Express*, 28 U. Rich. L. Rev. 1363, 1363 n. 2. (1994). Congress had the opportunity to amend the definition and statute of limitations period for hostile work environment claims with the Civil Rights Act of 1991 and chose not to.

[145] Since the 1980's, Courts of Appeals have used various tests in applying the continuing violation doctrine to discrimination claims. *See supra* n. 8 (providing a brief overview of the varying tests used in applying the continuing violation doctrine to discrimination claims within the Courts of Appeals). Although Congress was aware of this fact, it did not include the continuing violation doctrine as an exception in any provision, nor did it change the statutes of limitations for discrimination claims, when it passed into law the Civil Rights Act of 1991. *See*

majority determined that Congress intended the language of the statute to be interpreted in two completely different ways: discrete discriminatory acts have a separate statute of limitations from hostile work environment claims.[146] The text of the statute itself does not distinguish between hostile work environment claims and discrete acts of discrimination. Therefore, a strict interpretation of the charge filing period should prevent applying the continuing violation doctrine to hostile work environment claims.

Discrimination is discrimination, no matter what form it takes in the workplace. Thus, without such provisions in the text of the statute extending the statute of limitations charge filing period for hostile work environment claims, a strict interpretation of the identical textual language should apply to both types of discrimination claims. Due to the lack of strict interpretation, the *Morgan* Court's decision to allow the application of the continuing violation doctrine to hostile work environment claims negatively impacts the public policy interests in the employment context.

C. *Applying the Continuing Violation Doctrine to Hostile Work Environment Claims Is Unsound and Without Significant Supporting Policy Concerns*

By applying the continuing violation doctrine to hostile work environment claims, the Court inappropriately imposes public policy concerns that are not present in the employment context. Furthermore, by imposing these unintended new public policy issues that arise from the continuing violation doctrine, the Court unbalances the true public policy issues embodied in Title VII. The issue the *Morgan* majority should have addressed, and the *Morgan* dissent should have further explained, is precisely how and when "countervailing concerns of equity and public policy [become] sufficient to outweigh the considerations in favor of a strict limitations period."[147] Courts have recognized several situations where statutes of limitations should not be strictly applied: inherently unknowable harms, fraudulent concealment, and gradually developing harms.[148] Where there is potential for grave public harm or where public

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supra note 144 for the five Supreme Court cases overturned by Congress with the passing of the Civil Rights Act of 1991.

[146] *Morgan*, 122 S. Ct. at 101.

[147] Lin, *supra* n. 109, at 756.

[148] *Id.* "'Inherently unknowable' harms are those harms so difficult to discover that a plaintiff is generally unlikely to learn of the harm before the limitations period expires." *Id.* at 757. "Fraudulent concealment occurs when the defendant has prevented the plaintiff from obtaining knowledge of his or her cause of action through fraudulent or intentional means." *Id.* at 758. Finally, a "single wrongful act or the repetition or continuance of wrongful acts may give rise to gradually developing harms." *Id.* at 759. The continuing violation doctrine is interpreted more broadly for environmental cases than it is in

safety and welfare are at stake, sound public policy should apply the continuing violation doctrine and extend the statute of limitations period.

Environmental law, criminal law, antitrust, and RICO laws all consider or apply the continuing violation theory as an exception to the statute of limitations period.[149] Justice O'Connor briefly noted the areas of antitrust and RICO law in her dissent, but did not explain why applying the continuing violation doctrine was inappropriate within the employment context.[150] One commentator observed that by disregarding the application of the continuing violation theory in other substantive areas of law, the debate concerning the application of the doctrine within the employment context has been carried on in a "Title VII vacuum."[151] "[C]ontinuing violation jurisprudence" is well developed in other areas, particularly in antitrust law.[152] Some suggest that Title VII lawyers should more closely examine how the doctrine is applied in these other areas.[153] The three factors (inherently unknowable harms, fraudulent concealment, and gradually developing harms) are often considered in applying the continuing violation doctrine in other areas of law.

1. Competing Public Policy Concerns Supporting the Continuing Violation Doctrine are Absent in a Hostile Work Environment Claim

Discriminatory acts within the workplace can be felt, seen, and heard by the targeted individual or individuals. An employee has feelings, has reactions, and has the ability to communicate harm suffered. A hostile work environment does not create inherently unknowable harms. In comparison, the economy and outdoor environment both lack a voice to communicate a wrong committed against them, while a person has the ability to defend himself against discrimination. For example, if a supervisor subjects an

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antitrust or criminal law cases due to the heightened safety concerns that can affect the public at large. *Id.* at 752, 754 (discussing the continuing violation doctrine in the context of antitrust law).

[149] Lin, *supra* n. 109, at 731 (discussing continuing violation caselaw in the environmental context); *id.* at 745 (discussing employment discrimination law and continuing violations); *id.* at 750 (discussing continuing violations for a criminal omission); *id.* at 752 (discussing antitrust law and continuing violations). For discussion regarding the statute of limitations for RICO claims, *see generally Klehr*, 521 U.S. 179; *Grimmet v. Brown*, 75 F.3d 506 (9th Cir. 1996); *McCool v. Strata Oil Co.*, 972 F.2d 1452 (7th Cir. 1992); Mary S. Humes, *RICO and a Uniform Rule of Accrual*, 99 Yale L.J. 1399 (1990).

[150] *Morgan*, 122 S. Ct. at 2079-80.

[151] Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 L. & Contemp. Probs. 53, 55 (1986).

[152] *Id.*

[153] *Id.*

employee to such alleged harassment as harsh verbal reprimands on the job in front of other employees and inappropriate racial comments including the use of derogatory language, the employee is more than likely aware he or she is being treated in an inappropriate manner. A person will have, at the least, an internal reaction to being directly targeted, regardless of whether he or she shows an external reaction to the improper treatment. The emotions and reactions we have as human beings does not allow for harassment to be a truly unknowable harm. Similar to unknowable harms, fraudulent concealment is difficult to establish in regards to harassment in the workplace as well.

Harassment creating a hostile work environment cannot be fraudulently concealed from the individual at whom the harassment is directed. In the context of racketeering and pollution occurring in the environment, someone has to take actual steps (whether through manipulation, lies, or actual physical concealment) to make the dangers or illegal activity unknown to others. There is no magical shield or individual blocking harassment from occurring to an individual. When a supervisor repeatedly and directly denies an employee the ability to be trained or advanced in a position, there is no one between the supervisor and employee manipulating the supervisor's words. When an employee repeatedly harasses a co-worker, possibly by calling the co-worker inappropriate names or by continuously invading the co-worker's personal space, making the co-worker feel uncomfortable, there is no one standing in between the two employees attempting to hide the harassment.

The public safety and health concerns in environmental law and the public economic and market concerns embodied in antitrust law are far more significant than the public policy concerns within the employment context. "[T]here is less complexity in determining whether an employer's actions might be discriminatory than there is in discovering racketeering activity that by its very nature may be concealed. . . ."[154] The gradually developing harms caused to the environment and economy by wrongdoers also significantly outweigh public policy concerns present within the employment context.

Although alleged acts of harassment occurring on a daily basis may eventually form a gradually developing harm, this factor does not implicate the kind of public policy concerns necessary to justify the application of the continuing violation doctrine to hostile work environment claims. If an employee is subject everyday to harsh treatment by either a supervisor or co-worker and does not report the harassment, the harm is gradually developing over time. However, the emotional damage occurring to the

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[154] Br. of Petr. at 27, *Morgan*, 536 U.S. 101.

employee could be addressed if the employee reported the treatment to someone. The harm of the harassment becomes gradually developing because the employee does nothing about taking care of the problem. Of course, there are factors that may cause an employee to fear reporting a problem, possibly including the loss of the job or written reprimands. However, if an individual chooses to be silent, he or she is also choosing to perpetuate the problem. In the employment context, the gradually developing harm of harassment can be, at the very least, addressed because an individual has a voice, while the gradually developing harms in the economic and environmental arena cannot speak for themselves to let someone know a wrong is occurring. When the three factors previously discussed are considered in the context of hostile environment claims, the *Morgan* facts fall short of justifying the application of the continuing violation doctrine to extend the statute of limitations for Morgan's hostile work environment claims.

2. Comparing the Employment Context in *Morgan* to Public Policy Supporting the Continuing Violation Doctrine in Other Areas of Law

The facts of *Morgan* do not create a significant public policy interest sufficient to apply the continuing violation doctrine as an exception to the statute of limitations filing period. The harms of the alleged discrimination directed at Morgan were not inherently unknowable, fraudulently concealed nor was the harm gradually developing. The harm was not unknowable or fraudulently concealed because the discrimination could be seen, felt, and heard by Morgan. Morgan claimed he was aware of the discriminatory acts he was subjected to within his employment from day one.[155] The harm of the harassment may have been gradually developing; however, Morgan did not file a formal complaint for over four years, thereby perpetuating the hostile work environment to which he claimed to be exposed. Morgan had ample opportunity over the course of his employment to file discrimination charges against Amtrak[156] but waited over four years, or the equivalent of forty-eight months, to make his claims.[157] The Title VII filing period is 300 days (or ten

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[155] *See supra* pt. II B.

[156] *See supra* n. 60.

[157] *See supra* n. 60. Morgan's claim "alleged racially motivated discriminatory acts [and] included a termination for refusing to follow orders, Amtrak's refusal to allow him to participate in an apprenticeship program, numerous 'written counselings' for absenteeism, as well as the use of racial epithets against him by his managers." *Morgan*, 122 S. Ct. at 2069 n. 1. Racial epithets could clearly be viewed as discriminatory. However, "the others could all be indications that Mr. Morgan was unqualified for the other opportunities, did not follow instructions, and did not show up for work, all of which are fundamental defects in any employee, regardless of his race."

months) to ensure the public policy interest in allowing the employer to promptly defend against claims. Morgan deprived Amtrak of a prompt defense when he continued to expose himself to the workplace environment without taking action to file a timely charge of discrimination with the EEOC. While the policy concerns within the employment context are not significant enough to support the application of the continuing violation doctrine to hostile work environment claims, the Court's decision significantly upsets the balance maintained between the employer and employee originally established within the workplace by Title VII.

3. The *Morgan* Court Disrupts Title VII's Intent to Balance Employee and Employer Public Policy Interests in the Workplace

A balance must be struck between the legal interests of employees and employers.[158] In the context of employment law, there are public policy concerns affecting both the employee and employer. Since the 1960s, a "dominant national policy forbidding racial discrimination and harassment" in the work environment has been established.[159] This national policy binds unions, as well as employers.[160]

Employee interests include an employee's right to work in an environment free of discrimination. Other employee focused public policy arguments include workplace equality[161] and economic effect.[162] However, the application of the continuing violation doctrine to hostile work environment claims greatly diminishes the balance of these competing interests and tips the scales heavily in favor of the employee. The interpretation of hostile work environment claims constituting a single

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ACRU-ACLU Watch, *supra* n. 97, at ¶ 11. Compared with the factors considered in other substantive areas of law, the facts alleged in *Morgan* do not create a sufficiently important public policy concern, within the employment discrimination context, to support applying the continuing violation doctrine to hostile work environment claims.

[158] Br. of U.S. Amicus Curiae Supporting Petr. at 21, *Morgan*, 536 U.S. 101.

[159] *Tamko Roofing Products, Inc. v. United Steelworkers of Am.*, 2000 WL 33711514, *8 (N.D. Ala. Aug. 31, 2000).

[160] *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668-69 (1987) (holding that a union violated both § 1981 and Title VII when it chose not to process a racial grievance under the equal employment clause of a union contract with the goal of enhancing its probabilities of success on other issues); *Terrell v. U.S. Pipe & Foundry Co.*, 644 F.2d 1112, 1120 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 955 (1982); *Howard v. Intl. Molders & Allied Workers Union*, 779 F.2d 1546, 1547 (11th Cir. 1986) (holding that unions have an affirmative duty to eliminate any form of racial discrimination).

[161] *See Harris*, 510 U.S. at 22 (stating that "the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality").

[162] *Meritor*, 477 U.S. at 67-68.

recoverable claim may open up a floodgate of litigation for previous acts of discrimination occurring over long periods of time. An employee now has the ability to reach back many years to recover for exposure to an alleged hostile work environment.

Nevertheless, an employee needs to be held accountable to report acts of discrimination in a timely manner. The Supreme Court's Title VII cases "simply do not admit of a doctrine that excuses plaintiffs who have, and know that they have, accrued causes of action from making timely EEOC charges."[163] A victim of discrimination has a duty under the circumstances to use reasonable means "to avoid or minimize the damages."[164] Further, a plaintiff should not be rewarded for what discrimination her own efforts could have avoided.[165]

Employer interests include an employer's right to be protected against defending stale claims. The statute of limitations serves as a public policy protection for employers.[166] As a public policy, the charge filing period as a statute of limitations within the workplace offers employers "the right to be free of stale claims in time comes to prevail over the right to prosecute them."[167] The prompt filing of claims "promotes the societal interests at the heart of [remedial statutes like Title VII]."[168] However, employers need to take responsibility to make an effort to preempt discrimination before it begins. If a claim of alleged discrimination arises, the employer has the

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[163] Reply Br. of Petr. at 12, *Morgan*, 536 U.S. 101. The Supreme Court refused to apply the continuing violation theory in *United Airlines v. Evans* to a female flight attendant who sought seniority credit for her previous employment with the company. 431 U.S. 553, 554 (1977). The plaintiff was dismissed for violating a "no marriage" rule, and then rehired as a new employee. *Id.* at 555. The *Evans* Court held that the policy for denying seniority credit in this instance was not actionable as the policy gave "present effect to a past act of discrimination." *Id.* at 558. This ruling requires that a plaintiff file a claim when he or she "knew or should have known" he or she was being discriminated against, effecting a notice requirement into a claim. Reply Br. of Petr. at 12, *Morgan*, 536 U.S. 101; *see* Br. of Petr. at 14-22, *Morgan*, 536 U.S. 101. In *Del. St. College v. Ricks*, the plaintiff "claim[ed] a 'continuing violation' of the civil rights laws" and alleged various incidents as within the limitation's period. 449 U.S. 250, 257 (1980). However, the Court did not identify a "pattern" and did not allow the time-barred claims. *Id.* Neither did the Supreme Court apply the continuing violation theory to save all of the claims that would otherwise have been time-barred in *Bazemore v. Friday*, 478 U.S. 385, 388 n.1 (1986). In considering a discriminatory salary structure, Title VII was said to have been violated by the issuance of each week's paycheck with an actionable wrong accruing each time a paycheck was delivered. *Id.* at 395 (Brennan, J., concurring).

[164] *Faragher*, 524 U.S. at 806.

[165] *Id.* at 807.

[166] *Guaranty Trust*, 304 U.S. at 136.

[167] *Ry. Express Agency*, 321 U.S. at 349.

[168] Br. of Petr. at 28, *Morgan*, 536 U.S. 101. *See e.g. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974).

responsibility to remedy the situation immediately once it becomes aware of an unlawful employment practice.

Employees and employers share equal responsibility in eradicating discrimination from the workplace. Congress, in allowing an employee to "redress[] his own injury," gives the employee "a significant role in the enforcement process of Title VII" and "also vindicates the important congressional policy against discriminatory employment practices."[169] The undeniable requirement "that the employee file a charge at all," allocates part of the responsibility for eliminating discrimination to the employee.[170] On the other hand, Title VII's legal rules were designed to influence employers to bring discrimination to an end within the workplace.[171] Furthermore, if an employer does not take reasonable care to prohibit or discourage discriminatory conduct, then the employer will have to defend itself in court. Both the employer and employee suffer detriment from claims of discrimination.

Since the *Morgan* Court applied the continuing violation doctrine to hostile work environment claims, the public policy interests between an employee and employer now heavily favor the employee as the plaintiff attempting to litigate hostile work environment claims. The employer faces extraordinary difficulty defending against unreasonably delayed employee hostile environment charges.[172] Lengthening the limitations period for hostile work environment claims undermines effective plaintiff compliance in filing timely charges. Without a statute of limitations filing period, there is no longer the balance between the employer and employee Congress sought to create. There is now an increased harm to the employer. As a result, broadly interpreting the statute for hostile work environment claims disrupts longstanding public policy within the employment context.

D. Other Confusion Caused by the Morgan *Court Decision*

The *Morgan* Court left more questions unanswered than answered in applying the continuing violation doctrine to hostile work environment claims. One commentator remarked that the dissenters could have explained that a starting point surely exists for harassment although it may not have an end.[173] No explanation was provided to give direction to the

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[169] *Id.*

[170] Reply Br. of Petr. at 19, *Morgan*, 536 U.S. 101.

[171] *Ford Motor Co. v. Equal Empl. Opportunity Commn.*, 458 U.S. 219, 228 (1982).

[172] *See supra* nn. 92, 94 (discussing the doctrine of laches as an employer defense); *supra* n. 93 (discussing the definitions for the employer defenses of waiver, estoppel, and equitable tolling).

[173] Starr & Heft, *supra* n. 92, at ¶ 13.

lower courts on how to determine the starting point of discrimination for the repeated conduct of hostile work environment claims. This lack of explanation leaves open the question of when a series of discriminatory acts culminates into a hostile work environment. Furthermore, the *Morgan* Court provides no guidance:

> on how to determine whether a series of acts will be part of the same unlawful employment practice, noting only that it will be a lower court's responsibility "to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the [limitations] period."[174]

IV. CONCLUSION: IN THE AFTERMATH OF *MORGAN*

In applying the continuing violation doctrine to hostile work environment claims but not to discrete acts of discrimination, the Supreme Court rewrote Title VII and incorrectly carved out an exception to the statute of limitations for hostile work environment claims. First, the *Morgan* Court's conclusion was inaccurate because applying the continuing violation doctrine to hostile work environment claims ignores the importance and undermines the purpose of the statute of limitations for discrimination claims within the employment context.[175] Second, applying the doctrine to hostile work environment claims does not further the purpose and statutory text of Title VII within the employment context.[176] Third, applying the doctrine to hostile work environment claims is unsound and without significant policy concerns to support its application within the workplace setting.[177] Lastly, the decision will leave courts in a state of confusion by leaving many unanswered questions and providing little guidance on how to answer them.[178]

Congress has not amended Title VII to include two separate charge filing periods for claims of discrimination. Hypothetically, the Court is now allowing for an employee, who claims to have been subjected to a hostile work environment by her supervisor for ten years, to file a claim in the eleventh year of discrimination and possibly recover for all eleven years *if* the employee's most recent claim of discrimination falls within the statute

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[174] Schlossberg, *supra* n. 1, at ¶ 19 (quoting *Morgan*, 122 S. Ct. at 2076).

[175] *See supra* pt. III A.

[176] *See supra* pt. III B.

[177] *See supra* pt. III C.

[178] *See supra* pt. III D.

of limitations period.[179] Until Congress amends the statute of limitations for Title VII hostile work environment claims, the Supreme Court must strictly read the text of the statute in the same manner for hostile work environment claims as it was read for discrete acts of discrimination.

Only in reading the statute strictly will the competing interests of the employee and employer maintain the balance Congress sought to create in Title VII. Both the employee and employer have the right to protection. Yet, as a result of the ruling in *Morgan*, the employer's ability to defend against hostile work environment claims is now severely diminished.[180] The Supreme Court in *Morgan* overreached in its interpretation of the filing requirement and created new employment discrimination law that results in only more confusion.

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[179] Schlossberg, *supra* n. 1, at ¶¶ 1-2.

[180] The state courts within the United States may also choose to adopt the Supreme Court's ruling in *Morgan*. *See* Jay W. Waks & Gregory R. Fidlon, Kaye Scholer LLP, *U.S. Supreme Court Limits Application of the "Continuing Violation" Theory* ¶ 8 <http://www.kayescholer.com/podium/articles/2002/WaksJFidlonGUSSupremeCourtLimitsApplicationOfTheContinuingViolationTheoryAugust2002.pdf> (accessed Feb. 26, 2003) (observing that "state courts have historically been guided by the federal continuing violation analysis," with the *Morgan* approach likely to be followed in many state jurisdictions); *see e.g. Shepherd v. Hunterdon Developmental Ctr.*, 803 A.2d 611, 623-24 (N.J. 2002) (adopting the *Morgan* standard for hostile work environment claims).

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